REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 392 OF 2015

ODERA OBAR & CO. ADVOCATES……APPLICANT

-VERSUS -

U DESIGN……..…...….1ST RESPONDENT

AMAZON CONSULTANTS LIMITED……...……...…….2ND RESPONDENT

PROFESSIONAL CONSULTANTS LIMITED……...……..……3RD RESPONDENT

RULING NO. 2

1. This Ruling is in relation to 2 applications.

2. The first application was brought by the Law Firm of **ODERA OBAR & Co. ADVOCATES.** It is an application asking the court to enter judgment against the Respondents jointly and severally, for the sum of Kshs.10,039,347/- together with interest thereon at 14% per annum from 7th November 2015, until payment in full.

3. The Principal sum claimed is based upon a Certificate of Taxation dated 16th September 2016.

4. Pursuant to the provisions of Section 51 (2) of the Advocates Act;

> **"The certificate of a taxing officer by whom a bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs".**

5. The Respondents, **U DESIGN, AMAZON CONSULTANTS LIMITED** and **PROFESSIONAL CONSULTANTS LIMITED** appear to have been alive to that statutory provision.

6. Therefore, as they are disputing the decision embodied in the Certificate of Taxation, they filed an application, seeking review, variation or setting aside the taxing officer's decision dated 14th September 2016.

7. In particular, the Respondents expressed their dissatisfaction;

"... with the Taxing Officer's decision to allow and tax items 122 of the said Bill of Costs at Kshs.5,590,000.00 and further, the decision to allow and tax Item 144 of the said bill of costs at Kshs.2,976,459 …"

8. It is to be noted that the Advocate/Client Bill of Costs arose from work which the advocate had undertaken on behalf of the client in the case **U DESIGN & 2 OTHERS Vs ALEX BAZARA TABULO, Hccc No. 59 of 2014.**

9. The Respondents pointed out that their claim in that suit was for Kshs.10,882,943.00.

10. Therefore, when the advocate's costs were taxed in the sum of Kshs.10,039,347/=, the Respondents found the result to be harsh, unconscionable, exorbitant and unreasonable, because it was almost equivalent to the amount they had claimed in the suit in which the advocate represented them.

11. It was the Respondents case that the Taxing Officer applied the wrong provisions and/or principles of law, hence arising at a manifestly wrong decision.

12. The Respondents specific complaint was that the Taxing Officer based her decision on **ONLY** one factor; the alleged value of the subject matter averred in the Defendant's Counter-Claim.

13. At that point, it becomes clear that after the Respondents had filed a suit to claim Kshs.10,882,943/=, the Defendant had lodged a Counter-Claim for Kshs.359,000,000/-.

14. Therefore, in the light of the said Counter-Claim, it would be wrong for the Respondents to only compare the taxed costs to the claim which they had made in the suit against Alex BazaraTabulo.

15. It was imperative that, in determining the Instruction Fees, the Taxing Officer should have taken into account the totality of the claims made by both the Respondents and the Defendant.

16. When canvassing the applications, Mr. Ndambiri, the learned advocate for the Respondents, submitted that the Taxing Officer had not been guided by the applicable principles.

17. In that respect, counsel submitted that the value of the counter-claim had not been picked from a judgment. Therefore, in his considered view, the prayer in the counter-claim, for a sum in excess of Kshs.300 Million, did not mean that that was the value of the subject matter.

18. He added that even if that was the value of the subject matter, the Instruction Fee was not based only on such value.

19. According to the Respondents, the Taxing Officer was obliged to consider other values and circumstances, as per the Remuneration Order.

20. The other factors were said to include, the Nature and Importance of the matter; as well as the interest of the parties to the said matter.

21. According to the Respondents, they had drawn the attention of the Taxing Officer to those other factors, but the same were not taken into account.

22. The Taxing officer was also said to have failed to show, in her Ruling, how she either increased or decreased the basic instruction fee. That alleged failure was described by the Respondents, as constituting a failure to exercise discretion.

23. Meanwhile, on the issue of having increased the party and party costs by 50%, the Respondents blamed the Taxing Officer for not being clear about the provision upon which that decision was based.

24. On the basis of the foregoing submissions, together with a bundle of 17 authorities, the Respondents

invited the court to set aside, vary or review the decision of the Taxing Officer.

25. When responding to the application by the Respondents, the Advocate submitted that the Judge cannot interfere with the decision of the Taxing Officer unless there was an error in principle.

26. Both sides were in agreement concerning the well-settled legal position on References from the Rulings of Taxing Officers; that unless the Taxing Officer is shown to have erred in principle, the Judge determining the Reference will not interfere with the exercise of discretion by the Taxing Officer.

27. If any authority were required to back that position, it can be found in;

> **(a) FIRST AMERICAN BANK of KENYA Vs SHAH & OTHERS (2002) E.A. 65 at page 69;**
>
> **(b) KIPKORIR, TITOO & KIARA ADVOCATES Vs DEPOSIT PROTECTION FUND BOARD, CIVIL APPEAL No. 220 of 2004.**

28. Therefore, in order to persuade the court that the Ruling on Taxation herein needs to be set aside, varied or reviewed, the clients ought to persuade the court that the Taxing Officer erred in principle.

29. In this case the learned Taxing Officer held as follows;

> **"The counter-claim filed by the Defendant is for the loss of profits and damage in the sum of Kshs.359,000,000, suffered on account of the aborted project for the construction of Apartments for sale, the failure of which the Defendant contends is as a result of fraud on the Plaintiff's part. Therefore, the value of the subject matter of the counter-claim is Kshs.359,000,000…"**

30. In very clear terms, the Taxing Officer relied upon the pleadings, in assessing the Instruction Fees. By so doing, the Taxing Officer discharged the onus, as set out by Ojwang J. *(as he then was)* in;

> **REPUBLIC Vs MINISTRY of AGRICULTURE & 2 OTHERS EX PARTE MUCHIRI W'NJUNGUNA & 6 OTHERS, Misc. CIVIL APPLICATION No. 621 of 2000;**
>
> **"Taxation of costs, as a judicial function, is to be conducted regularly, on the basis of rational criteria which are clearly expressed, for the parties to perceive with ease"**

31. The Taxing Officer did not cite factors such as complexity of the case or novelty in the points of law that were being raised.

32. In the case of **NYANGITO & Co. ADVOCATES Vs DOINYO LESSOS CREAMERIES LIMITED, Misc. CAUSE No. 843 of 2013,** Odunga J. expressed himself thus;

> **"In the case I have found that the amount of money involved clearly showed what was at stake, and was evidence of the interest the parties had in the matter and the importance of the case to them".**

33. The learned Judge proceeded to uphold the Taxing Officer's decision, in which the basic instruction fee was increased by more than 10 times.

34. In the Court of Appeal of Tanzania, the Court had occasion to state as follows, in **REGISTERED TRUSTEES of THE CASHEWNUT INDUSTRY DEVELOPMENT FUND Vs CAHEWNUT BOARD OF TANZANIA, CIVIL REFERENCE No. 4 of 2007;**

> **"Admittedly, there was no decretal sum awarded. However, in my considered view, this does not preclude a Taxing Officer from making reference to the suit amount, seeking assistance when confronted by a decision regarding what should be awarded as instruction fee. Neither**

is he barred from seeking guidance from whatever angle that may assist in arriving at a befitting amount. This would also include seeking a leaf from the experience and procedure obtaining in the High Court. Costs are costs. With respect, contrary to Prof. Fimbo's strong attack, I find nothing wrong in seeking such guidance, including looking at the prescribed scales".

35. And in the case before me, the Taxing Officer did find guidance from the prescribed scale fees. Therefore, in that respect, the Taxing Officer cannot be faulted.

36. The Tanzanian case of the **Registered Trustees of the Cashew nut Industry Development Fund,** *(above)* also made the following significant point;

"Underlying the whole Court battle was the sum claimed and disputed. Thus, as rightly pointed out by Mr. Kilindu, the sum involved is that which was the subject matter of the suit and which, as we have seen, is about Shs.2.2 billion, a colossal sum by any standards. I thus hold that the Taxing Officer rightly considered the suit amount as a guide to his decision".

37. Based on that authority, which was cited by the Respondents, it is perfectly in order for the Taxing Officer to come to the conclusion, in appropriate cases, that the sum which one party claimed, even though it had been disputed by the other party, is the subject matter of the case between those parties.

38. In the case before me, the Taxing Officer first determined the party and party costs, based on the value of the subject matter. That process was conducted through calculations, based on paragraph 1 (b) of Schedule VI of the 2014 Advocates Remuneration *(Amendment)* Order.

39. Once the Taxing Officer's calculations yielded the sum of Kshs.5,590,000/- as the basic Instruction Fee, on the counterclaim of Kshs.359,000,000/=, she did not either increase or decrease that amount.

40. The Respondents suggested that the basic fee should have been decreased because the case had not yet been prosecuted to conclusion.

41. But the Taxing Officer rejected that submission, noting that the quantum of the Instruction Fees was not affected or determined by the stage which the suit had reached.

42. The decision by the Taxing Officer, in that regard, was not based on a whim. It was based on the decision of Ringera J. *(as he then was)* in **FIRST AMERICAN BANK of KENYA Vs SHAH & OTHERS [2002] 1 E.A 64,** at age 70, wherein the learned Judge said;

"In my opinion, the full instruction fees to defend a suit is earned the moment a defence has been filed, and the subsequent progress of the matter is irrelevant to that item of fees. In the premises I don't consider that the taxing officer erred in not taking into account that the suit was withdrawn only three days after it was filed and that no hearing had taken place".

43. I do agree with that decision because by the time an advocate has been given the necessary information and material which enabled him to file a defence on behalf of his client, he must be deemed to have been duly instructed.

44. Instruction fees is not earned throughout the life of the case.

45. Even if it became necessary for a defence to be amended, the instruction in that respect to take steps necessary to try and get the amendment effected are extra instructions. In other words, if there be need to seek leave of the court to amend the plaint, the advocate will be entitled to Instruction Fees for making that application.

46. Similarly, if there were court sessions which the advocate attended, he would be entitled to fees for such attendances.

47. Even when the advocate attended meetings with either his client or with the other party, he would be able to charge a fee for it.

48. The point I am making is that in respect to the services rendered by the advocate, in the course of the case, he becomes entitled to charge fees which were separate and different from the Instruction Fee.

49. The next point I wish to address is whether or not the Taxing Officer erred by loading 50% to the party and party costs, with a view to determining the Advocate/Client costs.

50. In the case of **NYANGITO & Co. ADVOCATES Vs DOINYO LESSOS CREAMERIES LTD, Misc. CAUSE No. 843 of 2013,** *(a case which was cited by the Respondents)* Odunga J. said;

> **"With respect to the increase under Part B of Schedule VI, my understanding is that such increase is only applicable where there has been a determination of the party and party fees under part A of the said schedule, in which case, instead of taxing the advocate/client bill the court may simply decide to increase the amount of the party and party costs under part A, as provided under part B".**

51. In this case, the Taxing Officer first ascertained the equivalent of party and party costs, as provided for in the scale. She then increased that sum as provided for under part B. In effect, the Taxing Officer complied with the rules governing the taxation of Advocate/Client Bills of Costs. Therefore, I find that there is no basis for faulting the Taxing Officer.

52. In the case of **KIPKENDA, LILAN & Co. ADVOCATES Vs CITY COUNCIL of NAIROBI, Misc. APPLICATION No. 173 of 2008,** Sewe J made the following observation;

> **"What the Advocates Remuneration Order provides for in Schedule VI B is as follows;**
>
> **'As between advocate and client the minimum fee shall be (a) the fees prescribed in A above, increased by one-half; or (b) the fees ordered by the court, increased by one-half … as the case may be …'**
>
> **Since this provision is peremptory in its terms, the taxing officer was under obligation to comply therewith …"**

53. Therefore, if the Taxing Officer had not complied with the mandatory provisions, she would have erred.

54. Finally, we ask whether or not the taxed costs should attract interest; and if so, from what date.

55. The answer is provided by Rule 7 of the advocates Remuneration **Order, which provides that;**

> **"An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest in raised before the amount of the bill has been paid or tendered in full".**

56. The advocate provided this court with proof that, before the Taxing Officer had delivered her Ruling, the advocate served the Respondents with a Bill of Costs, claiming Kshs.26,425,004/=.

57. Of course, that sum was subsequently taxed and allowed in the sum of Kshs.10,039,347/.

58. In the light of the certificate of Taxation, I hold that the Respondents were right to have declined to pay the sums set out in their advocates Bill of Costs dated 9th September 2015.

59. I further find that it is only from the date when the Taxing Officer delivered her Ruling that it became

clear about the actual fee payable to the advocate.

60. In my considered view, it would be unreasonable to subject the Respondents to interest on the taxed costs from September 2015, which was long before it became known what was the quantum of fees payable. I find that the interests of Justice demand that interest on the taxed costs be paid at the rate of 14% per annum from 16th October 2016. That date is 30 days after the Taxing Officer delivered her Ruling.

61. The nett result is that there is no merit in the reference from taxation. I therefore uphold the Ruling of the Taxing Officer.

62. Having upheld the decision of the Taxing Officer, it means that the Certificate of Taxation remains unchanged.

63. Accordingly, based on the provisions of Section 51 (2) of the Advocates Act, I do now hereby now enter judgment in favour of the advocate, against the Respondents jointly and severally, for Kshs.10,039,347/-, together with interest at 14% per annum from 16th October 2016, respectively.

64. The advocate will also have the costs of the applications dated 19th September 2016 and 26th September 2016, respectively.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **16th day** of **January** 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Ndambiri for the Clients

Miss Migiro for the Advocate

Collins Odhiambo – Court clerk.