REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS CAUSE NO. 31 OF 2015

BETWEEN

J. THONGORI CO. ADVOCATES.....APPLICANT

AND

UBA KENYA BANK LIMITED.....RESPONDENT

RULING

The Application

1. This ruling is on an application by way of a Chamber Summons dated 9th February 2018 by the initial Respondent herein, Uba Kenya Bank Limited. The application arises from the ruling on, and reasons for the taxation of an Advocates-Client Bill of Costs that had been filed by the Applicant's Advocate, namely J. Thongori Co. Advocates. The Applicant is seeks the following orders against its Advocate:

> **a) The order made by the taxing master on the 7th December 2017 allowing the sum of Kshs 2,557,817 as legal fees due to J.Thongori & Co Advocates on the basis of the Advocate-Client Bill of Costs dated 30th July be set aside.**
>
> **b) That the Advocate-Client Bill of Costs dated 3oth July 2015 be referred back to the Taxing Master with directions for fresh taxation**
>
> **c) The costs of this application be provided for.**

2. The application is supported by the grounds on its face and by the affidavit sworn on the 9th February 2018 by Fred Chumo**,** the Applicant's company secretary.

3. It is the Applicant's case that the amount of Kshs 2,557,817/= allowed by the taxing Master as legal fees due to the Advocates upon taxation of his Advocate-Client Bill of Costs is highly excessive, and way above the amount envisaged by Schedule VI of 2006 Advocates Remuneration Order . The reasons given by the Applicant for this position are that the taxing master allowed the Advocate's instruction fees of Kshs 1,000,000/= which is more than 35 times greater than the amount of Kshs 28,000/= allowable under the Schedule VI of the Advocates Remuneration Order 2009 without any basis at all, and that there was no basis for awarding the getting up fees in the subject constitutional petition under item 44.

4. Further, that the nature of the work carried on by the Advocate on behalf of the Applicant in regard to the petition in issue was not sufficient to warrant the excessive charges as awarded by the taxing master; the responses and submissions by the Advocates did not demonstrate any complexity in the matter; and that the taxing master agreed that the matter was not classified as complex or novel in the judgment.

5. It was therefore the Applicant's position that the taxing master's decision was based on an error of principle and amounted to wrongful exercise of discretion, and that this court is entitled to interfere with wrongful exercise of discretion. He contended that there was a delay in obtaining the certified ruling on the reasons for the taxation which was only secured on 2nd of February 2018, despite having requested for them on 15th December 2017 through a letter dated 8th December 2017. In closing he stated that this is a case fit for the exercise of discretion by the court to set aside the order of the taxing master given on the 7th of December 2017.

The Response

6. The application was opposed by the Advocate by way of grounds of opposition dated 7th March 2018 and replying affidavit sworn on the same date by John Thongori, Advocate. The Advocate deponed that the application as prepared is vexatious, frivolous, scandalous, and an

abuse of the court process. He refuted that there was an order made by the taxing master on 7th December 2017, and stated that he was only aware of a ruling delivered by the taxing master on 18th December 2017, where the said court taxed the bill of costs by J Thongori and Co. Advocates dated 30th July 2015 at Kshs 2,557,917.08.

7. It was the Advocate's case that in the ruling the taxing master was right and justified in awarding the Advocates a sum of Kshs 1,000,000/= under the item 1 on instruction fees in the Bill of Costs dated 30th July 2015, and the amounts awarded were not excessive and that the sums were justified in the prevailing circumstances.

8. The Advocate contended that there was no error of principle exercised or employed by the taxing master as confirmed by the contents of the ruling delivered on 18th December 2017, and she correctly exercised her discretion when assessing the costs requested for in the Bill of Costs dated 30th July 2015. It was his case that the taxing master gave clear and cogent reasons in her ruling as to why she awarded the said costs and referred the court to the ruling and the proceedings in **Petition No 201 of 2011**.

The Determination

9. The application was canvassed by way of written submissions filed in Court by the respective parties. A preliminary issue that needs to be clarified by the Court is the ruling that is the subject of this application. From the record, while it is indicated that the ruling on taxation was delivered on 8th December 2017, the actual ruling that is on record is shown to have been delivered and dated 18th December 2017. The Applicant on the other hand refers to a ruling of the taxing officer of 7th December 2017, which he explained in his submissions was in error and that what he intended was the ruling delivered on 8th December 2017.

10. The confusion as to the dates of the ruling on the record and in the Applicant's pleadings is however not fatal, as it is evident from the pleadings and submissions by the parties that the ruling that is referred is the one where the taxing officer taxed the Advocate-Client Bill dated 30th July 2015 at the amount of Kshs 2,557,917.08/=.There is only one such ruling on record which is dated 18th December 2017.

11. Mwaniki Gachoka & Company Advocates for the Applicant submitted that that the taxing master properly recognised provision 1(j) of the Advocates (Remuneration) Order, which prescribes a minimum instruction fee of Kshs 28,000 as the applicable provision. Further, that the taxing master noted that the matter had not been classified as complex or novel in any way in the judgment. However, that despite these findings, the taxing officer proceeded to award instruction fees at Kshs 1,000,000/=, which is 35 times greater than the prescribed amount, and failed to give reasons why the basic fee was increased from Kshs 28,000/= to Kshs 1,000,000/= as is required.

12. The Applicant relied on various authorities that it was submitted make it a requirement that that reasons are provided by the taxing master where they exercise discretion to vary the instruction fees upwards or downwards. The authorities included **Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd [2014] e KLR** and **Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 Others [2006] eKLR**

13. On the getting up fees awarded, the Applicant cited Schedule VI(2) of the Advocates (Remuneration) Order as the applicable provision, and submitted that that there was no trial held in this case, no witnesses were called or any witness statements prepared. That there was no oral testimony, evidence in chief, cross examination and re-examination and no document produced or identified by any witness. They submitted that all this were ingredients of a trial which were not there, and getting up fees should not be allowed as they cannot be charged in a petition or in any proceeding in which a trial is not present.

14. In conclusion they urged the court to find that the instruction fees and getting up fees allowed by the taxing master were excessively high and not justified in this matter, and urged the Court to be guided by the ruling in **Republic vs Commissioner of Domestic Taxes ex-parte Ukwala Supermarket Limited and 2 Others [2018] eKLR** and **National Oil Corporation Limited vs Real Energy Limited and Another [2016] eKLR**

15. John Thongori Advocate on the other hand submitted that the taxing master considered the provisions of Schedule VI of the Advocates Remuneration Order 2009 when assessing the instruction fees, as well as the principles that encompass taxation of costs Further, that the taxing master was guided by the cases of **Republic vs Ministry of Agriculture and 2 Others ex parte Samuel Muchiri Njuguna & 6 Others 2006 eKLR** and **Joreth Limited vs Kigano and Associates, Civil Appeal No 66 of 1999** which outlined the principles in regard to taxation of costs.

16. In addition, that the taxing master considered the importance of the matter to the parties, the volume of work done by looking at the documents prepared and perused, the period of time the matter was in court, the time expended by the advocates and the amount of research done in the matter. It was his submission that the capital value of the subject matter for which the Advocate was instructed to defend the Applicant was not certain, and as held in the ruling, the taxing master was left with the general discretion to tax the bill based on the importance of the matter to the parties, its complexity, and the responsibility placed on the counsels.

17. Therefore, that it would not be fair to refer for fresh taxation a bill of costs that was legally, regularly, fairly and justly assessed and fees awarded. Reliance was in this regard placed on the decisions in **Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd, Misc. Cause No 843 of 2013** and **Odera Obar & Co Advocates vs Design & 2 Others, Misc. Cause No 392 of 2015,** where it was held that there was no error in principle exercised or employed by the taxing master.

18. The issue before the Court is whether the taxing master erred in the taxation of the instruction fees and getting up fees in the Bill of Costs by J Thongori and Co. Advocates dated 30th July 2015. The applicable principles are that a Court cannot interfere with the taxing officer's decision on taxation unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference . These legal parameters were laid down in **First American Bank of Kenya Vs Shah and Others [2002] E.A.L.R 6**4 at

69 by Ringera J. (as he then was) who delivered himself thus;

> **"First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle".**

19. These principles reiterate the position of the Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002) 1 EA 92,** where the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

20. Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (2006) e KLR** :

> **" 1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;**
>
> **2. the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;**
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> **3. the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;**
>
> **4. so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;**
>
> **5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;**
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> **6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;**
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> **7. where responsibility borne by advocates is taken into account, its nature is to be specified;**
>
> **8. where novelty is taken into account, its nature is to be clarified;**
>
> **9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.**

21. These guidelines were also applied by Odunga J. in **Nyangito & Co Advocates – Vs - Doinyo Lessos Creameries Ltd [2014] eKLR,** and the learned Judge in addition also held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

22. In the present application, there is no contest that the applicable law on the taxing of the item on instruction fees in the Advocates-Client Bill of Costs dated 30th July 2015 is Schedule VI B of the Advocates (Remuneration) Order 2009, which provides as follows:

> **"As between advocate and client the minimum fee shall be—**
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> **(a) the fees prescribed in A above, increased by one-half; or**
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> **(b) the fees ordered by the court, increased by one-half; or**
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> **(c) the fees agreed by the parties under paragraph 57 of this order increased by one-half; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences."**

23. Schedule V1A which is applied by the said provisions provides a fee of Kshs 28,000/- in paragraph 1 (j), as the minimum instruction fee in an action to oppose prerogative orders, which was the nature of the subject suit (**Petition 201 of 2011**) that the Advocate was defending on behalf of the Applicant. The taxing master in her ruling dated 18th December 2017 properly applied this schedule and noted that the basic instruction fee was Kshs 28,000/=.

24. While taxing on the item on instruction fees, the taxing master in her ruling took into consideration the following factors: that the subject matter of the suit was not certain; the applicable guidelines in **Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others [supra]**; the importance of the matter to the parties, the volume of work done by looking at the documents that were prepared or perused; the period of time the matter was in Court; and time expended by the Advocate and the amount of research done in the matter. The taxing master also found that the matter had not been classified as complex or novel in any way.

25. I find that the taxing master did take into account relevant considerations and gave reasons why she exercised her discretion to tax off

the instructions fees from Kshs 7,500,000/= to Kshs 1,000,000/= , and that the instruction fee awarded of Kshs 1,000,000/= even though 35 times more than the basic fee allowed, was not excessive in the circumstances. I have in this regard noted that between the time of taking instructions on 23rd October 2011 and judgment on 15th July 2015, there were at least two applications that were defended or prosecuted by the Advocate in addition to the main Petition, , which items are in the Bill of Costs and were not contested by the Applicant.

26. As regards the taxation of item 44 of the Bill of Costs on regards getting up fees and award of Kshs 333,333/= regard by the taxing master for this item, the applicable law is paragraph 2 of Schedule VIA of the Advocates (Remuneration) Order 2009 which reads as follows:

> **"2. FEES FOR GETTING UP OR PREPARING FOR TRIAL**
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> **In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:**

Provided that –

> **i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;**
>
> **ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15 per cent of the instructions fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;**
>
> **iii. in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph".**

27. This paragraph only requires denial of liability in a case for it to be applicable. The Applicant did not in this regard contest the item on the Bill of Costs that a replying affidavit to the Petition was prepared and filed by the Advocate, and the Applicant therefore clearly contested the Petition. It is also on record that the Advocate attended hearings of the Petition which was argued before Mumbi Ngugi J. on various dates, which items were not contested by the Applicant. A trial in this regard need not be only by way of *viva-voce* evidence, and a trial is conducted pursuant to the directions of a court, including by way of affidavit evidence and submissions, which is allowed in constitutional petitions.

28. The work that was undertaken clearly entitles the Advocate to getting up fees, as not only as there was denial of liability of the actions complained of, but also for reasons that there was a trial of the Petition, contrary to the Applicant's arguments. As regards the sum awarded by the taxing master for getting up fees of Kshs 333,333/=, this is in line with the applicable provisions as it was the allowable minimum being one-third of the instruction fees of Kshs 1,000,000/=.

29. In the premises I find that the decision of the taxing master in awarding instruction fees of Kshs 1,000,000/= and getting up fees of Kshs 333,333/= was not based on any error of principle, neither were the said fees as awarded excessive to justify interference by this Court. I accordingly dismiss the Chamber Summons dated 9th February 2018 with costs to the Advocate.

30. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF JULY 2018

P. NYAMWEYA

JUDGE