REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC.CIVIL APPLICATION NO. 36 OF 2011

M/S NYAUNDI TUIYOTT & CO.ADVOCATES……APPLICANT

VERSUS

TARITA DEVELOPMENT LTD ……....RESPONDENT

RULING

1. By a Chamber Summons dated 4th February, 2013, the Applicant Tarita Development Limited prayed for the following orders:-

i. That this Honourable court do set aside the decision of the taxing master delivered on 26th July 2011.
ii. That this Honourable court do order that the Advocate/Respondent bill of costs dated 7th April, 2011 be taxed afresh before a different taxing master or alternatively that this Honourable court do exercise its discretion and order that:

a. The instruction fee (item 1) be reduced from Kshs. ,121,599.00 to Khs.135,000 or as to such other amount it finds reasonable;
b. The getting up fee (item 2) be reduced to Kshs. 45,000
c. Item 5 (one half of instruction fee) be reduced to Kshs. 67,500.
d. Item 6 (16% VAT) be reduced to Kshs. 44,441.92.
e. The bill of costs be taxed to a total of Kshs. 673,253.92 less funds withheld of Kshs. 1,500,000 leading to a sum of -826,746.08.

iii. That this Honourable court do find that the Advocate/Respondent has unjustifiably withheld from the client/Applicant Kshs. 826,746.08 and the same be refunded to the Applicant forthwith.
iv. That the costs and incidentals to this Application be in the cause.

2. The application is supported by the deposition made by *Barnabas* Bargoria a director of the Applicant dated 4th February, 2013 and the grounds stated on its face. The Applicant is basically challenging the decision of the taxing master *Hon. M'masi* contained in a ruling delivered on 26th July, 2011 in which she awarded the Respondent *Ms. Nyaundi Tuiyott and company Advocates* a sum of Kshs.1,271,421.42 as Advocate/client costs. The decision followed the hearing of the Respondent's Advocate-Client Bill of costs dated 7th April, 2011.

3. It is the Applicant's contention that the taxing master misdirected herself on the principles applicable in ascertaining the value of the subject matter for purposes of assessing the instruction fees payable to the Respondent by using the sum pleaded in the statement of claim in the arbitration proceedings which was Kshs.72,106,696 instead of the arbitral award of Kshs.2,904,077.40; that she failed to appreciate that the

Respondent had conceded during the taxation of party and party costs that the value of the subject matter had reduced substantially; that she erred in holding that the subject matter in party and party costs was different from the subject matter in Advocate-Client costs and that she failed to take into account the general conduct of the arbitral proceedings in assessing the instruction fees.

4. It is the Applicant's case that as a result of applying the wrong legal principles in taxing the aforesaid bill of costs, the taxing master awarded the Respondent an amount which was ten times more than the amount allowed by the law thereby enriching the Respondent unjustly and that it is in the interest of justice that the decision of the taxing master be set aside.

5. The application is opposed through grounds of opposition dated 12th June, 2013 and filed on 19th June, 2013 as well as a replying affidavit sworn by *Mr. Joseph Kaptich Songok* one of the proprietors of the Respondent firm of Advocates. In opposing the application, the Respondent claimed that the application was filed out of time without leave; that it lacked merit as the Applicant was not disputing that he instructed the Respondent to institute the arbitration proceedings on its behalf; that the same were defended and that the Respondent prosecuted the entire claim to its conclusion and was therefore entitled to full instruction fees.

6. The Respondent further contended that an advocate earns instructions fees at the point of taking instructions irrespective of the outcome of the suit and that the taxing master correctly based instruction fees on the amount claimed in the pleadings; that the applicant had not demonstrated that the taxing master had applied the wrong legal principles or misapprehended the law relating to the taxation of an Advocate/Client bill of costs and that her decision ought to be upheld.

7. On 4th November, 2014 both parties agreed to have the application disposed of by way of written submissions; those of the applicants were filed on 6th February, 2015 while those of the Respondent were filed on 6th October, 2015.

8. The Applicant in its submissions expounded on the grounds anchoring the application and the depositions in the affidavit filed in its support. In addition, it was submitted on behalf of the Applicant that the taxing master misapplied schedule VI of the Advocates Remuneration Order by taking the amount claimed in the pleadings to be the determinant of the value of the subject matter when assessing instruction fees instead of the arbitral award; that the correct legal position is that the amount claimed in the pleadings should only be used if a matter had not been determined but if taxation proceeded after a matter had been determined, the instruction fees should be based on the amount awarded by the court. For this proposition the appellant relied on the case of ***Kenyariri & Associates Advocates V Salama Beach Hotel Ltd & 4 others (2014) eKLR*** and ***M/s Lubuleliah & Associates V N.K Brothers Ltd (2014) eKLR.***

9. It was further submitted that the entire taxation was bad in law as it was unlawful to have party and party costs assessed differently from costs in an Advocate/Client bill of costs as part A & B of Schedule VI of the Advocates Remuneration order should not be read disjunctively; And that the learned taxing master erred in not taking into account the unique nature and general conduct of the arbitral proceedings. It was further contended that the taxing master erred in failing to find that the Respondent owed the applicant Kshs.826,746.08.

10. On behalf of the Respondent, it was submitted that the learned taxing master correctly applied the law in determining the instruction fees payable to it as the amount was based on the value stated in the pleadings which was allowed under Schedule V1; that unlike party and party costs, instruction fees are an independent and static item not pegged on the success or failure of a suit; that where the value of a claim is stated in the pleadings, that value should form the basis of awarding instruction fees as advocates earn their fees upon instructions to institute a suit.. The Respondent therefore urged the court to dismiss the application with costs for lack of merit.

11. I have considered the application, the rival submissions made by the parties and the authorities cited. Before delving into the merits or otherwise of the application, I wish to first deal with a preliminary point

the Respondent raised in its grounds of opposition. This is the claim that the instant reference was incompetent as it was filed out of time and without leave of the court. The Respondent appears to have abandoned this claim as it did not make any submissions in support of the same. This notwithstanding, I am duty bound to consider the said claim given that it was raised in opposition to the reference and it was in effect challenging its competence.

12. On perusing the court record, I find no substance in the above claim as the court record clearly shows that though the reference was filed out of the time stipulated in paragraph 11 of the Advocates Remuneration order, this was done with leave of the court granted on the 18th September, 2012 by Azangalala J (as he then was) pursuant to an application by the applicant dated 27th February, 2012. Consequently, I find that the instant application (reference) is competent and is properly before the court.

13. Having found that the application is competent, I now turn to address the issue of whether or not the learned taxing master erred in computing the instruction fees awarded to the Respondent. The gist of the applicants complaint is that the learned taxing master misdirected herself by using the amount stated in the statement of claim (pleadings) in the Arbitration proceedings as the value of the subject matter instead of using the arbitral award in calculating the instruction fees. As noted earlier, the Respondent disputed this claim and maintained that the learned taxing master properly applied the law as she determined the value of the subject matter from the pleadings.

14. It is common ground that the law applicable to the impugned taxation was schedule VI of the Advocates Remuneration order in view of the provisions of ***Rule 10(2)*** of the ***Arbitration Rules*** which provides that all fees in arbitral proceedings shall be calculated in accordance with the scale of fees applicable to the High Court. Schedule VI provides the formula for taxation of both party and party costs and Advocate/ clients costs in matters filed in the High Court. It prescribes the minimum amount which can be awarded as instruction fees based on the value of the subject matter as can be ascertained either from the pleadings, judgment or settlement between the parties. In addition, the provision gives the taxing master wide discretion in increasing or reducing the amounts specified under the schedule.

15. Before proceeding any further, I think it is important at this juncture to examine the scope of the mandate of the High Court when sitting on references filed against the taxation of costs. It is settled law that the taxation of costs whether between party and party or between Advocates and their clients is a special jurisdiction donated only to taxing officers by the Advocates Remuneration Order.

16. The High Court ought not to interfere with the decision of a taxing master unless it is satisfied that it was based on an error of principle or where the amounts awarded were manifestly excessive as to lead to the reference that they were based on an error of principle. The High Court cannot substitute its discretion with that of the taxing master. It is therefore not open to the court to disturb an award of costs by a taxing master simply because it could have awarded a higher or lower amount.

17. In ***Kipkorir Titoo & Kiara Advocates V Deposit Protection Fund Board (2005) 1 KLR 528*** the Court of Appeal emphasized this legal position and stated as follows;

> ***"On a 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.***
>
> ***If the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle.***
>
> ***If a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of the taxing officer. The judge has however a discretion to deal with the matter himself if the justice of the case so***

requires."

See also: ***Steel Construction & Petroleum Engineering (EA) Ltd V Uganda Sugar Factory Ltd[1970] EA 141.***

18. In this case, the taxing master after considering the submissions by both parties and after appreciating that the Respondent had conceded during the taxation of party and party costs that the value of the subject matter in the arbitration proceedings was Kshs.2,904,077.40 proceeded to compute the instruction fees on the basis of the amount claimed in the pleadings which was Kshs.72,106,696 giving rise to an award of Kshs.1,121,599. That this concession was infact made is not disputed by the Respondent. In disregarding the said concession, the taxing master stated as follows;

" ***The Respondent contends that Mr. Nyaundi conceded that the subject matter during taxation was the sum of Kshs. 2,904,077.40. It is evident that he was called upon when the party and party costs were being assessed and not as between the firm of M/s Nyaundi Tuiyott and company Advocates and Tarita Development Limited…"***

19. It is evident from the foregoing passage that the taxing master was of the view that the value of the subject matter in the party and party bill of costs was different from the one in the Advocate/Client bill of costs. This was an error of law on the part of the taxing master. The law is that the value of the subject matter remains the same since under Schedule VI, the only difference between an advocate/Client costs and party and party costs is that the former comprises the party and party costs calculated under Part A increased by a minimum of one half under part B. It is therefore legally untenable to ascribe different values to the subject matter in the assessment of party and party and advocate/client's costs.

20. Though I appreciate that the taxation of the party and party costs was done by the Arbitrator and not the taxing master, the learned taxing master having found as a fact that there was such a concession should have been guided by the conceded value in assessing instruction fees as the Respondent was estopped from denying that the value of the subject matter was to be determined from the Arbitral award.

21. I wholly concur with the Respondents submissions that instruction fees are an independent and static item that does not change irrespective of the outcome of the suit and that advocates earn their fees from the moment they are instructed whether the suit subsequently fails or succeeds. However, the instruction fees so earned must be based on the value of the subject matter if the same can be discerned from the pleadings, judgment or settlement between the parties if any.

22. In my view, whether the value of the subject matter will be determined from the pleadings, or the judgment or a sum agreed upon by the parties will depend on when the bill of costs is filed and taxed. That is why Schedule V1 provides for three different indicators of the value of the subject matter which runs across all the stages in the life of a suit.

23. I am thus in total agreement with ***Angote J*** in ***Kenyariri & Associates Advocates V Salama Beach Hotel Ltd & others 2014 eKLR*** and Kamau J in ***M/s Lubuleliah & Associates V N.K Brothers Ltd (2014) eKLR*** that the value of the subject matter should not be determined solely from the pleadings. The amount stated in the pleadings should only determine the value of the subject matter if at the time of taxation, the suit had not been determined. But if taxation takes place after the matter in question had been determined either by the court in a judgment or by consent of the parties, then the taxing master should calculate instruction fees based on the amount awarded by the court or the sum agreed upon by the parties. But since the taxation in this case was in respect of arbitration proceedings, which had been determined at the time the bill was taxed, the taxing master ought to have calculated instruction fees on the basis of the Arbitral award.

In the premises, I am satisfied that in this case the taxing master erred in principle in computing instructions fees on an amount stated in the pleadings in a matter that had already been determined instead of the amount that was awarded by the Arbitrator.

24. In view of the foregoing, I am satisfied that the taxing master erred in arriving at the instruction fees of Kshs.1,121,599. Consequently, I find merit in the Chamber Summons dated 4th February 2013. I accordingly allow the application and set aside the decision of the taxing master dated 26th July 2011.

25. With regard to Prayer 2, I find that the other contested items are dependent on the amount assessed as instruction fees and considering that a taxing master has discretion to either increase or reduce the amounts specified in Schedule VI whether in relation to instruction fees or getting up fees taking into account the different parameters stated therein, I find that the interests of justice would be better served if the bill of costs is remitted to the taxing master for fresh taxation. I therefore remit the taxed bill to the Deputy Registrar of this court for reassessment. The taxed costs should take into account any money already paid to the Respondent.

Each party shall bear its own costs.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 14th day of April 2016.