REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 616 OF 1999

PETER AMOLO AKUMU GOULD.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED .....DEFENDANT

R U L I N G

1. The Defendant, **Kenya Commercial Bank Ltd** filed a reference under Rule 11 of the Advocates Remuneration Order through a Chamber summons application dated 15th September, 2011. where it sought orders to wit:

> ***i. The defendant's objection to the decision of the Taxing Officer on items 1,4 and 149 of the Defendants Bill of Costs filed on 7th July 21009 be heard and decided;***
>
> ***ii. The costs of the application be provided for.***

2. The Application is premised on the grounds that; the taxing officer has failed to give the reasons for her decision on items 1,4 and 149 of the Bill of Costs pursuant to Rule 11 (2) of the Advocates (Remuneration) Order despite request to do so. That the Taxing Officer erred in holding that the appropriate instruction fees in the suit was Kshs. 1,000,000/=. That the Taxing Master failed to appreciate the fact that the counsel appearing in the matter took 13 days of court attendance to conduct the trial of the matter. That the Taxing Officer failed to appreciate the fact that the amount of money sought for special damages of Kshs. 79,913,344/- was excessive hence placed a high responsibility on the counsel for the Defendants. Further that the taxing officer erred in holding that the appropriate instruction fee on the injunction application was Kshs. 5,000/- especially since the research undertaken was extensive and the application was complex. That the taxing officer erred in holding that the appropriate getting up fees was Kshs. 333,333/- and finally, that, the entire decision was wrong which demonstrated failure to follow the laid down principles for the taxation of costs.

3. In his response the Plaintiff deponed a replying affidavit where he deponed that he is not privy to the ruling by the taxing officer which the Defendants are challenging and as such, the reference before this court is premature. He avers that the ruling is not ready and if it is, the items whose taxation is being objected to are too high and he shall object when time is right. He further stated that the suit cannot be termed as complex since the cause of action was for wrongful dismissal. He further asserted that the sums stated by the defendant advocate are extremely excessive. He therefore concluded that the application was frivolous, vexatious and an abuse of the court process.

4. The parties filed their respective written submissions and highlighted them during the interparties hearing on 26th June,2016. In his submissions, the applicant averred that the Replying affidavit should be

struck out for contravening order 19 Rule 3(1) of the Civil Procedure Act which requires that the affidavits be confined to matters of fact and not arguments. It argued that the Ruling subject of this reference was delivered on 24th September, 2010 where the defendant objected to the decisions on item 1, 4 and 149 of the Bills of Costs and requested reasons for the decisions. It claims that there were no forthcoming reasons which prompted it to request for reasons severally specifically vide the letters dated 19th January, 2011, 10th March, 2011 and 27th June, 2011, which letters unfortunately failed to elicit any response. It argued that failure to produce the Ruling or certified copy of the proceedings delivered on 24th September, 2010 by Mrs. Gicheha is not fatal and further that it is common for one taxing officer to deliver a ruling on behalf of another taxing officer. He further averred that the appeal referred to by the Plaintiff was dismissed and further that lack of capability to pay the taxed costs is not a fact in determining a bill of costs.

5. On his part the Plaintiff submitted that the application subject of this ruling should not be entertained since it has been brought prematurely. He stated that, a reference can only be made to the High Court after the Taxing Officer has given reasons for his/her decision. As at the time of filing the application no reasons had been given by the taxing officers as provided under Rule 11 of the Advocates Remuneration Order. Neither had the Certificate of Taxation been issued. He further contended that the court can only interfere with the decision of a Taxing Officer where it is demonstrated that was an error of principle, which error has not been pointed out. He stated that the Defendant has merely stated that it has a problem with the quantum as shown under grounds b, d, e and g of the application. He cited the cases of **Thomas James Arthur Vs Nyeri Electricity undertaking (1969) ED 492**, where it was held that questions of quantum are regarded as matters which the taxing officers are particularly fitted to deal with and also the case of **Kibet & Co. Advocates Vs Ibrahim S. Ahmed and Another**, where the court upheld the decision in the case of **Thomas James Arthur** *supra*. He stressed that a reference can only be filed after reasons have been given which was not the case in the current reference and that the Defendant has not pointed out what error of principle was committed.

6. The issues arising for determination in this Chamber Summons are:-

1) Whether the reference filed is properly before this court.

2) If the answer is to the affirmative, whether the principles that applied in the taxation of the bill were correct.

7. On the first issue, Rule 11 (1) and (2) of the Advocates Remuneration Order provides that:

" (1) 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 which he objects.

(2) The taxing officer shall further 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 the Judge by chambers summons, which shall be served on all the parties concerned setting out the grounds of his objection"

8. Rule 11 (1) and (2) of the Remuneration Order clearly stipulates that a party that is aggrieved by the decision of a taxing master has the right to move the High Court by way of a reference which reference is made through a chamber summons application. However, before the aggrieved party, in this case the Defendant files the reference, it is required to have raised its objection and obtained the reasons for the taxing master's decision, within 14 days from the date the decision was made. In the present case, the Defendant claims that it has severally sought reasons from the taxing master without success. It has annexed correspondences dated 27th September 2010, one dated 19th January 2011, another dated 10th March 2011 and the final one dated 27th June 2011 addressed to the Deputy Registrar. It is apparent that among these listed letters, the ones dated 27th September 2010 and 27th June 2011 bear the Courts stamp, which means that they were received. They however did not elicit any response which prompted the

Defendant to file this reference.

9. While in my view, lack of reasons may not be fatal to the Defendants application, especially given the efforts put into obtaining the reasons, the lack of a Ruling of the taxing officer and lack of a certificate of costs may be fatal. The Plaintiff claims that the application is premature since the Ruling being objected to, is not ready and that none of the parties have a copy of it. The Defendants denies this averment and insists that there is a ruling. It has not, however, attached the Ruling or a certificate of taxation to substantiate its claim. It only argues that failure to attach the Ruling and Certificate of taxation is not fatal.

10. It is trite law that the High Court can only interfere with the assessment of costs if the taxing master has misdirected himself on a matter of principle. See the case of **Joreth Ltd – Vs - Kigano & Associates EALR (2002) IEA 92**, where the Court of Appeal set aside the order of the High Court which reassessed the instruction fee allowed by the taxing officer and stated:-

> ***"What the learned Judge did not appreciate, was that sitting on a reference against the assessment of instructions fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle."***

11. For this court to establish whether there was a breach on a matter of principle by the taxing officer, then the Defendant is required to exhibit the Ruling by the Taxing Officer and Certificate of Taxation for the court as provided for under Section 51 of the Advocates Act, which was not done.

12. The orders that the Defendant has sought in the reference cannot be effectively dealt with by this Honourable Court without the decisions of the Taxing Officer and/or the ruling on taxation so that this Honourable court can be able to appreciate the substance of the reference. The hands of the court are tied especially given that the Plaintiff is questioning the existence of the Ruling by the taxing master. The Ruling and the certificate of taxation are in essence essential for purposes of determining the reference before the court.

13. Had the applicant annexed a certified copy of the ruling, this court could have proceeded to consider the reference in line with the Court of Appeal decision **Kipkorir, Titoo & Kiara Advocates Vs Deposit Protection Fund Board,** Civil Appeal No. 220 of 2004 (UR) which is binding on this court.

14. In the result, I find and hold that the application herein is incompetent. The same is struck out with costs to the Respondent.

Dated, signed and delivered at Nairobi this 6th day of October, 2016.

…….

L NJUGUNA

JUDGE

In the presence of

…… for the Plaintiff.

……. For the Defendant.