REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC CIVIL APPLICATION NO. 161 OF 2017

FRANCIS MUTUKU MUNG'ALA.....APPLICANT

VERSUS

TAWA STAGECOACH SAFARIS LTD.....RESPONDENT

R U L I N G

1. The Applicant herein filed a Chamber Summons dated 18-12-2017 pursuant to Rule 11 (2) of the Advocates (Remuneration) Order seeking for the following reliefs namely:

(a) That the honourable court be pleased to enlarge time within which the Applicant may file a defence for taxation and decision of the Taxing Master of 8-11-2017 on the Advocate's Bill of Costs dated 29-6-2017.

(b) That the decision of the Taxing Master delivered on 8-11-2017 in so far as it related to taxation of items 1,2,3,4,5,7,9,12,13,14,15,16,17,18,19,20,21 23, 24 and 27 of the Advocates Bill of Costs dated 29-6-2017 be set aside.

(c) That the honourable court be pleased to remit this matter to another Taxing Master for re-taxation of item numbers1,2,3,4,5,7,9,12,13,14,15,16,17,18,19,20, 21, 23, 24, and 27 of the Advocate's Bill of Costs dated 29-6-2017.

(d) That in the alternative to prayer (b) above this Honourable court be pleased to re-tax the items therein as contained in the Advocate's Bill of costs dated 29-6-2017.

(e) That the costs of the application be provided for.

2. The Application is supported by the annexed affidavit of Beth Mwangi sworn on even date and further on the following grounds:

(i) That the Taxing Master misdirected herself by misinterpreting the provisions of schedule VI of the Advocate's (Remuneration) (Amendment) Order 2009 and the provisions of schedule VII of the Advocates (Remuneration) (Amendment) Order 2014.

(ii) That the Taxing Master erred in principle by failing to distinguish between the fees applicable as between party and party under Schedule VI a of the Remuneration Order vis-a-vis the enhanced fees applicable as between an advocate and client under Schedule VII B of the said Remuneration Order.

(iii) That the Taxing Master erred in principle by failing to apply the provisions of Schedule VII B of the Remuneration Order, 2009 and Schedule VII B of the Remuneration Order 2014 in the assessment of the sum due to the Applicant on account of the items listed herein.

(iv) That the Taxing Master erred in principle by holding that value added tax (VAT) was chargeable on instruction fees only.

3. The Respondent failed to file a response to the Applicant's application even after being granted time to do so. Hence it would appear that the Respondent is not opposed to the said application.

4. Parties were directed to file written submissions but none were filed. Learned counsel for the Applicant sought to rely on the averments contained in the affidavit in support of the application. I have considered the application and the affidavit in support thereof and find the following issues necessary for determination:-

(i) Whether the Taxing Officer properly applied the requisite provisions of the Advocate (Remuneration) (Amendment) Order 2009 and 2014.

(ii) Whether it is appropriate to remit the matter to the Taxing Officer for re-taxation.

5. As regards the first issue, it is not in dispute that the Applicant herein had represented the Respondent in a primary suit namely **Machakos CMCC No. 673 of 2011 Francis Mutuku Mungala -VS- Tawa Stagecoach Safaris Ltd and 2 Others** and as such the Bill of Costs was clearly one between advocate and client which should be handled pursuant to Schedule VII B of the Advocate (Remuneration) (Amendment) Order 2009 and 2014. One of the key elements of such an advocate/client Bill of Costs is that the Advocate's instruction fees is subject to be increased by half (50%). The other element is that Value Added Tax (VAT) is applicable to the eventual amount which has been taxed by the Taxing Officer. It is true that a higher court is not entitled to upset a taxation merely because in its opinion, the amount awarded is high or low and it would not interfere with a Taxing Officer's decision unless the decision is 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. (see the case of **CONSTRUCTION PETROLEUM ENGINEERING (E.A) LTD -VS- UGANDA SUGAR FACTORY [1970] EA 141**. Upon perusal of the Taxing Officer's ruling dated 4-12-2017, I find that a wrong principle had been applied and thereby a lower award of costs as regards the instruction fees and the non-application of the V.A.T on the eventual taxed sums. Consequently, I find that the Taxing Officer did not properly apply the requisite provisions of schedule VII B of the Advocate (Remuneration) (Amendment) Orders 2009 and 2014 as between Advocate and Client.

6. As regards the second issue and in view of the aforegoing observations, I find it is proper to remit the matter to the Taxing Officer for re-taxation so that the appropriate figures are arrived at upon proper application of Schedule VII B of the Advocates (Remuneration) (Amendment) Order 2009 and 2014.

7. In the result the Applicant's application dated 18-12-2017 is allowed in terms of prayers (1), (2), (3) thereof with no order as to costs.

Orders accordingly.

Dated and delivered at Machakos this 6th day of November, 2018.

D. K. KEMEI

JUDGE