REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 513 OF 2016

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

AND

IN THE MATTER OF REFERENCE TO A JUDGE

BETWEEN

NATIONAL LANDS COMMISSION.....APPLICANT

VERSUS

PROF. TOM OJIENDA & ASSOCIATES.....ADVOCATE/RESPONDENT

JUDGMENT

(Being a reference under paragraph 11 of the Advocates (Remuneration) Order of the ruling on taxation of 7th December 2017, by Deputy Registrar Hon. S. A. Opande)

INTRODUCTION

1. I am, by this ruling considering a chamber summons dated **20th December 2017** filed by the National Land Commision (NLC). That chamber summons is a reference against the taxation of ***17th December 2017***, by the taxing master ***S.A. Opande***. The said taxation was of an advocate/client bill of costs.

BACKGROUND

2. ***Professor Tom Ojienda*** was the advocate who was instructed by NLC to file before the Supreme Court a Reference being Advisory Opinion No. 2 of 2014. By that reference NLC requested for the Supreme Court Advisory Opinion pursuant to Article 163 (6) of the Constitution. NLC sought the Supreme Court's opinion on the mandate between it and the Ministry of Land Housing & Urban Development in the context of Chapter 5 of the Constitution and the relevant legislation. Supreme Court delivered its opinion on ***2nd December 2015*** and thereby set out the functions of NLC and also defined the different functions of NLC on one hand and the Ministry of Land Housing & Urban Development on the other hand.

3. The advocate/client bill of costs relates to the advocate's representation of NLC before the Supreme Court in that matter.

4. The bill of costs was taxed by the taxing master ***E. Tanui*** on ***20th April 2016***. By that taxation that taxing master taxed instruction fees at ***Ksh 65 million***. The total amount of that taxation was ***Ksh 112,741,002***.

5. The client on ***20th March 2017*** filed a reference against that taxation. ***Justice Ochieng*** by his ruling dated ***27th July 2017*** set aside the amount of the instruction fees in that taxation, and ordered that amount to be taxed before a different taxing master. The learned judge in ordering that only the instructions fee were to be subjected to the re-taxation, found that NLC had not challenged the other taxed amounts, other than the instruction fee.

6. The instruction fees were subjected to re-taxation before the taxing master ***S. A. Opande***. That taxing master delivered his ruling on his taxation on ***7th December 2017***. By that ruling that taxing master taxed the instruction fee at ***Ksh 40million***. It is that ruling which is the subject of the present reference under consideration.

7. NLC by this reference, seeks the ruling of S.A Opande of ***7th December 2017*** to be set aside and struck out; that the advocate's bill of cost be taxed afresh and /or the court do proceed to make a finding on that taxation; and that there be stay of execution until determination of this reference.

8. The application of NLC is supported by an affidavit of ***Brian Ikol*** the Deputy Director of Legal Affairs and Enforcement of NLC.

9. By that affidavit the deponent stated that the taxing master erred, misdirected himself and failed to take into account the ruling of ***27th July 2017*** whereby the learned judge ***Justice Ochieng*** by that ruling referred to the provision in Article 48 of the constitution that relates to access to Justice. He deponed that NLC being a public body it will be the public that will bear the burdern of footing the prohibitive fee which he said would be contrary to the provision in Article 201 (d) of the Constitution which requires public money to be used in a prudent and responsible way.

10. The reference was opposed by the advocate by his replying affidavit. The advocate clarified that the client was only entitled to object to the instruction fee only and not to the other items. Further he stated that contrary to what was stated by NLC the taxing master considered the constitutional povisions.

11. The advocate further deponed that taxation of bill of costs is a matter of opinion on the amount taxed was reasonable given the particular circumstances of the case. The advocate relied on the case of ***Nyangito & Co. Advocates vs Doinyo Lessos Creameries Ltd [2014]*** which discussed the principle that should guide a judge when considering a reference from taxation and stated:

> *"(1) 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 manifested excessive at to justify an inference that it was based on an error of principle;*
>
> *(2) It would be an error of principle to take into account irrelevant factors or to 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 importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties, the general conduct of the proceedings and any direction by the trial judge;*
>
> *(3) 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 was high.*
>
> *(4) It is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary."*

ANALYSIS AND DETERMINATION

12. It is the ruling of ***27th July 2017*** which was in respect to the client's reference dated ***20th April 2016*** that sets the stage of how the taxing master ***S.A Opande*** was required to proceed with the taxation which is now the subject of the reference before me. To therefore consider that reference, I will refer to the directions given by the learned judge in that ruling.

13. In that ruling, the learned judge in approving the holding of ***Premchand Raichand Ltd vs Quarry Services of East Africa Limited [1972] E.A. 162*** stated that its holding was correct because legal costs should not be ***"permitted to escalate to such levels that cannot be afforded by the average Kenyan"***. In his view, the learned Judge stated if legal costs were permitted to escalate ***"the bulk of society would effectively be deprived of access to legal services".***

14. The learned judge proceeded to find that the taxing master ***E. Tanui*** considered relevant factors in determining the instruction fees. The judge however having made that finding stated:

"nontheless, I still find that the final award of Ksh 65,000,000 was so high in itself that it cannot be rationalized with the constitutional imperatives which is to ensure that all persons may be able to access justice".

15. Because of that, the learned judge set aside the instruction fees as taxed by ***E.Tanui*** and ordered the advocate/client bill of costs be taxed afresh. In ordering that it be re-taxed the learned judge noted that the client had not in the reference before him, challenged any other item in the bill of costs. The learned judge therefore directed that the other items in the bill of costs should not be subject of the re-taxation.

16. The taxing master ***S.A. Opande*** in re-taxing the bill of costs referred and considered the sentiments of the learned judge regarding the constitutional imperatives and having done so, that taxing master made reference to the findings of ***E.Tanui***, that the advocate had done a lot of research and work towards the preparation and presentation of the submissions before the Supreme Court and stated that he could not disregard that finding because it was a finding endorsed by the learned judge in the ruling of ***27th July 2017***.

17. The taxing master proceeded to make his finding that what was before the Supreme Court was not an ordinary suit. That it was a reference seeking the Supreme Court's opinion on issues affecting NLC and affecting the Ministry of Land Housing & Urban Development. The taxing master also found that NLC sought in the advocate expertise and experience. He then pronounced himself thus:

> ***"I am convinced that even though the initial figure on instruction fees was deemed too high, the advocate is entitled to fair compensation for the volume of work done considering the special expertise he put in the work".***

18. I have considered the affidavit evidence, the parties submissions and their authorities.

19. It is clear to me that what was before ***S.A Opande*** the taxing master, was consideration of the instruction fee. That was made clear by the ruling of ***27th July 2017***.

20. That ruling also supported and upheld the finding of ***E. Tanui*** in the first taxation where the said taxing master in very great details set out what was before the Supreme Court and the important role that matter played to the Nation of Kenya.

21. The taxing master ***S.A Opande*** during re-taxation specified why he exercised his discretion in awarding ksh 40,000,000 to the advocate.

22. A taxing master in taxing a bill of cost, does so in exercise of his discretion. This was restated in the case before the Court of Appeal that is, ***Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board***, the Court of Appeal held:

> ***"on reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs."***

In ***Arthur vs Nyeri Electricity Undertaking [1961] E.A 497***:

> ***"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 and the court will interfere only in exceptional case".***

23. The taxing master exercised his discretion in awarding ksh 40 million and I can find no error in principle in assessing that amount. He gave adequate basis which led to that award. In my opinion, he did not misdirect himself in any way that I can discern. Contrary to what is stated by NLC there is nothing that would make me say that he erred so as to cause injustice. I am in agreement with the finding of ***E. Tanui*** and the learned ***Judge Ochieng*** that the matter before the Supreme Court must have been time consuming and required research and skill. That in my view justified the taxation carried out by ***S.A Opande***. It is for that reason that I find no merit in NLC's reference.

24. Before concluding this ruling however, I need to respond to the advocates submissions that NLC was barred from filing the present reference because it had previously filed a reference against the taxation of ***E.Tanui***. The advocate's submission in my view is incorrect. It is incorrect because paragraph 11 of the Advocates (Remuneration) Order provide for reference of taxation. The taxation by ***S.A Opande*** was a separate and distinct taxation from the one carried out by ***E.Tanui***. NLC was therefore quite right to have filed this reference before court.

25. In the end the chamber summons dated ***20th December, 2017*** is rejected, it is dismissed with costs to the advocate with the bill.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **20th** day of **September,** 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Applicant

..... for the Respondent

MARY KASANGO

JUDGE