



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT No. 461 of 2008

GOVERNORS BALLOON SAFARIS LIMITED.....PLAINTIFF

Versus

SKYSHIP COMPANY LIMITED.....1ST RESPONDENT

COUNTY COUNCIL OF TRASMARA.....2ND RESPONDENT

RULING

A plethora of applications

[1] The Plaintiff has filed several applications in respect of this matter; some in this Court and others in the Court of Appeal. But, the applications which concern this Ruling are: Chamber Summons dated 23rd July 2014; Notice of Motion dated 28th July 2014; and Notice of Motion dated 25th August 2014. The Plaintiff also filed a Preliminary Objection dated 30th September, 2014 on the standing of the 2nd Defendant as a party in the suit. I should, however, be understood well; that there is nothing wrong in filing numerous applications in court as long as the plurality of applications is necessary to vindicate a party's right; does not offend the law; does not become an exercise in frivolity or an abuse of the process of the court. I will, therefore, consider the applications herein on their merits. I should also state from the outset that, the parties were required by the Court to file a composite submission but canvassing each and every issue raised in the preliminary objection and all the applications listed above. Therefore, all submissions filed herein are properly before the court and shall be so treated and considered. But first, let me determine whether the 2nd Respondent is a proper party.

Preliminary objection on 2nd Respondent as a party

[2] The Applicant raised a preliminary objection; that the 2nd Respondent ceased to exist upon enactment of Urban Areas and Cities Act, Act No 13 of 2011; and the County Government Act. These Acts created and conferred legal right upon the County Government of Narok to proceed with the above suit. Therefore, it is only the County Government of Narok which can proceed with this suit. The 2nd Respondent is of the view that the suit is in order and the County Government of Narok is the one to proceed with the suit as the successor of 2nd Respondent pursuant to the Constitution as well as the Urban Areas and Cities Act, Act No 13 of 2011; and the County Government Act. Although both divides cited similar judicial decisions, constitutional as well as statutory provisions, each side seems to take a different stand point arising out of their respective interpretations of the judicial authorities, constitutional and statutory provisions cited.

[3] The statement of the problem as formulated in the objection has its roots in and its solution will be found in the Constitution. The Constitution of Kenya, 2010 ushered a new scheme of governance and one of its important hallmarks is devolved governments. The Constitution of Kenya, 2010, completely departed from the order set out in the previous Constitution, but it provided for sufficient transitional provisions to ensure that things continued speaking especially the succession of state organs. Towards this end, Section 33 of the Sixth Schedule to the Constitution is relevant; it provides as follows:

“An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.”

[4] This constitutional provision is necessary in view of the arguments coming through from counsels on the objection herein; it is also an integral part in the management of constitutional change-over by Courts through interpretation of law. The matter before me is purely one of succession of institutions by the new or equivalent state organs created under the Constitution of Kenya, 2010. The change-over is governed by and is done in accordance with the prevailing constitutional and legal framework of the nation. Parliament is a major state organ which was tasked by the Constitution to manage the transition of state organs into the devolved governments. It started the process of managing the transition through legislation as provided for in the Constitution and enacted the relevant legislation namely *Urban Areas and Cities Act; Transition to Devolved Governments; County Governments Act; County Governments Public Finance Management Transition; and Transition County Allocation Of Revenue*. The *County Governments Act* took effect after the results of the first General Elections under the Constitution held on 4th March, 2013. The Constitution established 47 Counties under the Fourth Schedule of Chapter Seventeen and County Government for each County so established. The preamble to these Acts of Parliament clearly shows that they give effect to the provisions of the Constitution on devolved governments, for instance the *Urban Areas and Cities Act* states that it is:

An Act of Parliament to give effect to Article 184 of the Constitution; to provide for the, classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents and for connected purposes

And the *County Governments Act* states that it is:

An Act of Parliament to give effect to Chapter Eleven of the Constitution; to provide for county governments' powers, functions and responsibilities to deliver services and for connected purposes.

[5] The *County Governments Act* in section 134 provided that:-

(1) The Local Government Act is repealed upon the final announcement of all the results of the first elections held under the Constitution.

(2) All issues that may arise as a consequence of the repeal under subsection (1) shall be dealt with and discharged by the body responsible for matters relating to transition.

Judges have dealt with this issue of succession of state organs before, and I am content to cite the following cases already cited by parties herein. See what David Majanja J in the case *Republic -vs- Town Clerk of Webuye County Council & another [2014] eKLR* said, that:

“...the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment.”

And what Okong'o J in the case of **J.A.S Kumenda & another vs. Clerk Municipal Council of Kisii & 6 others [2013] eKLR** said, that:

"I agree with the submission by the advocates for the respondents that after the repeal of the Local Government Act, local authorities and institutions that were constituted thereunder like the 1st and 2nd respondents herein ceased to exist as legal entities and as such cannot sue and be sued and can neither proceed with nor be proceeded against with respect to any pending suit. I don't agree however that the suits that had been instituted by and against the defunct local authorities some which are pending rulings and judgments must remain in limbo until such a time that the body referred to in section 59 aforesaid of the Urban Areas and Cities Act is set up. From my reading of the Urban Areas and Cities Act and the transitional provisions of the Constitution of Kenya, 2010, I have formed the opinion that such suits can be proceeded with by and against the County Governments."

See also further opinion of the judge in the above case, that:

"Due to the foregoing, the County Governments are in my view the successors of the local authorities that were constituted under the repealed Local Government Act and should be the ones to proceed with pending legal actions by the defunct local authorities and against whom the pending legal proceedings against the said local authorities should be sustained.... County Governments under the new Constitution took over the powers and functions of the local authorities as they were recognized and defined under the old constitution and the Local Government Act.. It follows therefore that until the body referred to in section 59 of Urban Areas and Cities Act is established, legal actions that were pending by and against the defunct local authorities can be sustained or pursued against County Governments under whose jurisdiction such local authorities were situated."

[6] There is no doubt that, according to the Constitution, the County Governments are the successors of the Local Governments under the repealed Local Governments Act. And it is not in dispute also that *County Government of Narok County* is the successor of County Council of Trans Mara, the 2nd Respondent. By that succession, they assumed the assets, liabilities as well as any legal proceedings by or against the defunct local authorities. Therefore, my understanding of the law is that *County Government of Narok County* is by law the party in these proceedings and not County Council of Trans Mara. Such succession is a matter of the law and the Constitution which the court should take judicial notice of, and make an endorsement to that effect on the record in order to avoid such arguments as the ones I am confronted with. And, for the avoidance of doubt, all subsequent pleadings should bear the name of *County Government of Narok County* as the 2nd Respondent. It is so ordered. In light thereof, I am not able to accede to the argument by Mr Oyatsi that it is only when the party aggrieved files a legal action in Court as prescribed under the law that he becomes a party to proceedings and the Court acquires jurisdiction over him or her. The succession of the 2nd Respondent as a party is ordained of law and the Constitution and the *County Government of Narok County* need not file any action as the aggrieved party in order to take over or to acquire rights or obligations in these proceedings. By operation of law, *County Government of Narok County* steps into the shoes of the County Council of Trans Mara; acquires the rights and obligations in the suit as if it were the predecessor party. **See section 59 of the Urban Areas and Cities Act, Act No. 13 of 2011 as well as section 23(3) (e) of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)** which are explicit on pending proceedings where there has been repeal of law or succession of this nature.

[7] Now therefore, following my decision that *County Government of Narok County* is by law the party in these proceedings and not County Council of Trans Mara; and that such succession is a matter of the law and the Constitution which the court should take judicial notice of, *in the absence of evidence that the firm of Kemboy & Co Advocates is acting without instructions from the County Government of Narok County, the arguments by Mr Oyatsi that the said advocates are not properly*

on record does not hold any water. The Replying Affidavit herein has been sworn by the Secretary to the County Government of Narok County and has confirmed they are the party herein. I am pleased also to note that Mr. Bundotich confirmed their instruction and that the proper party is County Government of Narok County. That submission is not disputed and is the correct position of the law. This Court, therefore, has jurisdiction to deal with this matter on the basis of the succession whereby the proper party before the court is the County Government of Narok County. The upshot is that I dismiss the preliminary objection with costs to the Respondents. I will now proceed to determine the applications herein on merit.

APPLICATION DATED 23RD JULY 2014

[8] *The application dated 23rd July 2014 consists in a the Plaintiff's challenge on the decision of the Deputy Registrar as Taxing Officer in taxing costs for the 1st and 2nd Respondent in the sum of Kshs. 23,010,674.00 each. The application is what the law calls Reference. The Applicant filed similar submissions on its Reference against the costs which were taxed in favour of the 1st and 2nd Respondent. I will, therefore, analyze the submissions together.* The Applicant submitted that after the filing of the Reference, there was a subsequent development in these proceedings which has a bearing; i.e. the objection it raised to the entire taxation process on the basis of a discovery by the Applicant that the 2nd Respondent, in executing the Order for the Award of costs, obtained Warrants from this Honourable Court using a process or procedure that is outlawed under Article 160(1) of the Constitution. The Applicant submitted that the Warrants were issued to a Court Broker without an application made to Court by the 2nd Respondent, and without payment of the prescribed Court fee under the Judicature Act Cap 8 Laws of Kenya. It is on this discovery that the Applicant filed a separate Constitutional case in this Court stating that the said action was evidence or proof that the proceedings which gave rise to the Award of the costs herein lack integrity and ought to be annulled. But, the objection and the application for conservatory order were dismissed by the High Court relying on a law that has since been repealed by the Constitution. And being aggrieved, the Applicant filed a Notice of Appeal in the Court of Appeal which was followed by an application for an injunctive or conservatory order pending the hearing and determination of the intended appeal. That application has been certified urgent by the Court of Appeal and was fixed for hearing on 3rd November 2014. The Plaintiff confessed that it made the said disclosure to this Honourable Court so that its prosecution of the present application should not be deemed to be a waiver of its rights to pursue the said intended appeal or application in the Court of Appeal.

[9] On the merits of the present application, the Plaintiff submits that the Deputy Registrar as the Taxing Officer erred in principle when she held that the subject matter of the present dispute was Kshs. 1.5 billion. The said error arose from the fact that the Taxing Officer either misapprehended the law or failed to apply proper law in determining the value of the subject matter in this suit. It is expressly stated under Order 2 Rule 3(1) of the Civil Procedure Rules, as follows:

“Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.”

Further, Order 3 Rule 4 states as follows:

“(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.

(2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.” (emphasis added).

[10] Applying the above provisions of the law, the Applicant submitted that the Plaintiff filed by the Plaintiff contained, in the body, a statement in summary form, of all the material facts on which the Plaintiff relied upon to support its claim. Also, the Applicant contended that, the Plaintiff was entitled, if it so wished, to make a claim of special damages in the sum of Kshs. 1.5 billion but freely relinquished its claim to such damages. The mandatory Court fees prescribed under the Judicature Act for a claim for special damages in excess of Kshs. 1 million is Kshs. 75,000.00. But in the present case, absent a claim for special damages, the Court fees assessed on the plaintiff, and which the Plaintiff paid was Kshs. 8,615.00. The Court was, therefore, not seized of a claim for Kshs. 1.5 billion and had no jurisdiction in law to admit it or adjudicate on it. The Respondents jointly and severally were not called upon to defend a claim for Kshs. 1.5 billion. In the face of the above facts, and the law, the Deputy Registrar as the Taxing Officer clearly made an error when she arrived at the conclusion that the Plaintiff’s claim was for a loss of Kshs. 1.5 billion by relying on the statement in summary form contained in paragraph 11 of the plaintiff. The Deputy Registrar failed either to apply the law as contained in Order 3 (4) of the Civil Procedure Rules, or misapprehended the law. On those reasons, the Award of Kshs. 23,010,674.00 for each Respondent should be set aside as there is no legal basis for it under the law.

[11] The Applicant also responded to the respective submissions by the 1st and 2ND Respondents on the propriety and merits of the Reference. The Applicant termed the challenge by the Respondents as misconceived, and based on twisted law and wrong facts. Contrary to the submissions by the Respondents, the Applicant gave notice to the Taxing Officer under Rule 11 on 9th June 2014, four (4) days after the ruling was made by the Taxing Officer on 5th June 2014. The notice is in the Court file, and a copy is attached for ease of Reference. The law was not even settled in the case of *Postal Corporation of Kenya vs Donald Kipkorir & 3 Others, HCCC NO. 658 of 2004* by Waweru J (*unreported*). The said decision was *unsettled* in *Civil Appeal No. 220 of 2004, Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board*, when the Court of Appeal stated as follows:

There are six grounds of appeal. In grounds 1, 3 and 6 the appellant challenges the competency of the Reference which was before the learned judge. Mr. Kipkorir for the appellant submitted before us, as he did before the learned judge, that, the Reference was fatally defective because the reasons of the taxing officer for the taxation were not filed before the judge and secondly because the Reference was filed out of time.

As regards the lateness in filing the Reference, the ruling on taxing was delivered on 23rd February 2004. By a letter dated 24th February 2004, the respondent’s advocates gave notice to the taxing officer of the items he was objecting to and asked the taxing officer to furnish him with reasons for taxation for the objected items. That was within the 14 days stipulated in Rule 11 (1) of the Order. By Rule 11 (2) of the Order the taxing officer was required on receipt of the notice to record the reasons forthwith and forward them to the respondent’s advocates who were then required to file a Reference to the judge within 14 days from the receipt of reasons. The taxing officer did not record the reasons but by a letter dated 3rd June 2004 the Deputy Registrar informed the respondent’s advocates that he (the Deputy Registrar) had endorsed on the respondent’s letter of 24th February 2004 that the “Reasons are in the Ruling”.

The Deputy Registrar’s letter dated 3rd June, 2004 does not say when the endorsement was made. In particular, it does not say that the endorsement was made on 24th February 2004 or any other date within the 14 days of the ruling. Further, there is no evidence that the respondent had been informed before 3rd June, 2004 that the taxing

officer would be relying on the ruling of 23rd February, 2004 for his reasons. In the circumstances, the appellant's contention that time started running on 24th February, 2004 cannot be correct. We would agree with the learned judge that the Reference was filed, within the prescribed time.

It is true that the taxing officer did not record the reasons for the decision on the items objected to after receipt of the respondent's notice. It seems that the taxing officer decided to rely on the reasons in the ruling on taxation dated 23rd February 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a Reference and the absence of such reasons would not in itself preclude the objector from filing a competent Reference. The rest of the grounds of appeal deal with the merits of the Reference". (emphasis added).

[12] In the present case, the Applicant argued that, the Deputy Registrar did not even respond to the objector's request for reasons to be furnished. Based on the said binding Court of Appeal decision, the said failure to provide a response is fatal. In any event, the Taxing Officer has to comply with two requirements, **firstly**, to report the reasons for the taxation in writing, and **secondly**, to forward them to the objector. Even where the reasons are recorded in the ruling, that alone is not sufficient. Time begins to run from the moment the ruling containing the reasons is **forwarded** to the objector. The ruling was forwarded to the objector on 15th July 2014. The Reference was filed eight (8) days later on 23rd July 2014, within time. The Court of Appeal in the above case observed as follows:

“In brief, the appellant contends that the objection to taxation was essentially on quantum and that there were no valid grounds for interference by the learned judge.”

In the said binding decision, the Court of Appeal upheld the High Court decision to set aside the Taxing Officer's decision in the said case on the basis, inter alia, that,

- a. the claim in the suit was not a monetary claim but a claim for declaratory orders; and,
- b. the Taxing Officer had made an error in law by using a figure of Kshs. 6,081,312.97 to determine the instruction fees payable in the absence of a claim for such a sum of money.

That is exactly the same position as in this case as the prayers in the plaint are for declaratory orders, and there is no monetary claim of Kshs. 1,500,000,000.00. There is absolutely no basis in law for the Taxing Officer to use Kshs. 1,500,000,000.00 in computing the instruction fees.

[13] The Applicant also had something to say about the 1st Respondent's reliance on a High Court judgment of Mabeya J; that Mabeya J is bound by the Court of Appeal decision in the said **Civil Appeal No. 220 of 2004, Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board** and not the other way round.

[14] The Applicant urged the court to set aside the taxation herein.

1st Respondent's written submissions on C/S dated 23rd July, 2014

[15] The 1st Respondent contended that this application is a Reference under rule 11(2) of the Advocates (Remuneration) Order, against a decision of the taxing officer made on 30th June, 2014. The parties had by a consent order recorded before the Court on 23rd September, 2014, agreed to

the grant of a stay of the taxed costs pending the hearing and determination of the Reference, dispensed with the hearing of the Plaintiff's Notice of Motion seeking such stay and agreed on a time-table for the hearing of the Reference. In those circumstances, the Plaintiff's submissions on "no waiver of rights" are mistaken. The 1st Respondent stated that it was correcting the facts which had been distorted by the Applicant. The true facts are that; the decision of the taxing officer was made on 5th June, 2014. The Honourable Mrs. Nyambu delivered a written ruling setting out her reasons as to why she taxed the contested items in the 1st Respondent's Bill in the manner she did. Indeed, the Plaintiff acknowledges the written decision was made of 5th June, 2014 by annexing a copy and stated: "*the annexed decision made by the Deputy Registrar, as Taxing Officer, to award the 1st Respondent party and party costs in the total sum of Kshs 23,010,674.00cts be reversed.*" Rule 11(2) of the Advocates (Remuneration) Order, requires a Reference to be lodged within fourteen days of receipt of reasons of the decision. It is now well-settled that when a taxing officer has rendered a ruling explaining the basis of her taxation, a party need not apply for reasons under rule 11(1), but should lodge its Reference on the basis of the ruling delivered and time begins to run from the date such ruling was delivered. As Waweru J in *Postal Corporation of Kenya v Donald Kipkorir & 3 others* (unreported) Nairobi HCCC No. 658 of 2004 explained:

"If the reasons for taxation on the disputed items on the bill are already contained in the considered ruling, why should further reasons be sought or supplied simply because of the unfortunate wording of sub-rule(2) of Rule 11 of the Advocates (Remuneration) Order seems to demand so? What further purpose will be served by further reasons not already served by the reasons contained in the considered ruling? To borrow the words of Ringera J, did the Chief justice intend that there should be a ritualistic observance thereof even when reasons for the disputed taxation are already contained in the formal and considered ruling? I think not."

See also the case of *Ahmednasir Abdikadir & Co Adv v Nat Bank of Kenya Ltd [2006] 1 E. A 5* at page 11 per Ochieng' J.

[16] The 1st Respondent averred that the Plaintiff could have sought succour under rule 11(1) which provides "*should any party objection to the decision of the taxing officer, he may within fourteen days after the decision give notice to the taxing officer of the items of taxation to which he objects.*" No such notice has been given whether within the period prescribed- fourteen days or at all. So, however way one looks at it, the Reference is untimely. As we have previously submitted, "*not for the first time in these proceedings, the Plaintiff's breath-taking insouciance bids fair to bring the administration of justice into disrepute. It is against this background of wanton insolence, its belated submissions should be considered. The Plaintiff has essentially set itself as a law unto itself entitled to do whatever it wishes, however it wishes, to whomever it wishes. It is mistaken*". Absent of good cause, a party who fails to abide by the directions of the Court must bear the consequence of such default. If it is forthcoming, admits error, and requests extension on cogent grounds, it might well avoid those consequences. That, however, is not the road the Plaintiff has taken. The Reference is untimely and should be struck out- see for example *Ahmednasir Abdikadir & Co Adv v Nat Bank of Kenya Ltd [2006] 1 E A 5* at page 11 per Ochieng' J.

[17] The 1st Respondent made further submissions that the Applicant is challenging instruction fee. The Applicant contested the instruction fees before the taxing master on two wholly unsustainable grounds i.e. the value of the matter was not as reflected in the Amended Plaint for want of proper pleading- full particulars of special damages were not given and the Respondent's advocates had not earned and were not entitled to the said entire quantum of the instruction fees or any portion thereof. The taxing master realized these arguments were mere smokescreens and stated that:

"With respect to item 1, the value of the subject matter has been disclosed at paragraph 11 of the Plaint as Kshs 1.5 billion. The Respondents used a figure of Kshs.3billion to calculate instruction fee. In my view, the value of the subject matter is 1.5 billion as stated in paragraph11(c) of the plaint. This is the value I shall use to calculate."

This is not an error at all and the Plaintiff has totally failed to demonstrate that this was an error of principle. There is nothing in the ruling by the taxing master which constitutes failure to consider the substance of the claim. For the Plaintiff to claim that there is no claim for Kshs 1.5 billion in the Amended Plaintiff is callous and disrespectful of this Honourable Court. Merely by rejecting the Applicant's arguments, the taxing master did not commit any error in principle. Introduction of Order 2 rule 1 & Order 3 Rule 4 of the Civil Procedure Rules, and the fact that it only paid Kshs 8,615/-, is to confuse what is clearly stated as the value of the subject matter of the suit at paragraph 11 of the Amended Plaintiff which is Kshs 1.5 billion. The Applicant did not raise these submissions before the taxing officer, and so are precluded from pursuing them before Court. In any event, the arguments are mistaken. The role of the taxing officer is not to investigate or adjudicate upon the adequacy or propriety of pleadings. Her role is to assess the costs based on the value of the subject-matter as disclosed in the pleadings which is precisely what the taxing officer did in this case. Whether that value has been given in summary form as required by Order 2, rule 3(1) or a Plaintiff is entitled to relinquish a portion of its claim (or escaped paying the full filing fees- remember additional filing fees are payable when the Plaintiff failed to pay the requisite amount) is irrelevant to this exercise. The Applicant is merely delaying this matter. The Applicant alleged in its own pleadings a **total minimum loss of Kshs 1.5 billion**, which the taxing master saw and used in the taxation of costs-that is not a misapprehension of law as claimed by the Applicant. In the Certificate of Urgency dated 14th August 2008 and signed by Oyatsi Advocate on behalf of the Plaintiff, he sought and in fact had the matter certified as urgent for the reason that "*...the Plaintiff would suffer irreparable loss estimated at not less than Kshs. 1.5 billion...*" This sum is repeated in a sworn Affidavit of Aris Grammaticas in support of the urgency and at paragraph 12 thereof, being the Affidavit sworn on 14th August 2008. The Plaintiff went forth in particulars at paragraph 11 of the Plaintiff herein to state the minimum value of the dispute.

[18] The 1st Respondent submitted before the taxing officer, and so does it do now that, where there is no judgment, the value is ascertained from the pleadings i.e. the entire Plaintiff including but not restricted to the prayers. In Nairobi HCCC 131 of 2003 **Meir Mizrahi & Another -vs- Nairobi City Council & Others**) Havelock J while quoting with approval the following decision of the court of Appeal in the case of **Joreth Ltd v Kigano & Associates** (supra) which the 2nd Respondent relies upon, the learned judges on the issue of ascertaining the value of the subject matter held *inter alia*;

"We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of Costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account amongst other matters the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

[19] In this case, the value of the subject matter is evident both from the Chamber Summons dated 14th August 2008 and the Plaintiff. The Plaintiff and the Chamber Summons dated 14th August 2008 both gave a minimum sum of Kshs. 1.5 billion as the value. The Plaintiff did give further values at paragraph 11 (a) and (b) as Kshs. 700,000,000.00 and Kshs. 800,000, 000.00. In Nairobi HCCC Misc Number 394 of 2008 **Kagwimi Kang'ethe & Company Advocates -vs- Penelope Combos & Another** Mabeya J held as follows:

"..Let it be known that it is not necessary that the value of the subject matter be in the prayers, it is to be ascertained from the pleadings generally. My view therefore is that, since the value of the subject matter in this matter seems to have been ascertainable, there was no error of principle on the part of the taxing officer"

[20] Therefore, the Applicant has not shown that there is error of principle on part of the taxing officer to warrant interference by the Court. The Reference should be dismissed with costs.

2nd Respondent's Submissions on C/S dated 23rd July 2014

[21] The 2nd Respondent is of the view that the stay application herein is already spent as the court granted stay of execution on condition that it deposits the entire decretal sum in court. The said condition is, however, yet to be complied with. The 1st Respondent then went ahead to make extensive submissions on the Reference. It first gave a chronology of all the applications, objections and appeal filed by the Applicant in respect of this matter. Chambers Summons Application dated 21st November 2008; Chamber Summons Application dated 23rd July, 2014; Notice of Motion Application dated 28th July, 2014; Notice of Motion Application dated 25th August, 2014; Preliminary Objection dated 23rd September, 2014; Notice of Motion Application in the Court of Appeal dated 25th February, 2014 lodged, *ex-parte* under a Certificate being Civil Application No. 35 of 2014, which was dismissed on 13th June, 2014 by Waki, M'noti and Mohammed JJA; Constitutional Petition dated 27th August, 2014 being High Court Petition No. 428 of 2014 which was dismissed.

[22] The 2nd Respondent contended that the Plaintiff's ostensible cause of action against the **1st Respondent** was an alleged procurement and inducement of a breach of contract by the **2nd Respondent** of an alleged 66-year Agreement between the Plaintiff and the 2nd Respondent. It was alleged by the Plaintiff that the said Agreement had conferred upon the Plaintiff "*exclusive rights to carry on the business of Air Services for Passengers using hot air balloons within the area adjacent to Little Governors Camp in the Maasai Mara*". The Plaintiff also filed an Amended Plaintiff on 17th November, 2008 to which parties filed defences. At paragraph 11 of the **Amended Plaintiff** the Plaintiff puts the particulars of loss at an estimated minimum of Kshs. 1.5 billion.

[23] On the Reference, the 2nd Respondent made out arguments which are similar to those made by the 1st Respondent. It urged that the Reference was filed almost 2 months after the ruling on taxation was delivered and the **Certificate of Taxation** issued. It was clearly out of time given that Rule 11 of the Advocates Remuneration Order provides that a Reference should be filed after a period of 30 days from the date of the decision of the taxing officer. This makes it incompetent and fatally defective. The decision of the taxing officer was delivered on 5th June, 2014 and a Certificate of Taxation issued on 6th June, 2014 yet the Plaintiff filed its Reference on 23rd July, 2014 a period of 48 days. The same was filed without leave of court or concurrence of the parties.

[24] Further submissions were made. The value of the subject matter for purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. Paragraph 1(iii) of Schedule VI of the Advocates (Remuneration) Order, 2006 which is the relevant order to be applied in this matter, gives discretion to the taxing officer to award such amount for instructions as she may consider reasonable taking into account all the matters as enumerated above. In the Plaintiff filed on 14th August, 2008 and subsequent Amended Plaintiff dated 17th September, 2008 the Plaintiff sued the 1st and 2nd Respondents for breach of contract and claimed loss of profit it would have otherwise made had the contract not have been breached. At paragraph 11 of the Amended Plaintiff the Plaintiff puts the particulars of loss at an estimated minimum of Kshs. 1.5 billion. The pleadings were clear that the value of the subject matter was an estimated loss of 1.5 billion. The taxing officer used her discretion as guided by Schedule VI Paragraph 1 (b) of the Advocates Remuneration Order, 2006 and correctly directed herself on the value of the subject matter. The Instruction fee allowed at Kshs. 22, 847,000/- was proper. There is no error in principle as the taxation and all the issues before the taxing officer were decided on merit. There appears the Applicant is under a misconception and does not realize that full instruction fees is earned as soon as a Defence is filed and it does not matter that the suit is terminated summarily. Subsequent

progress of the matter is irrelevant to the item of fees. This is provided for under Schedule VI Paragraph 1 (b) of the Advocates Remuneration Order, 2006 which provides:

“To sue in any proceedings described in paragraph (a) where the defence or other denial of liability is filed...”

This position is supported in the case *First American Bank of Kenya v Shah and Others* [2002] 1 EA 64 where Ringera, J (as he then was) held:

“The full instruction fees to defend a suit are earned the moment a defence was filled and the subsequent progress of the matter is was not relevant.”

In the case of *Joreth Ltd v Kigano and Associates* [2002] 1 EA 92 Kwach, Shah and Bosire JJA held:

“By the first ground thereof the Respondent states that Instruction Fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. In principle that is correct.”

[25] On the basis of the above, the 2nd Respondent submitted that this Honourable Court does not have jurisdiction to entertain this matter because the High Court’s jurisdiction can only be exercised where the taxing officer has erred in principle and acted in excess of his powers. None of these things exist here. They relied on the case of *Thomas James Arthur v Nyeri Electricity Undertaking* (1961) EA 492 in which the court held;

“Where there has been an error in principle the court will interfere, but 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.”

Therefore, the Reference should be dismissed with costs. The request for stay of execution of the Order made on 22nd November, 2013 awarding costs to the Respondents should be denied. The application dated and filed on 28th July, 2014 should be dismissed because the conditional stay has not been complied with. In blatant breach of the conditions of the stay orders, the Applicant only deposited the costs awarded to the 1st Respondent and not those awarded to the 2nd Respondent. The Plaintiff’s Advocates on record, Messrs Sharpley Barret & Company Advocates via a letter dated 12th September, 2014 seems to be under the misguided assumption that the 2nd Respondent is a none existent legal entity and therefore the Plaintiff is not indebted to it and further that the 2nd Respondent cannot purport to execute a decree. According to the 2nd Respondent the numerous applications, petitions and appeals filed by the Applicant are just attempts to delay payment of the costs, thus, defeat the ends of justice. The delay in executing the Order given on 22nd November, 2013 is prejudicing the rights of the 2nd Respondent. The Reference is also a waste of time. The Plaintiff’s allegation that; the certificate of taxation and warrants of attachment were issued by the court in contravention of the provisions of the Constitution; and the Court was subject to the control or direction of undue influence lacks material particulars and is merely speculative. Furthermore, the allegations made by the Plaintiff of corruption and bribery are an abuse of and contemptuous of the Court and meant to misdirect the Court on the facts at hand.

[26] The 2nd Respondent also submitted that on the 25th September, 2014 it filed a Notice of Discontinuance of Suit dated 4th September, 2014 as against the Plaintiff for the reason that the dismissal of the Plaintiff’s suit as against it and the subsequent award of costs by the Honourable Court was an effective remedy to the 2nd Respondent and the counter-claim had been overtaken by events. The discontinuance was as per Order 25 Rule 1 as read together with Rule 3 of the Civil Procedure Rules which provides as follows:

“1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Respondents or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

“3. The provisions of this rule and rule 1 shall apply to counter-claims.”

They cited the case of Giusseppe Bozzolasco v Anneliese Susan Feller & 3 others [2013] eKLR O.A. Angote J that:

“Having discontinued the suit against all the Respondents, the Plaintiff cannot now be heard to say that he wants the 2nd and 3rd Respondents’ statements of defences struck out with costs. There are no defences to be struck out because the suit was discontinued together with all the pleadings in the file.”

[27] The 2nd Respondent is of the view that the Applicant should be stopped from abusing the process of the court. This will be achieved by dismissing the Reference with costs to the 2nd Respondent.

COURT’S DETERMINATION

Quite unpleasant exchanges

[28] Before I set out to determine the real issues in controversy, I should say that I am disheartened by the unmeasured language used by counsel herein in their respective submissions. Legal counsels should learn how not to be entangled in their client’s case as if it is their own—a basic tenet of professional lawyering.

[29] I now go back to the real issues in dispute. I have determined that the County Government of Narok County is the proper party in this suit and the fact that pleadings still bear County Council of Trans Mara does not affect the propriety of the proceedings. The County Government of Narok County has by law succeeded and stepped into the shoes of County Council of Trans Mara. They just proceed with the case from where it has reached without having to file an action to become parties as it was submitted by the Applicant. This kind of succession is a matter of the Constitution and the law which the court takes judicial notice of and only endorses that fact in the file. I have so ordered. I will now determine the merits of the Reference.

Issues

[30] I see two major issues here. The first one, whether the Reference is out of time; and the second, whether the taxing officer committed an error in principle as to entitle the court to interfere with the discretion of the taxing officer.

Was the Reference filed out of time?

[31] It was urged by the Respondents that the Reference was filed almost 2 months after the ruling on taxation was delivered and the **Certificate of Taxation** issued. According to the 2nd Respondent, the Reference was, therefore, clearly out of time as it offends Rule 11 of the Advocates Remuneration Order which provides that a Reference should be filed after a period of 30 days from the date of the decision of the taxing officer. This makes it incompetent and fatally defective. They argued that the decision of the taxing officer was delivered on 5th June, 2014 and a Certificate of Taxation issued on 6th June, 2014 yet the Plaintiff filed its Reference on 23rd July, 2014 after a period of 48 days. To make matters worse, the 2nd Respondent averred that the Reference was filed without leave of court or concurrence of the parties. The 1st Respondent submitted that the

Applicant did not give the notice of *Objection to decision on taxation* within 14 days as required under Rule 11 of the Advocates (Remuneration) Order. According to the 1st Respondent the law is now settled that where reasons are provided in the ruling by the taxing officer, there is no requirement that the reasons must be provided for afresh. The Objector should just file a Reference on the basis of the ruling and time starts to run from the date of delivery of the ruling. This Reference is, therefore, out of time and should be dismissed for that reason. The Applicant, on the other hand, submitted that it gave the notice of *Objection to decision on taxation* through the letter by its advocates dated 9th June 2014, which was four (4) days after the delivery of the taxation ruling. It annexed a photocopy of the purported notice in its submissions.

[32] Rule 11 of the Advocates (Remuneration) Order provides as follows:-

11 *Objection to decision on taxation and appeal to Court of Appeal*

(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 to which he objects.*

(2) *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.*

(3) *Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.*

(4) *The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.*

[33] This Rule 11 of the Advocates (Remuneration) Order has been subject of intense interpretation by courts and reading the decisions from the High Court and the Court of Appeal, one may easily say that judicial opinion is divided. But, there are matters which emerge in this case and from the string of judicial authorities on the matter and which I do not hesitate to record that: ***the Chief justice in making rule 11 did not intend that there should be a ritualistic observance thereof even when reasons for the disputed taxation are already contained in the formal and considered ruling.*** I am guided by the words of Ringera J (as he then was), Waweru J-see the High Court case of Kipkorir Titoo. I am not assuming anything here. See the words of the Court of Appeal in the Court of Appeal case of Kipkorir Titoo that:

It seems the taxing officer decided to rely on the reasons in the ruling on taxation dated 23rd February, 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11(2) of the Order, we are nevertheless, satisfied that there was substantial compliance.

In my view, a statutory recast of Rule 11 of the Advocates (Remuneration) Order is necessary. That notwithstanding, these arguments are not untenable that; reasons provided in the ruling are sufficient for purposes of a Reference under Rule 11; and in that case, the Objector should file a Reference on the basis of those reasons; which means that time will start to run on delivery of such taxation ruling. But the question would linger; what about where the taxation ruling carries no

reasons?

[34] I turn to the facts of the case. Was the notice of objection to taxation given as required under Rule 11 of the Advocates (Remuneration) Order? I have perused the entire file and I seem not to locate the letter dated 9th June 2014, a photocopy of which has been annexed to the submissions of the Applicant. The Applicant did not annex a certified copy of the said letter even after it had decided it was important to annex a copy. The court is left with no choice than to say that none was given as required. Even if it had been filed, the Applicant did not file the Reference until 48 days after the delivery of the taxation ruling. On that score, the Reference is fatally assailed. But a more resounding decision should come from the merits of the Reference.

[35] The Applicant argued that the suit herein was for declaratory relief. I can see only one prayer for declaratory relief in the Amended plaint, i.e.:

d. A declaration that the contract dated 1st March 2007 and entered into between the first and Second Defendants is null an void.

I should state from the outset that the other major prayers are for injunction, mandatory injunction and damages.

[36] The Applicant has argued that the taxing officer committed an error in principle when she derived the value of the subject of the suit, i.e. Kshs. 1.5 billion from the particulars provided under paragraph 11. According to the Applicant, the principle applicable in deriving the value of the subject matter for purposes of taxation is as per the law especially Order 2 Rule 3(1) and Order 3 Rule 4 of the Civil Procedure Rules. Order 2 Rule 3(1) provides as follows:

“Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.”

And Order 3 Rule 4 states as follows:

“(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.

(2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.

[37] Applying the above provisions of the law, the Applicant submitted that the Plaint filed by the Plaintiff contained, in the body, a statement in summary form, of all the material facts on which the Plaintiff relied upon to support its claim. Also, the Applicant contended that, the Plaintiff was entitled, if it so wished, to make a claim of special damages in the sum of Kshs. 1.5 billion but freely relinquished its claim to such damages. The Applicant saw support to its claim herein in the fact that the mandatory Court fees prescribed under the Judicature Act for a claim for special damages in excess of Kshs. 1 million is Kshs. 75,000.00, but only paid Court fees of Kshs. 8,615.00. To the Applicant, this shows that the Court was not seized of a claim for Kshs. 1.5 billion and had no jurisdiction in law to admit it or adjudicate on it. Further, the Applicant argued that the Respondents jointly and severally were not called upon to defend a claim for Kshs. 1.5 billion. In the face of the above facts, and the law, the Applicant is convinced that the Deputy Registrar as the Taxing Officer clearly made an error when she arrived at the conclusion that the

Plaintiff's claim was for a loss of Kshs. 1.5 billion by relying on the statement in summary form contained in paragraph 11 of the plaint. The Deputy Registrar, therefore, they argued, failed either to apply the law as contained in Order 3 (4) of the Civil Procedure Rules, or misapprehended the law. On those reasons, the Award of Kshs. 23,010,674.00 and Kshs. 23,056,164.00 for the 1st and 2nd Respondents respectively should be set aside as there is no legal basis for it under the law.

[38] The Respondents argued that, where there is no judgment, the value of the suit property should be ascertained from the entire pleadings of the Plaintiff, in this case the Plaint and the Amended Plaint; and it is not restricted to the prayers only. And they cited the decision of Havelock J in Nairobi HCCC 131 of 2003 *Meir Mizrahi & Another -vs- Nairobi City Council & Others* where the said judge quoted with approval the decision of the Court of Appeal in the case of *Joreth Ltd v Kigano & Associates* (supra) thus, *inter alia*;

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of Costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account amongst other matters the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

[39] The above formulation of law in the case of *Joreth Ltd v Kigano & Associates* has not changed. The value of the subject matter of the suit should be deduced from the entire pleadings of the party and should not be restricted to the part where the prayers are contained. This follows after the fact that issues for determination will arise from the pleadings of the parties and no averment in the pleading should be seen as otiose unless it is superfluous or mere embellishment of the pleading or it has been relinquished in accordance with the law. This is the applicable law on this subject and I will accordingly be guided by it. The Applicant has placed much emphasis on Order 2 Rule 3(1) and Order 3 Rule 4 of the Civil Procedure Rules to show that the taxing officer committed an error in principle when she used Kshs. 1.5 billion as the value of the subject of the suit. Order 2 rule 3(1) prescribes what every pleading should contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits. This only supports the view the court has taken that every pleading should contain every material fact and when such material fact is so pleaded, it is part of the cause of action and cannot be seen as otiose unless it is unnecessary or an adornment or has been relinquished in accordance with order 3 rule 4 of the Civil Procedure Rules or has been rendered inapplicable by operation of law or some other intervening circumstances. The pleading in paragraph 11 of the amended plaint is not unnecessary or an adornment or it has not been relinquished in accordance with order 3 rule 4 of the Civil Procedure Rules or rendered inapplicable by operation of law or some other intervening circumstances. It is part of the claim by the Applicant and was the basis of moving the court for relief. It is also a direct alleged consequence of the alleged breach of contract. I am now in a position to analyze the arguments on Order 3 Rule 4 of the Civil Procedure Rules.

[40] Order 3 Rule 4 reinforces Order 2 rule (1) of the Civil Procedure Rules. They are complimentary. Under Order 3 Rule 4, every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may omit or relinquish any portion of his claim. The rule envisages a situation where a party has more than one relief in respect of a cause of action; a choice by the person concerned is involved, either inadvertently or conscientiously, to omit or relinquish any or some of the reliefs the person is entitled to claim. Where a person omits a relief, there is little difficulties involved as the relief is absent from the pleading although the omission will have legal consequences as will be borne out shortly. Trouble is found where a party has pleaded the relief and he intends to relinquish it. For the relief so pleaded not to count, it must be expressly relinquished by the person pleading it. The reason why the law requires that the relief so pleaded be relinquished expressly, unless estoppel arises, is to enable the

other party to know that the relief in question has been relinquished and he need not defend it. Again, such decision to relinquish a relief already pleaded must be a conscientious one because where the party so relinquishes any portion of his claim, he shall not afterwards sue, except with the leave of court, in respect of the portion omitted or relinquished. The particulars in paragraph 11 of the amended plaint are already pleaded; they are not unnecessary detail; and they are part of the Plaintiff's claim arising out of the alleged breach of some contract in question. The Respondents defended the entire claim on a minimum loss of Kshs. 1.5 billion. The Applicant cannot now claim that the claim for Kshs. 1.5 billion in damages for breach of contract had been relinquished when it did not do so or signify intention to do so before the suit was dismissed. The suit was dismissed as is and should be treated as such even for purposes of taxation. The arguments by the Applicant towards that end are afterthoughts which are aimed at introducing confusion but nonetheless, cannot entangle the court in such a clear matter. The pleadings were clear that the value of the subject matter was alleged breach of contract and an estimated loss of 1.5 billion. The taxing officer used her discretion as guided by Schedule VI Paragraph 1 (b) of the Advocates Remuneration Order, 2006 and correctly directed herself on the value of the subject matter. The Instruction fee allowed at Kshs. 22, 847,000/- was proper. Therefore, the taxing master did not commit any error in principle when she determined that the value of the subject matter was Kshs. 1.5 billion and based the instruction fee on the said value. These issues were also before the taxing officer and were decided on merit. It is important to note, because the Applicant made submissions on it; that the subject matter of the suit and its value is determined from the pleadings, judgment or settlement and not the amount of fees paid. Assessment of fees for purposes of filing a claim is not determination of the value of the subject matter for purposes of taxation of costs. The clerk assessing the fees is not the arbiter of the value of the value of the suit. If for any reason a party pays a lesser sum in filing fees, the court will normally ask for additional fees to be paid.

[41] For all the above reasons, I do not see any error in principle or any exceptional circumstances which will impel me to interfere with the discretion of the taxing officer herein. I dismiss the Reference dated 23rd July 2014 with costs to the Respondents. Before I close, I wish to make a finding on the application for stay of execution. Those applications are spent after the court granted stay of execution on condition that the Applicant deposits the entire decretal sum in court. If those conditions were not met, the order lapsed after 45 days. And now with this decision, there is nothing to stop execution of the decree. It is so ordered.

Dated, signed and delivered in court at NAIROBI this 3rd day of February, 2015

F. GIKONYO

JUDGE