



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. 499 OF 2012**

**MEREKA & CO. ADVOCATES.....ADVOCATE/RESPONDENT**

**-VERSUS-**

**NEW KENYA CO-OPERATIVE CREAMERIES LIMITED.....CLIENT/APPLICANT**

**RULING**

1. Before the court for consideration and determination are two (2) applications and an Amended Notice of Preliminary Objection. The **first** application is a chamber summons/reference by the Client/Applicant filed under Certificate of Urgency dated 26<sup>th</sup> February, 2018 and supported by the grounds set out in the body thereof in addition to the affidavit of **Peter Kennedy Ombati** sworn on the same date together with annexures. The aforesaid application is brought under Article 48 of the Constitution, Section 3A of the Civil Procedure Act and Paragraph 11 (2) of the Advocates Remuneration Order. The orders sought therein are:-

- i) THAT the Honourable Court be pleased to set aside the taxing master's entire decision rendered on 11<sup>th</sup> July, 2017.**
- ii) Spent.**
- iii) THAT the Honourable Court be pleased to remit the advocate-client bill of costs dated 13<sup>th</sup> September, 2012 to a different taxing master for taxation.**
- iv) THAT costs of the Reference be provided for.**

2. In his supporting affidavit, **Peter Kennedy Ombati** averred that the Applicant/Client instructed the Advocate vide a letter dated 11<sup>th</sup> October, 2010 to advertise a Caveat Emptor notice to the public, draft individual affidavits for 16 titles for purposes of the now Ethics and Anti-Corruption Commission and deal with any legal issues arising therefrom. A copy of that letter has been annexed to the affidavit. The deponent went on to state that the Advocate prepared the Caveat Emptor notice for the 16 titles and 13 affidavits. Copies of the same are similarly annexed. According to the deponent, the Applicant subsequently withdrew its instructions given to the Advocate and directed it to hold any further action until otherwise directed. A copy of the letter to that effect has been annexed.

3. Peter K. Ombati stated that the Advocate then went ahead to file an Advocate-Client bill of costs against the Applicant for the sum of Kshs.117,532,374. A copy thereof is annexed. The same was taxed by Deputy Registrar F.R. Wangila on 22<sup>nd</sup> October, 2013 in the sum of Kshs.222,658 with instruction fees being taxed at Kshs.200,000.

4. What followed as indicated in the deponent's affidavit is that the Advocate filed a reference in court on 25<sup>th</sup> November, 2013 seeking to set aside the taxing master's decision as relates to the instruction fees. A ruling was delivered by Justice Serگون on 30<sup>th</sup> July, 2015; thereby setting aside the same and further ordering that the bill of costs be heard afresh before a different taxing master.

5. It is the deponent's affirmation that on 11<sup>th</sup> July, 2017, Deputy Registrar Sitati taxed the bill of costs at Kshs.32,346,940 being the instruction fees, disbursements and VAT. A copy thereof is annexed. Consequently, the Applicant filed a notice of objection challenging the entire ruling of 11<sup>th</sup> July, 2017 and further requested for reasons behind the said decision. An annexed copy of the notice is provided. The Applicant later succeeded in obtaining a copy of the ruling on 13<sup>th</sup> February, 2018.

6. It was declared that on or about 8<sup>th</sup> January, 2018 the Advocate obtained a Certificate of Taxation of the Kshs.32,346,940. The deponent has annexed a copy of the same to his affidavit. It is argued that the sum taxed on instruction fees is excessive and unfounded. Furthermore, the deponent argued that the Advocate had not sought VAT in the bill of costs, yet the same was awarded by the taxing master despite the fact that the taxing master ought to tax only items pleaded in the bill of costs. To add on, the deponent affirmed that rather than consider the

value of the subject matter, the taxing master ought to have considered the work done by the Advocate. In failing to do so therefore, the taxing master erred.

7. The above application/reference stands opposed and a Replying Affidavit was sworn by **David M. Mereka** on 5<sup>th</sup> April, 2018 to that effect. Essentially, the deponent argued that no leave was granted to file the Reference out of time and that the same should be struck out with costs. It was also contended that the Applicant did not diligently seek to obtain reasons for the ruling of 11<sup>th</sup> July, 2017 from the taxing master, neither did it give reasons for failing to move the court within a reasonable period of time. The deponent in turn stated that contrary to the arguments made by the Applicant, the taxing officer did in fact consider both the work done by the Advocate and the value of the subject matter, in arriving at the decision. In the deponent's view, the taxing master considered all relevant factors and duly exercised discretion in arriving at the decision of 11<sup>th</sup> July, 2017.

8. David Mereka also averred that, the parties previously met and negotiated on the advocate's fees, thereby agreeing that the Advocate would give a discount of 15% on the taxed fees. However, the Applicant failed to perform its obligations. As a result, the deponent is of the view that the bill of costs has been compromised at the amount of Kshs.27,363,149 and further that the reference is barred by the principle of estoppel, there being an agreement already in place.

9. Furthermore, the deponent argued that the Applicant has not offered any security and has come to court with unclean hands. That the Applicant has not demonstrated the manner in which it will suffer substantial loss and that no decree has been extracted, meaning that, there is no need for stay at this point in time. Similarly, the deponent stated that the Applicant has not demonstrated the manner in which the taxing master erred in increasing the amount. On the subject of VAT, the deponent's response was that the same is rightly included since it flows from taxation of advocate-client bill of costs in line with statute.

10. As indicated hereinabove, the Advocate filed an Amended Notice of Preliminary Objection dated 12<sup>th</sup> April, 2018. In summary, the same challenges the validity of the Reference for the reason that it was filed out of time and without leave of court. On this basis, a prayer is made that the Reference be struck out with costs.

11. Subsequently, parties filed submissions. The Applicant's submissions dated 10<sup>th</sup> May, 2018 reiterated that it only managed to obtain a copy of the ruling by the taxing master on 13<sup>th</sup> February, 2018; hence the reason for the delay in filing the reference. Still, the applicant went on to argue that the reference was filed only 14 days after obtaining the aforesaid ruling and this was not contested in the Reply by the Advocate and that the Advocate did not avail any document to indicate either that the ruling was ready prior to the 13<sup>th</sup> of February, 2018 or that the taxing master had notified either party of the reasons behind the taxation within the requisite 14 days.

12. Further, the Applicant was of the view that by relying on the estimated value of the properties in assessing the instruction fees owing to the Advocate, the taxing officer erred; that the taxing officer as well erred by assessing the instruction fees in line with Schedule VI of the Advocates (Remuneration) Order as opposed to Schedule V and by increasing the same, adding that the sum of Kshs.32,191,940 is manifestly excessive; and that the taxing officer erred in applying VAT whereas the same had not been pleaded in the bill of costs. Reference was made to authorities.

13. The Advocate's submissions (dated 10<sup>th</sup> May, 2018 and rejoinder submissions dated 8<sup>th</sup> June, 2018) were quite comprehensive. On the subject of the Preliminary Objection, the Advocate recapped the contents therein, arguing that the reference was filed out of time since such time begins to run when the ruling is delivered with reasons and not when a party receives a copy of the said ruling. Authorities have been quoted in support of this argument. The submissions argued that the Applicant has simply been indolent and cannot therefore argue that there was a reasonable explanation for the delay. In addition, it was submitted that the Preliminary Objection stands unopposed owing to the fact that no response has been filed; that the decision of 11<sup>th</sup> July, 2017 was reasonable and in accordance with the relevant statutory provisions. Furthermore, that the taxing officer has the discretion to increase the amount assessed as long as the same is done soundly and justifiably. The Advocate submitted that the taxing master did not err in calculating the instruction fees, including the VAT or considering the value of the subject matter.

14. The **second** application is similarly a chamber summons by the Client/Applicant dated 11<sup>th</sup> May, 2018 brought under Article 159 (2) (d) of the Constitution, Section 3A of the Civil Procedure Act and Paragraph 11 (4) of the Advocates (Remuneration) Order. The said application is supported by the grounds set out therein and the affidavit of **John M. Ohaga** sworn on 11<sup>th</sup> May, 2018. The orders sought thereunder are:-

i) Spent.

ii) **THAT** the Honourable Court be pleased to enlarge time for filing the reference against the taxing master's decision delivered on 11<sup>th</sup> July, 2017.

iii) **THAT** the reference dated 26<sup>th</sup> February, 2018 and filed on 27<sup>th</sup> February, 2018 be deemed as competently and/or properly filed.

iv) **THAT** costs of the application be provided for.

15. The supporting affidavit mentioned hereinabove largely echoes the averments made in the reference of 26<sup>th</sup> February, 2018 save to add that numerous follow-ups were made towards obtaining the reasons for the decision of 11<sup>th</sup> July, 2017 and the ruling. It was also averred that since the Notice of Objection and request for the reasons was lodged timeously, the time ought to run from the date of receipt of the certified copy of the ruling. To the deponent's mind, the reference was filed in good time and there was consequently no need to seek enlargement of time to file the same.

16. The above application was opposed by the Advocate/Respondent through a replying affidavit sworn by **David M. Mereka** on 26<sup>th</sup> June, 2018. The deponent in this instance argued that the aforesaid application is an afterthought with the intention of defeating the Preliminary Objection and submissions already filed. The deponent further reiterated that the reference was filed out of time without leave of court, and that no reasonable explanation was given for the delay in filing the two applications currently before court.

17. The written submissions that followed from the Advocate largely expounded on the contents of the Reply, coupled with legal backing. The Advocate in turn reiterated that the application is an abuse of court process since the Applicant presented conflicting arguments as to whether the reference was filed within time or not. Judicial authorities were referred to in support of this submission.

18. Parties highlighted their submissions orally before court on 9<sup>th</sup> October, 2018.

19. Having considered the abovementioned applications, responses and submissions by the parties herein, the court will now give its view beginning with the **chamber summons of 11<sup>th</sup> May, 2018**. The main issue for determination herein is whether the reference was filed out of time. The Applicant has established that following the delivery of the ruling on 11<sup>th</sup> July, 2017, the Notice of Objection was filed on 12<sup>th</sup> July 2017 whereas the letter requesting for reasons was filed on 14<sup>th</sup> July, 2017 in compliance with **Paragraph 11 (1)** of the Advocates Remuneration Order which stipulates that;

**“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.”**

20. The Applicant maintained that it only managed to obtain a certified copy of the said ruling on 13<sup>th</sup> February, 2018 and the reference was filed on 27<sup>th</sup> February, 2018 (within 14 days).

21. The court refers to **Paragraph 11 (2)** of the Remuneration Order which expresses as follows;

**“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.”**

22. Reading from the above provisions in relation to the circumstances of this case, it is fair to state that the taxing master did not adhere to Paragraph 11 (2), resulting in the delay in filing of the reference. The court's considered view is that whereas on one hand it can be argued that the Applicant did not exercise due diligence in following up on the reasons from the taxing master, it can be seen that on the other hand, it was the duty of the taxing master to provide the Applicant with such reasons within a reasonable time. As such, the court is of the view that the Applicant should not be faulted for the failure on the part of the taxing master to provide the reasons in good time.

23. Reference is also made to Justice Nyamweya's reasoning in **Anthony Thuo Kanai T/A. Thuo Kanai Advocates-v-John Ngigi Ng'ang'a MISCELLANEOUS APPLICATION NO. 259 OF 2013** that;

***“...The Applicant herein attached as Annexure “ATK 2” a letter dated 9th December 2013 and filed in court on the same date, requesting for written reasons for the taxing officers decision. There is a notation on the said letter apparently by the Deputy Registrar of this Court, who was the taxing officer, stating that the reasons are in the ruling and that the Advocate should file a reference. This handwritten notation is dated 21st January 2014. Time for purposes of filing a reference therefore started to run from 21st January 2014 which was the date the explanation as to his reasons were given by the taxing officer, and at the date of filing of this application on 3rd February 2014 the time limit of fourteen days had not lapsed. This application was therefore filed within time and is competently before this Court.”***

24. In line with the above, the court is of the view that time started to run from 13/2/2018 when the Applicant received the certified copy of the ruling bearing the reasons. As such, I have come to the conclusion that the reference was filed in good time and the Advocate's arguments to the contrary cannot stand. In the same way, the court is not convinced that the Advocate will suffer prejudice should the reference be allowed as the same has not been established to the satisfaction of the court, and the Preliminary Objection automatically falls on this basis. This in effect means that the Applicant ought not to have filed the Application dated the 11/5/2018 and the court need not say more on it.

25. The court now moves to address the substance of the **reference of 26<sup>th</sup> February, 2018**. The bone of contention in this instance being the instruction fees and VAT awarded by the taxing master vide the ruling delivered on 11<sup>th</sup> July, 2017. It is the Applicant's case that the instruction fees was excessive and that VAT was awarded despite not having been pleaded in the bill of costs. On the subject of the instruction fees, it is imperative for the court to establish whether the instruction fees was exorbitant. In doing so, the court is required to probe the work done *vis-à-vis* the instruction fees awarded. As reiterated in the reference, the Advocate was instructed to advertise a caveat emptor notice and prepare affidavits for numerous titles. Further to this, the Advocate was instructed to deal with any other arising legal issues. It is not disputed that soon thereafter, the Applicant withdrew its instructions, prompting the filing of the bill of cost.

26. In calculating the instruction fees in the ruling of 11<sup>th</sup> July, 2018, the taxing master took into account both the work done and the value of the subject matter, *inter alia*. The question to ask, therefore, is whether in doing so the taxing master erred. It is worth reiterating that the work done by the Advocate was limited to the abovementioned. The matter did not proceed to court and no pleadings were filed. It is the court's firm belief that whereas an advocate is undoubtedly entitled to legal fees for professional services rendered, such costs ought to be commensurate to the amount and nature of work undertaken. To add on, such pay should be reasonable.

27. In reiteration of the above, the court draws from the analysis in the case of **Rosa Associate v KTK Advocates[2018] eKLR** where the

Honourable Judge referred to the Court of Appeal's holding in **Moronge & Company Advocates-v-Kenya Airports Authority [2014] eKLR** that;

***“...The advocates pay however must be commensurate to his work otherwise shall be what is termed as “unjust enrichment”. The same must be a reasonable compensation for professional work done. The court shall interfere with the decision of the taxing master if the same was unreasonable and excessive in the circumstances...”***

28. Having appreciated the aforesaid position, the court opines that the taxing master should likewise consider the above in making a decision. Not only so; the taxing master ought to exercise his/her discretion judiciously and with due consideration to the parties and the circumstances of the case at hand. This view was taken in the **Anthony Thuo Kanai** case cited hereinabove in this sense;

***“...the taxing master is vested with discretion to increase or decrease instruction fees and that in exercising such discretion, the taxing officer must act judicially by taking into account relevant factors stipulated in the Advocates (Remuneration) Order 2009 including importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances.”***

29. In the case at hand, the taxing master awarded instruction fees of **Kshs.32,191,940/=**. Noting that the matter did not proceed to court and the work done was not complex and/or overly time-consuming in nature, I have concluded that the instruction fees was excessive, given those circumstances.

30. Having established the above, the question remains: what should the court do? The case of **Premchand Raichand Ltd & Another-vs- Quarry Services E. Africa Ltd (1972) E.A. 162** sheds some light as follows;

***“...the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit...”***

31. It cannot be over-emphasized that courts are emblems of justice and ultimately, the duty of the court is to balance interests and do justice to the parties. The Applicant rightly cited **Article 48** of the Constitution on access to justice. In essence, all parties are deserving of justice without favour or discrimination. Having found that the instruction fees calculated was exorbitant, the court shall exercise its discretion in interfering with the decision of 11<sup>th</sup> July, 2017. On the issue of the discount alleged to have been given by the Advocate, the court's position is that no evidence of this has been presented and as such, the court will not dwell on the subject and in any event, if the parties had agreed on that, they would have filed a consent in court to that effect.

32. In regards to the question of whether VAT should be awarded when the same was not pleaded, the court's view is premised on the case of **Amuga & Co. Advocates v Arthur Githinji Maina MISCELLANEOUS APPLICATION NO. 265 OF 2012** wherein the Honourable Judge made reference to the **AM Kimani & Co. Advocates –vs- Kenindia Assurance Co. Ltd** holding that;

***“...under the Value Added Tax Act an advocate is entitled to charge VAT on instruction fees and also disbursements”*** and **J.P Machira T/a Machira & Co. Advocates –vs- MDC Holdings Ltd & 2 others** where Justice Ringera held that;

***“As regards VAT it is a statutory requirement that legal services are chargeable with VAT.”***

33. The court is guided by the aforementioned authorities in reasoning that the Advocate is entitled to VAT. The Applicant's claims in this regard is therefore unfounded.

34. In view of the above, the court hereby grants **prayers 1 and 3** of the reference but with no orders as to costs. Consequently, the Amended Preliminary Objection dated 12<sup>th</sup> April, 2018 is hereby dismissed.

**Dated, signed and delivered at NAIROBI this 22<sup>nd</sup> day of November, 2018**

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Advocate/Respondent

..... for the Client/Applicant