REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 65 OF 2007

BEATRICE KARIUKI & ASSOCIATES ADVOCATES…….APPLICANT

- VERSUS –

GATOKA LIMITED…….....….RESPONDENT

RULING ON REFERENCE

1. The matter before me is in the nature of a reference from the Ruling of a Taxing Officer. The reference is dated 30th April, 2014.

2. In making the reference the applicant, **BEATRICE KARIUKI & ASSOCIATES ADVOCATES** *(hereinafter "the Advocates?)* made it clear that they were aware that the Court may only interfere with the decision of the Taxing Officer if the Court is satisfied that they had erred in principle.

3. In this case, the Advocates submitted that the Instruction Fee allowed by the Taxing Officer was so manifestly low as to justify an inference that the decision was founded on wrong principles.

4. Secondly, the Advocates faulted the Taxing Officer for refusing to award them Getting Up Fees. As far as the Advocates were concerned, the fact that the case had been set down for hearing, and as the necessary preparations had been made for the hearing, the Taxing Officer should have awarded them Getting Up Fees.

5. It is common ground that the respondent, **GATOKA LIMITED** *(hereinafter "the client?)* had initially instructed the Law Firm of **WAWERU GATONYE & COMPANY ADVOCATES,** who filed **Hccc No. 391 of 2003.**

6. In that case, the client claimed Kshs. 350,900,896/- plus interest thereon at 25% per annum from 5th July 1997.

7. The Advocates herein had previously worked at the Law firm of Waweru Gatonye & Company Advocates. After working there for only 6 months, Ms Beatrice Kariuki established the Law Firm of Beatrice Kariuki & Associates Advocates.

8. The Advocates later received instructions from the client, to take over the handling of their case.

9. According to the Advocates;

> **"…the brief was what lawyers fondly refer to as 'juicy brief', the kind to significantly alter the fortunes of a budding firm as the Objector's who at the time of receiving the brief, had hardly practiced on her own for one and a half years?.**

10. In the opinion of the Advocates, the client must have had great faith in them, to have entrusted them with that brief.

11. However, the client withdrew instructions from the Advocates after a short while. The Advocates deemed the withdrawal of the instructions from them as a nightmare.

12. Therefore, to try and ensure that they received their just entitlement of legal fees, the Advocates filed an Advocate/Client Bill of Costs. The Advocates believed that the Taxing Officer would "*ensure fairness and as it were, shielding parties against unjust enrichment in both divides?.*

13. But the Advocates now believe that the Taxing Officer failed to live up to her call of duty. He is said to have picked an arbitrary figure from the air, and thus did not exercise his discretion in a judicious manner. It is for that reason that the Advocates asked the court to set aside the sum of Kshs. 250,000/- which was awarded as Instruction Fees, and also to hold that the Advocates were entitled to Getting Up Fees.

14. The sum of Kshs. 250,000/- was described by the Advocates as being contemptuous, to say the least.

15. In the opinion of the Advocates, the Law Firm of Waweru Gatonye & Company Advocates could not have even imagined charging the client Kshs. 250,000/- as Instruction Fees, for a claim of Kshs. 350 Million. Or perhaps, it is the Client who could not have imagined that Waweru Gatonye & Company Advocates could have charged them that sum.

16. In this case, the value of the subject matter was clear, and therefore, the Advocates hold the view that if the Taxing Officer had based his assessment on the said value, the Instruction Fee should have been much higher than was awarded.

17. But instead of enhancing the basic fees, calculated on the basis of the applicable scale, the Taxing Officer is faulted for reducing the Instruction Fee to a sum which was far below the basic fee.

18. According to the Advocates, a reasonable and fair Instruction Fee was Kshs. 6,000,000/-.

19. That submission is founded upon the Advocates contention that they reviewed the pleadings and the state of preparedness, prior to fixing a hearing date.

20. The Advocates also said that they interviewed witnesses and recorded their statements.

21. All the preparations for the trial are said to have given rise to an entitlement for Getting Up Fees, amounting to Kshs. 2,000,000/-.

22. In answer to the reference, the Client submitted that the Court could only interfere with the decision of the Taxing Officer when there was an error in principle. Quoting from the case of **THOMAS JAMES ARTHUR Vs NYERI ELECTRICITY UNDERTAKING [1961] E.A. 492** the client noted that;

> **"…questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal, and the court will intervene only in exceptional cases?.**

23. In my understanding, the Advocates are not simply saying that the amount awarded was too low. Their main complaint was that the sum was so low that it can be inferred from it, that the Taxing Officer had erred in principle.

24. In this case, it is important for the court to re-visit the findings made by the Taxing Officer, on matters

of fact. Thereafter, the court would evaluate whether or not the Taxing Officer had erred in principle.

25. First, the Taxing Officer held that this was an important matter in value and the interest of the parties in it, cannot be gainsaid.

26. Secondly, he held that the issues at the "preliminary level?, leading up to the filing of the suit, were handled by Waweru Gatonye & Company Advocates.

27. In the circumstances, the Taxing Officer observed as follows;

> **"I would therefore have expected that between the 20/4/2006 when the applicants took over, if they did any more work than had been done by the previous advocates, it would be evident either from the court record or in correspondence between the applicant and the respondent. Unfortunately, I see none?.**

28. If the Advocates failed to draw the attention of the Taxing Officer to the work which they did, other than fixing a hearing date, it would not be right for this court to fault the Taxing Officer on such evidentiary matters.

29. The Taxing Officer also reiterated thus;

> **"It is noteworthy herein that the applicant didn't file any pleadings. She didn't conduct the suit, as it is yet to be heard. There is not any evidence that the advocate acted much beyond the point she took over from the firm of Waweru Gatonye & Company Advocates?.**

30. The Taxing Officer also held that the Advocates did not provide even an iota of evidence to support the contention that a Lead counsel had been engaged to lead them.

31. Apart from making a statement that the Lead counsel was engaged, the Advocates were found to have failed to provide evidence of any action taken by the lead counsel.

32. First and foremost, therefore, the Ruling by the Taxing Officer was based on his findings, that the Advocates failed to provide evidence to demonstrate that they had done the work which they asserted that they had done.

33. Such a finding on matters of fact, are not issues of principle, as is envisaged that a court handling a reference from taxation, would tackle.

34. In the case of **PREMCHAND RAICHAND LTD & ANOTHER Vs QUARRY SERVICES of EAST AFRICA LIMITED & OTHERS (No.3) [1972] E.A. 162,** the Court of Appeal emphasized that in assessing costs, English cases would be irrelevant;

> **"….the matters has to be looked at on an East African basis. The correct approach in assessing a brief fee is, we think, to be found in the case of Simpsons Motor Sales (London) Ltd Vs Handon Corporation, [1964] 3 ALL E.R. 833, when PENNY CUICK, J. said;**
>
> **'one must envisage an hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content take on the brief?.**

35. In the light of that authority, the Advocates assertion that the firm of Waweru Gatonye & Company Advocate's could not have accepted the sum of Kshs. 250,000/-, as Instruction Fees, is without basis.

36. That may be a firm of pre-eminent reputation. The fact that it could demand, *(and possibly receive)* high fees, does not mean that the Taxing Officer should be influenced by such consideration.

37. The emphasis is upon a hypothetical character.

38. In determining the Instruction Fee, the Taxing Officer derived guidance from **MAYERS & ANOTHER Vs HAMILTON & OTHERS [1975] E.A. 13.**

39. First, that case had been cited by the Advocates, and therefore the Taxing Officer was obliged to give it consideration.

40. Secondly, the said decision is of the Court of Appeal for East Africa, and it was therefore binding upon the Taxing Officer. The Court of Appeal had said that;

> **"…the moment an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee but it is only necessary to look at the concluding words of the particulars of the instruction fee in the bill of costs in issue , 'considering most difficult and conflicting case - law on the matter' -**
>
> **to realize that an advocate will not ordinarily become entitled, at the moment of instruction, to the whole of the fee which he may ultimately claim?.**

41. The Court made it clear that at the beginning;

> **"The advocate would, as I see it, be entitled to claim the minimum instruction fee, but he could not properly claim in respect of work he had not done. The entitlement under instruction fee grows as the matter proceeds?.**

42. By relying upon that binding authority, the Taxing Officer did not err.

43. Indeed, when he held that the work leading up to the filing of the suit had already been done prior to the Advocates herein being instructed, that finding is comparable to the following statement by the Court of Appeal in the case of **Mayers Vs Hamilton** *(above);*

> **"Clearly, the study of the relevant law was a necessary prelude to the drafting of the defence?.**

44. In similar vein, the study of the relevant law in this case was a prelude to the drafting of the suit. And as that work was not undertaken by the Advocates herein, the Taxing Officer did not err to have taken that fact into account.

45. I am aware that in **JORETH LIMITED Vs KIGANO & ASSOCIATES CIVIL APPEAL No. 66 of 1999,** the Court of Appeal held as follows;

> **"By the first ground thereof the respondent states that Instruction Fee is an independent and static item, which is charged once only and is not affected or determined by the stage the suit had reached. In principle that is correct?.**

46. The learned Judges of Appeal went on to say;

> **"The learned Judge was clearly wrong in saying that one-half the work done qualifies for one-half Instruction Fee?.**

47. If that means that that court's conclusion is that soon after being instructed, the advocate earns his full Instruction Fee, it would imply that that decision is at variance with the decision in **Mayers Vs Hamilton [1975] E.A.13.**

48. In my understanding of the law, when there are two or more conflicting decisions from the Appellate Courts, the courts below them are at liberty to rely on any of such decisions until the said decisions are

declared wrong, by the Appellate Courts.

49. Therefore, the Taxing Officer cannot be said to have erred in principle, when he relied upon an authority which was binding upon him.

50. In the case of **TRADE BANK (IN LIQUIDATION) Vs L.Z. ENGINEERING CONSTRUCTION LTD, Hccc No. 19 of 1998,** the court addressed itself as follows on a reference from taxation;

> **"In a case of this nature, where the scale fee is extremely large, in my view the basic scale fee should be considered by the taxing master, having regard to what is the proper remuneration for filing of the Defence and all the work that was entailed in doing so, and reducing the same if the taxing officer is of the view that the remuneration would be wholly out of proportion to the amount of work which was actually done in the filing of the defence?.**

51. In my understanding, that is what the Taxing Officer in this case did.

52. Accordingly, I find no error in principle, on the part of the Taxing Officer, and I do therefore uphold the Ruling on Taxation.

53. Finally, I wish to point out that a Reference from the decision of a Taxing Officer should be filed within 14 days from the date when the Taxing Officer gives his reasons for his decision.

54. As the Ruling of the Taxing Officer was delivered on 28th May 2007, and because the said Ruling contains the reasons for the decision rendered; I hold the considered view that the reference which was filed on 30th April 2014 was hopelessly out of time.

55. Therefore, apart from holding that the reference lacked merit, I also find that, because it was filed so late in the day, it should be struck out.

56. I order the Advocates to pay to the Client, the costs of the Reference.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **17th day** of **January 2017.**

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Applicant

Miss Gitau for Nyachoti for the Respondent

Collins Odhiambo – Court clerk.