REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO 770 OF 2013

CONSOLIDATED WITH

MISCELLANEOUS APPLICATION NO 769 OF 2013

KENYARIRI AND ASSOCIATES ADVOCATES……APPLICANT

VERSUS

SALAMA BEACH HOTEL LIMITED

AND 3 OTHERS……..…… CLIENT/RESPONDENTS

RULING

Introduction

1. This ruling pertains to two references filed to challenge the decision of the taxing master in respect of the bills of costs in Petition Nos. 410 and 437 of 2012. **Misc App No. 769 of 2013** relates to Petition No. **410 of 2012** while **Misc App No. 770 of 2013** is in relation to the taxation in **Misc. Appn. No 437 of 2012.**

2. It appears from the material before the Court that the applicant and the respondent previously enjoyed an advocate-client relationship. The applicant had been retained by Mr. Hans Langer, the 2nd respondent and the Managing Director and majority shareholder of Salama Beach Hotel Limited, to provide legal services to the respondents. It was alleged, so far as is relevant for present purposes, that following negotiations between the parties, it was mutually agreed that the applicant firm would be retained to provide general legal services on retainer basis at Kshs 120,000/= per month, later increased in December 2012 to Kshs 250,000/= per month. The applicant firm of advocates represented the respondents' interests until they fell out due to various differences with regard to how to proceed with certain pending matters. Upon the conclusion of Petition No. 410 of 2012 and 437 of 2012, the applicant filed a Bill of costs for taxation which was duly done. The applicant was dissatisfied with the ruling of the Deputy Registrar on the taxation and has filed the present references against the decision of the taxing master.

3. The applications in the two references are brought by way of Chamber Summons application dated 6th May 2014 and brought pursuant to paragraph 11 (2) of the Advocates (Remuneration) Order. The applications are supported by affidavits sworn by Mr. Christopher Orina Kenyariri and are expressed to be appeals against the decision of the Deputy Registrar. They seek orders that the decision of the Deputy Registrar dated 17th April 2014 and 24th April 2014 be set aside and/or varied and the applicant's Bills of Costs dated 29th July 2013 be taxed afresh. The applicant also

asks for the costs of the application.

4. The grounds on which the applications are brought are, inter alia, that the taxing master erred in his application of the principles to be relied on in taxation of Bills of Costs; that he misdirected himself by not recognizing that he first had to set a basic instructions fee before determining the appropriate fees; that he erred in law and in fact when he awarded the instructions fees without considering the nature of the instructions the advocates had executed and the amount of work undertaken by the advocates and therefore failed to make a finding of adequate compensation for work done.

5. The applicant also complains that the taxing master erred by not indicating which Schedule of the Advocates (Remuneration) Order he applied. It is the applicant's contention further that the taxing master failed to take into account the nature of the case, the interests of the parties in the matter and the general conduct of the proceedings, and in the circumstances, the advocate-client Bill of Costs as taxed by the learned Deputy Registrar is manifestly low and unjust in the circumstances.

6. The respondents oppose both applications. In respect of Misc. Application No. 770 0f 2013, the respondents have filed a cross-reference alleging that the taxing master erred in finding that the Court record indicated that the respondent had not filed any documentation and seeks orders to set aside, review or vary the said orders. It argues that it opposed the two Bills of Costs and filed a replying affidavit sworn by the 2nd respondent as well as written submissions both dated 9th September 2013. Its case is that the parties highlighted their submissions on 17th March 2014, and a ruling reserved for 17th April 2014, and the taxing master therefore erred in proceeding on the assumption that the applicant's Bill of Costs was unopposed.

7. While the two references raise similar issues, I will consider each of them separately given the disparate contentions made by the parties with respect to each of the rulings.

Misc. Application No. 769 of 2013

8. In this application, the applicant/advocate objects to the decision of the taxing master reflected in the ruling delivered on 17th April 2014 in which he taxed the advocate/client bill of costs in the sum of **Kshs 431,256/=.** The applicant complains that the Deputy Registrar erred in law and in fact in failing to indicate which schedule of the Advocates Remuneration Order he applied in the taxation and proceeded to erroneously tax based on a non–existent, imagined figure, thereby failing to adequately compensate the advocate and carelessly depriving the advocate of fees already earned. He complains, further, that the taxing master erred by not setting a basic instruction fee before determining the appropriate fees, and by not taking into consideration the amount of work undertaken by the advocates and therefore failed to make a finding for adequate compensation for the advocates. The applicant argues that the award by the taxing master of **Kshs 431, 256/=** and instruction fees of **Kshs 200,000/=** is manifestly too low; and that the taxing master did not consider the nature of the advocate's instructions nor the work undertaken.

9. The respondents are also unhappy with the decision of the taxing master. They argue that the taxing master erred in law and fact in proceeding with the taxation ex parte; in holding that the Court record did not show that the respondents ever filed any other document in the matter apart from an affidavit in reply, and in declining to deduct the total taxed amount of Kshs 431, 256/= from the amounts already paid by the respondents/clients to the advocate. The respondents further argue that the taxing master erred in holding that it is not clear how many matters were covered by the retainer amount so as to apportion a pro rata figure on each case and discount the same against the amount taxed, and in failing to consider that the retainer fees also covered other Bills of Costs in Nairobi Misc. 298, Misc. 299 and Misc. 300 of 2013, and Malindi Misc. 13-17 of 2013 and Misc. 41 and 42 of 2013 as itemized by the clients/respondents in the affidavit of Hans J Langer filed in Court on 9th September 2013.

10.I have considered the ruling of the taxing master in this matter. After making some introductory remarks with respect to the Bill of Costs before him, he states as follows:

> *"Upon being served, the respondent, vide a notice dated 12th August, 2013 appointed the law firm of Ndegwa Kiarie to represent them in this matter and filed a Replying Affidavit on the 9th September, 2013. Apart from the Replying Affidavit, the respondent did not file any other document and were not in attendance on the 25/2/ 2014 when this matter came up for taxation. I was satisfied that proper service of a Notice of Taxation dated 13th February 2014 had been effected on the same day (the 13th of February, 2014) and an Affidavit of Service sworn by Hudson Chanzu on the 24th February, 2014 attested to that. I thus allowed the applicant to proceed ex parte…"*

11.The taxing master then considered the submissions by the applicant, as well as the affidavit sworn by the 2nd respondent, Mr. Langer, on 9th September 2013, including the issue of the retainer relied on by the respondents. He then proceeded to observe as follows:

> *"As already stated herein, I have gone through and considered fully the arguments canvassed in Malindi High Court Miscellaneous 16 of 2013. The issue as to whether the applicant herein was entitled to file a Bill of Costs for taxation, notwithstanding the retainer agreement was fully argued and laid to rest. The court delivered of itself as follows:*
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> ***"There is no indication in this matter that the applicant herein agreed that he would accept a lesser sum than that stipulated in the appropriate scale governing the advocates' fees. Indeed, the letter dated 24th January, 2011 by the respondents and addressed to the applicant is not an agreement contemplated under Section 45 of the Advocates Act. The letter simply appointed the applicant as the advocate for the respondent (Salama Beach Hotel Ltd) on a retainer basis of Kshs 120,000/= per month and any other payment was subject to quality expeditious completion of work given and submissions of a fee note. The applicant was therefore entitled to submit his fee note or tax his costs on the work done…"***

12.The Deputy Registrar then expressed his view as follows:

> *"The retainer being referred to in Malindi Miscellaneous Number 16 of 2013 is the same retainer referred to in this matter. I have not been shown any appeal, pending or otherwise against the decision made in the above cited case and as such will belabor no more on the issue than adopt the decision of the High Court rendered therein."*

13.After concluding that the bill of costs was properly before him, the taxing master went on to state that had the proper data been laid before him on the fees already paid under the retainer, he would have taken such fees into consideration in taxing the applicant's fees, but no such data had been presented before him. He noted the claim by the respondents in their replying affidavit that a total of **Kshs 14, 000,000/=** had been paid under the retainer between February 2011 and April 2013, but observed:

> ***"This was disputed by the applicant. It was also not clear before this court how many matters were covered by the retainer amount so as to apportion a pro rata figure on each case and discount the same against the taxed figure herein. Had that been properly articulated before me however, I would not have hesitated to have that sum deducted from the taxed figure in this matter.***

14. With respect to the instructions fees, the Court, after observing that the applicant had charged a total of kshs 2,120,000/=, stated as follows:

> ***" The applicant seems to have heavily relied on the value of the shares (which he referred to as the subject matter of the suit) valued at Kshs 160, 000, 000/=. Whilst the relative interests of the parties in a matter is a factor to be considered in determination of instruction fees, it is never the sole determining factor in petitions filed under the constitution. The taxing master in determining the fees payable has to look at the complexity of the issues involved, their novelty as well, the time expended by the parties on the matter, the level of research undertaken and the volume of documentation involved, among others.***
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> ***I have perused the record in Nairobi High Court Petition 410 of 2012. The documents involved were fairly moderate. The matter though involving several foreign parties did not at all raise complex issues as would warrant the fees charged by the applicant herein. Basically, the main issue for determination was enforcement of a debt owed."***

15. The taxing master, after taking into account the above factors, assessed the instructions fees in the matter at Kshs 200,000/= as instruction fees. After raising the figure by one half in accordance with the scale for advocate/client fees, to bring the total instructions fees to Kshs *300,000/=, the Court taxed the total bill at Kshs 431,256/=*

16. Taking into account the reasoning of the taxing master which I have set out above at some length, particularly bearing in mind the matters he took into account in arriving at his decision, I am unable to find any error in principle in arriving at the amount of Kshs 200,000 as the instructions fees in the matter. He was alive to the fact that the matter in respect of which the Bill of Costs related was a constitutional petition alleging violation of the petitioners' rights by a decision and orders made in Malindi HCCC No. 118 of 2009. He had perused the Court record in Petition No. 410 of 2012, and in light thereof, the Deputy Registrar clearly articulated his reasons for arriving at the sum that he awarded, and no error of law or fact has been demonstrated. There is therefore no basis for interfering with the exercise of discretion by the taxing master in Misc. Application No. 769 of 2013.

17. I have considered the contention by the respondents that the taxing master erred in finding that the respondents had filed only an affidavit in reply and no other documentation. I have considered the undated submissions filed in Court on 9th September 2013. The taxing master made a finding that there were no documentations, and that there was also no appearance by the respondents for the taxation. With respect to the submissions, aside from the submissions on the law which are echoed in the taxing master's ruling, the rest of the submissions echo the 2nd respondent's averments in his affidavit which the taxing master considered and discounted. I am not satisfied therefore that any prejudice was suffered by the respondents that would justify referring this matter back to the taxing master.

Misc. Application No. 770 of 2013

18. With regard to Misc. 770 0f 2013, the applicant complains that he is dissatisfied with the ruling delivered by the taxing master on 24th April 2014. His complaint is that the advocate-client Bill of Costs was stated in the said ruling to be with respect to legal services rendered in **Nairobi High Court Petition No. 437 of 2012** whereas the instructions were to defend the respondent against encroachment upon their property worth Kshs 600,000,000.

19. The applicant is aggrieved by the ruling of the taxing master with respect to item 1, the instructions fees. He complains that the value of the subject matter was Kshs 600,000,000, but that the taxing master became speculative when he determined the instructions fees at Kshs 50,000 without indicating the basis on which he arrived at this figure. He asks the Court to interfere with

the decision of the taxing master and set it aside with respect to item 1.

20. On the respondent's cross-reference dated 6th June 2014, the applicant submits that the respondent did not file any responses to the bill of costs in Misc. Appl. No. 770 of 2013. He terms the affidavit sworn by Mr. Anthony Ndegwa Kimani as untruthful, and submits that it does not annex a single document to support the deponent's averments. He also submits that the deponent is not truthful as the Court in Malindi has already given a decision in the matter before it and had found that no retainer had been paid to the applicant.

21. The question that this Court is required to determine is whether the application/appeal or the cross reference have merit and warrant the interference of the Court in the decision of the taxing master.

22. The circumstances under which the Court will interfere with the decision of the taxing master are fairly well settled. In the case of **Premchand Raichand Limited and Another -vs- Quarry Services of East Africa Limited and Another (1972) EA 162,** the Court noted that:

> ***"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other."***

23. The Court in the above case enunciated the following as the principles to be considered in determining whether or not to interfere with the decision of a taxing master:

a. ***That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,***

b. ***that a successful litigant ought to be fairly reimbursed for the cost he has had to incur,***

c. ***that the general level of remuneration of Advocates must be such as to attract recruits to the profession and***

d. ***so far as practicable there should be consistency in the award made and***

> ***(e) The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party."***

24. In the case of **Registered Trustees of the Cashewnut Industry Development Fund -vs- Cashewnut Board of Tanzania Civil Appeal No. 18 of 2001**, the Court reaffirmed the position in **Premchand** case when it stated:

> ***"I should start by saying that I am gratified by the fact that both learned counsel are agreed as to the key guiding principles on taxation of costs. All the cases referred to in one way or another pronounce the same. And, in my considered view the Premchand case aptly pronounces them. They include:- the "Court owes a duty to the general public to see that costs are not allowed to rise to such a level as to deprive of access to Courts all but the worthy?; "a successful litigant ought to be fairly reimbursed for costs he has had to incur?; "the general level of the remuneration… must be such as to attract worthy recruits to… the profession?; "there must, so far as is practicable, be consistency in the awards made, both to do justice between one person and another and so that a person contemplating litigation can be advised by his advocate very approximately what, for the kind of a case contemplated, is likely to be his potential liability for costs?;the taxation of costs not being a mathematical exercise but entirely a***

matter of opinion, the Court will not interfere with the award merely because it thinks the award somewhat too high or too low: it will interfere if the award is so high or so low as to amount to an injustice to one party or another; in practical terms, apart from a small allowance to the appellant for the advice and undertaking of the appeal, there is no deference between fees paid to Appellant and Respondent. A fall in value of money, in comparable cases, may also be a factor to be considered."

25. In the present case, the applicant challenges the fees awarded by the Deputy Registrar of **Kshs 134, 055/=** on the basis that the taxing master failed to indicate the Schedule of the Advocates (Remuneration) Order that he applied, and that the amount is manifestly low.

26. I will deal first with the cross-reference which is to the effect that the taxing master erred by proceeding on the basis that the applicant's Bill of Costs was unopposed. I have considered the taxing master's ruling dated 24th April 2014. I note that the taxing master addressed his mind to the documents on record as follows:

> "*Apart from this notice of appointment, the court record does not show me that the respondent ever filed any other document in this matter. There is however an unfiled affidavit by the applicant sworn on the 12th September, 2013 which purports to respond to a Replying Affidavit allegedly sworn by the 2nd respondent on the 30th August, 2013, which Affidavit is not on the court record. The Applicant also filed Written Submissions on the 13th September 2013. I will thus proceed with the taxation on the premise that the application herein was unopposed."*

27. As I have observed with respect to Misc. 769 of 2013, I am not satisfied that the findings of the taxing master that the respondents had failed to file either submissions or an affidavit were erroneous, caused any prejudice to the respondent or would justify the remitting of the matter to the taxing master. The arguments by the respondent in both matters are the same, revolving around the retainer and the various cases in Malindi and Nairobi, which the taxing master considered and dismissed as unmeritonus in his ruling.

28. With regard to the applicant's bill of costs, the taxing master expressed himself as follows:

> ***"The applicant herein has cited complexity of the matter, the research involved and the time spent on the matter as the justification for the sum charged as instruction fees herein. The issues involved in this matter, which oscillated around the determination as to whether the petitioner's rights were under threat of being infringed or not cannot be held to be as complex and/or novel as to warrant a sum of Kshs 1,000,000/= as instruction fees. To state the least, they were in fact straight forward issues for determination as to whether the rights were under threat of infringement or not. The court record in file number 417 of 2012 does not show that voluminous documents were involved in the matter. The applicant herein ceased from acting from the respondents before the conclusion of the case and cannot be said to have expended much time and research on the matter as to attract a figure as is being claimed on instruction fees. Having considered all these, I do arrive at the conclusion that an amount of Kshs 50,000/= (fifty thousand) would be sufficient as instruction fees herein."***

29. The taxing master thus addressed his mind to the factors and principles that he ought to consider in arriving at a determination of the fees in respect of the matter, among them the complexity of the matter and the time expended on preparation of documentation and research, and came to the conclusion that the matter was not complex nor did the applicant spend much time on preparation of documents or research. In my view therefore, he cannot be faulted for the decision he arrived at on this point.

30. The applicant argues that the taxing master erred by not indicating the schedule of the Advocates (Remuneration) Order that he utilized to arrive at the amount of Kshs 50,000 as the instructions fees. The applicant has relied on the decisions in **Joreth Limited -vs- Kigano and Associates (2002) 1 EA 92 at 99-100** in support of its assertion as to what constitutes the subject matter in any case. It is his contention that the taxing master became speculative and determined instruction fees at **Kshs 50,000/=** without stating the basis upon which he arrived at the figure; and that the taxing master should have avoided speculation. In that regard, it relies on the decision in **F.M Mulwa Advocates -vs- Patrick Mutheke Ndeti (2006) eKLR.**

31. Is there a requirement that the taxing master should have indicated the schedule on which he assessed the applicant's instructions fees? The taxing master is no doubt an officer of great experience in this field, and doubtless well-versed with taxing requirements. He is also correct in his observation that the matter involved prayers for reliefs sought under the bill of rights of the Kenya Constitution, and in his conclusion that ***"The issues involved in this matter, which oscillated around the determination as to whether the petitioner's rights were under threat of being infringed or not cannot be held to be as complex and/or novel as to warrant a sum of Kshs 1,000,000/= as instruction fees.***"

32. That being the case, referring the matter back to the taxing master will not achieve much. As the court observed in its ruling in **Petition No. 224 of 2010 Emange Ne-Semata Investments Limited -vs- The Attorney General & 4 Others:**

> [20]….This was a purely public law issue, the instructions fees in respect of which fall for determination on the basis of the principles enunciated by Ojwang J (as he then was) in **Republic -vs Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W. Njuguna & 6 Others** (supra) where the learned Judge observed as follows:
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> ***'It is noteworthy that Counsel for the Respondents herein invoked many authorities from private-law claims sounding in damages and entailing pecuniary awards. Such claims do not, in my opinion, fall in the same class as public-law claims such as those in judicial review, in constitutional applications, in public electoral matters, etc. Such matters are in a class of their own, and the instructions fees allowable in respect of them should not, in principle, be extrapolated from the practices obtaining in the private law domain which may involve business claims and profit calculations.'***

33. It is I believe fairly settled now that taxation of bills of costs arising out of public law matters such as applications for prerogative orders and petitions alleging violation of constitutional rights falls under Schedule VI(1) (j). Having followed the correct principles in the taxation, the taxing master ought to have indicated the schedule he based the fees on. That failure, however, is not in my view, sufficient to justify interfering with his discretion in the matter.

34. In the circumstances, both the application and respondents' cross-reference are dismissed. Each party shall bear its own costs.

Dated, Delivered and Signed at Nairobi this 12th day of March 2015

MUMBI NGUGI

JUDGE

Mr Kenyariri instructed by the firm of Kenyariri & Associates Advocates for the applicant/petitioner

Mr Ndegwa instructed by the firm of Ndegwa Kiarie & Co. Advocates for the respondents