REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NUMBER 100 OF 2013

UFUNDI CO-OPERATIVE SAVINGS AND CREDIT SOCIETY.... APPLICANT/CLIENT

VERSUS

NJERI ONYANGO & COMPANY ADVOCATES.....RESPONDENT/ADVOCATE

R U L I N G

The application before the court is the Notice of Motion dated 17th July, 2014 seeking that the decision of the Taxing Master dated 17th May, 2013 on the Taxation on the Bill of Costs dated 8th February, 2013, be set aside. The main ground upon which the application is based appears to be that the Taxing Master erred in law and fact in awarding the Respondent a sum of Ksh.14,806,890.80 out of the Bill of Taxation.

The Applicant claims that the Taxing Master was not entitled to allow valuation of the property the subject matter of the disputes. He also argued that the dispute was before a subordinate tribunal and the High Court scale fees applied were accordingly wrong. He further argued that the claims before the court were for injunctive and declaratory orders and not a commercial claim which would require the valuation of the subject matter. Finally, the Applicant argued that the Taxing Master in taking into account and order valuation of the property in dispute, took account of matters which were extraneous.

The Applicant in his argument before this court conceded however, that he did not serve the required notice of objection to taxation within 14 days as required by the law but argued that the failure was merely technical and should be ignored for the sake of rendering substantive justice since the Notice was, in any case, cured by an enlargment of time by this court.

The Applicant further conceded that in the objection notice or earlier he had not demanded of the Taxing Master the reasons for the Taxation Ruling in respect of which he would then file a reference to the Judge in Chambers.

Thirdly, the Applicant conceded that this application by Notice of Motion, was not the method prescribed by the relevant law to challenge a taxation to the Judge in Chambers. However, the applicant again argued that the court should ignore the method used and proceed to listen to the really dispute before the court which effectively, was that the Taxing Master in taxing the instructions fees at the figure cited above, erred in principle and the court should set it aside. He said the correct figure should be Ksh.1,500,000/-. The Applicant urged that the Taxing Master should have considered that granting the instructions fees allowable to the Respondent where three advocates had been instructed, was based on wrong principle in law and amounted to a punitive approach against the Applicant herein.

The Respondent opposed. She stated that: -

i. The application was incompetent for being made by way of Notice of Motion instead of by Chambers Summons.
ii. That the above is a requirement of a Statute-and the Advocates Remuneration Act and not Civil Procedure Rules and that the procedure provided is substantive and not merely procedural so that failure to adopt the same is fatal.
iii. That the Applicant failed to give notice required to the Taxing Master, and that if given, it was invalid for being out of time.
iv. That unless the applicant sought and gave reasons for objection he would not have a reason to appeal to the Judge in Chambers.
v. That in this case there was no appeal or reference to the Judge but a mere application by Notice of Motion although finally heard by a Judge.
vi. That even on merit, the court can only act to correct an error on the basis of principle misapplied by the lower tribunal.
vii. That the Ksh.14,000,000/- instructions fees taxed was not in error but in accordance with the consented value of the subject matter, a valuation of which the Taxing Master had power to order for under the Taxing Rules to avail the value of the Ufundi Plaza's whose ownership was the basis of the suit.
viii. That, the issue about the right Schedule under which the Taxation should taken place was not an issue before the Taxing Master and should not be raised so belatedly before the Judge in Chambers.

I have carefully perused the records and the arguments before the court.

The Procedure by an aggrieved party to taxation is provided for by the Advocates Remuneration Order Rule 11 and is specific. A party aggrieved must write to the Taxing Master within 14 days of the Ruling of Taxation, a Notice of Objection specifying the items in the Bill of Taxation in respect of which he is aggrieved of and requesting the Taxing master to give reasons for allowing them as shown in the Ruling.

It is not denied that the Applicant failed to do so until it was out of time. It later rightly sought an extension of time to serve the Notice of Objection and the court (Waweru, J) granted the same with the following words: -

> "***The client shall file and serve notice of objection to the taxation within 14 days of delivery of this Ruling."***

The above ruling was delivered on 4th July, 2014. Sadly, despite the above favourable discretion, and the clear instruction of the Ruling, the applicant failed to comply with the court direction and with the legal requirement to serve the Notice to the Taxing Master, which had been the whole and basic purpose of the application aforecited. The Applicant, instead went ahead to file this general application by Notice of Motion instead of filing a reference to the Judge in Chambers using a Chamber Summons.

It is my view and finding, that when the Applicant filed this application, he had not by Notice, made any objection to any taxed items in the Bill of Taxation which had been allowed in the Ruling. The Notice which it served with the application did not require the Taxing Officer to give reasons for allowing any specific item in the Bill. The Notice was, therefore, in nature and forms not the Notice of Objection envisaged under Rule 11 (1) (2) of the Advocates Remuneration Order.

The Applicant, if I understand it, agrees with the above conclusions but prays that the court ignores the format of the application and Notice used in view of Article 159 of the Constitution which urges this court to ignore technicalities and try to look at the substance of the actual issues.

The conclusions I however reach are that the Applicant so misdirected itself that

a. It failed to serve the proper objection Notice to the Taxing Master in time.
b. It failed to do so for the second time after being granted extension of time by court.

c. It failed to file a proper reference to the Judge in Chambers but instead filed in court a general application by Notice of Motion instead of filing a Chamber Summons.

In **Kenya Airport Authority Vs Queens Insurance Agency**, **NRB HCCC No. 1430 of 2000 (unreported)** the Court found that the Applicant: -

i. Had not given notice in writing to the Taxing Officer of the items in the Bill of Taxation which he objected to.
ii. Had not sought and/or obtained record by the Taxing Officer of the reasons of the latter's decision on the complained of items.
iii. Had not waited for nor received the reasons for the taxing Officer's ruling before going ahead to file its application.
iv. Had accordingly not exhausted the mandatory provisions of the Advocates Remuneration Order Rule 11.

The court went ahead to find that the application before it was incompetent and was only good enough for dismissal.

The application before the court is not any different. The Applicant even after being indulged by the court to do so, failed to file the required Notice of Objection to the Taxing Officer's Ruling. It failed to seek the reasons for the said ruling. It failed to file the envisaged application of reference of the Taxing Officer's ruling to the Judge in Chamber. Indeed, in this case, it can hardly be said that there was a reference to the Judge in Chambers as envisaged under the relevant Order, Rule 11 aforecited. I, therefore, would have no hesitation to find that this application is incompetent both in form and substance.

The Applicant argued that this court should ignore the Applicant's failure to adopt the statutory procedures provided by the Advocates Remuneration Order in making a reference to the Judge in Chambers. It quoted, inter alia, Article 159 (2) of the Constitution which urges the Tribunals to apply substantive justice instead of being dictated by procedural requirement. However, in my view and finding, the matter before the court must first and foremost be properly before the court. Rule 11 of the Advocates Remuneration Order mandatorily requires that before a reference is made to the Judge in Chambers, certain procedures must be followed. If a party deliberately or recklessly fails to comply with the procedures mandatorily required to be followed, he/it cannot be heard to argue that Article 159(2) of the Constitution protects such an offender. Indeed such a party cannot argue that it is properly before the court and seeks protection under the said Article 159(2). It would be stretching the principle too far for the court to ignore the statutory mandatory provisions of Rule 11 of the Remuneration order to attempt to satisfy Article 159 (2), especially to try and assist an indolent party such as the Applicant who deliberately and/or recklessly failed to comply with the it even after being indulged by the court that extended the period to comply. I get strong support in the case of **Republic Vs The Land Disputes Tribunal**, **Mukurweni, Misc. Application No. 405** where the court stated in relation to Article 159 (2) thus: -

> ***"In my view Article 159(2) of the Constitution is meant to ensure that justice is done to the parties in cases where the court is properly seized of the matter without locking out the parties for failure to comply with matters of procedure.***
>
> ***Where, however, the matter is not before the court in that a party has failed to bring himself within the circumstances which clothe the court with powers to grant him the remedies sought, it would be stretching the provisions of Article 159 (2) of the Constitution too far if the court were to ignore all statutory provisions in order to accommodate a party who without any justifiable reason failed to adhere the provisions of the law."***

The Applicant further argued that the Taxing Officer should have taxed the Bill of Taxation under Schedule (vii) applicable in the subordinate court and not schedule (v) applicable in the High Court. I

have carefully perused the record of taxation. There is no indication that the Applicant, who attended the taxation, raised this issue before the Taxing officer to enable the issue to be canvassed by both parties and a decision made on merit. It is the view of the court and its finding therefore, that it is too late for the Applicant to raise that issue even if it might have validity. In **Kenneth Kiplangat T/a Kiplagat & Associates Vs National Housing Corporation (2005) eKLR** the court was of the view that where the applicant raised no objection to an issue before the Taxing Officer, he is estopped from raising such objection before the Judge in Chambers. I entirely agree and hold the same in this case. The same was held in **Moronge & Co. Advocates Vs Kenya Airport Authority** in **Civil Appeal No. 262 of 2012**.

The Applicant in general sought that the court (Judge in Chambers) interferes and reverses that Taxing Officers finding in respect to the item of instructions fees. It is trite law however, that the Appellate tribunal, which the Judge in Chambers in respect of taxation Ruling is, will not generally interfere with an exercise of discretion of the Taxing officer unless the latter's decision: -

i. Was in error of principle or
ii. The sum allowed is so high or excessive or so low that it clearly is unreasonable and will have been contrary to the existing principle.

In this case, the Applicant did not argue that the Taxing Officer used wrong figure of the value of the subject matter or that he allowed a figure several times the minimum allowed in the schedule. The Applicants; argument was that the figure appears just too large.

As stated in **Arthur** Vs **Nyeri Electricity Undertaking, (1961) EA 497**" –

> ***"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 interfere only exceptional cases."***

In my view the Applicant did not establish that the Taxing Officer erred in principle, to warrant interference of the Judge in respect to the figure of Ksh.14,806,890/60, itself being merely quantum, rather than a result of wrong exercise of discretion. The court notes that the figure arose out of a valuation filed by the consent of among others, the Applicant's counsel. The court further notes and follows the decision of the Court of Appeal in **Joreth Limited Vs Kigano and Associates (2002) eKLR** in which that court sanctioned the use of a Valuation Report where the value of the subject property had not been disclosed in the pleadings.

There was also the Applicant's argument that there were two other Advocates who represented the applicant and who also sought instructions fees, thus providing a ground for reduction of such fees to the Respondent. It is my understanding that such a view may be considered where the advocates act simultaneously which is not the case here. It was upon the Applicant in such a case to negotiate such fees before instructing the 2nd or subsequent advocates. However, the Taxing Officer will grant fees in his discretion taking into account the particular circumstances of the case. However, an advocate who is instructed by a party, is entitled to full instructions fees unless there is an understanding otherwise for lawful reasons. In this case no such agreement exists and I find no reason to reduce the instructions fees allowed by the Taxing Master on the reason that Respondent was only among other Advocates who acted.

Taking all the facts, reasons and circumstances discussed above, I find no merit in this application which I hereby dismiss with costs. Orders accordingly.

Dated and delivered at Nairobi this 7th day of July, 2015.

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D A ONYANCHA

JUDGE