



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MISC APP NO. 3 OF 2019**

**IN THE MATTER OF: THE ADVOCATES ACT CAP 16 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE ADVOCATES REMUNERATION ORDER**

**AND**

**IN THE MATTER OF: A REFERENCE FROM THE DECISION OF THE TAXING OFFICER DELIVERED ON THE 3<sup>RD</sup> JANUARY 2019 WITH RESPECT TO THE DEFENDANT'S PARTY & PARTY BILL OF COSTS DATED 13<sup>TH</sup> SEPTEMBER 2017 IN ENVIRONMENT AND LAND COURT CASE NO 3 OF 2015**

**BETWEEN**

**AZZURI LIMITED.....PLAINTIFF**

**VERSUS**

**PINK PROPERTIES LIMITED.....DEFENDANT**

**AND**

**THE ATTORNEY GENERAL.....INTENDED DEFENDANT/APPLICANT**

**RULING**

1. By the Notice of Motion application dated 1<sup>st</sup> February 2018 as filed herein on 1<sup>st</sup> February 2019, Azzuri Ltd (the Applicant) prays for orders: -

*2. That the Decision of the Taxing Officer (Hon Wandia, SRM) contained in the Ruling dated 3<sup>rd</sup> January 2019 taxing the Respondent's Party & Party Bill of costs dated 13<sup>th</sup> September 2017 at Kshs 2,811,408/- be varied or set aside.*

*3. That this Honourable Court do order that the Respondent's Party & Party Bill of Costs dated 13<sup>th</sup> September 2017 be placed before another Taxing Officer (for) fresh taxation.*

2. The Motion which is supported by an affidavit sworn by Kelvin Muchiri Advocate for the Applicant is premised on the grounds that:

i) The Taxing Officer applied the wrong principles in taxing instructions fees Item No. 1 of the Bill at Kshs 1,600,000/- for litigation brought majorly in the public interest.

ii) The Taxing Officer applied the wrong principles in taxing the instructions fees at grossly more than what is chargeable under the Advocates Remuneration Order;

iii) The Taxing Officer's decision is devoid of an outline, factual issues, applicable law and reasoning all of which are principles that must abide any Court Ruling/Judgment and by Law, Order 21 Rule 4 & 5 of the Civil Procedure Rules; and

**iv) The Taxing Master's decision is manifestly wrong.**

3. That application is however opposed. By a Notice of Preliminary Objection dated and filed herein on 24<sup>th</sup> May 2019, Pink Properties Ltd (the Respondent) objects to the application and urges that it be struck out on the basis that the same is fatally defective for failure to comply with the mandatory provisions of Rule 11 of the Advocates (Remuneration) Order.

4. I have perused and considered the application and the objection raised thereto. I have equally perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

5. 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) .....

4) .....

6. According to the Respondent, the Applicant was obliged by this provision where he intended to challenge the Ruling on taxation to file a notice of his objection within a period of 14 days where he was convinced that the taxing officer did not provide reasons in the Ruling in regard to how the Bill was taxed. Given that the Ruling on the taxation was done on 3<sup>rd</sup> January 2019, the Respondent contends that the last day for such a notice to be given was 18<sup>th</sup> January 2019 and that the Applicant failed to file a compliant notice within such period.

7. As it were, neither party herein was clear as to when the Party and Party Bill of Costs dated 13<sup>th</sup> September 2017 was placed before the Taxing Officer for taxation. Neither was it clear to me if either party was present in Court when the Ruling was delivered on 3<sup>rd</sup> January 2019. From a Notice of Taxation on record, it would appear that the matter was placed before the Honourable Wandia, DR for taxation on 26<sup>th</sup> February 2017, a date which appears improbable given the date of the Bill itself.

8. Be that as it may, on the said 3<sup>rd</sup> January 2019, the Honourable Deputy Registrar delivered herself in a short hand-written Ruling as follows: -

**"Ruling**

***The Ruling arises from the Defendants Party and Party bill of costs dated 13<sup>th</sup> September 2017. Though the same was opposed, I have looked at it and I find it reasonably drawn. I will allow it at Kshs 2,811.408/-***

***Delivered on the 3<sup>rd</sup> day of January 2019."***

9. Subsequently and by a letter dated 7<sup>th</sup> January 2019 as filed herein on 9<sup>th</sup> January 2019, the Applicant wrote to the Taxing Master as follows: -

**"RE; ELC NO 3 OF 2015**

**Azzuri Ltd –vs- Pink Properties Ltd**

***We shall be grateful if you will kindly let us have certified copies of the Ruling delivered on 3<sup>rd</sup> January 2019. We intend to file for (a) reference before the High Court. We undertake to pay all your charges."***

10. By another letter dated 28<sup>th</sup> January 2019 and filed contemporaneously with the present application on 1<sup>st</sup> February 2019, the Applicant addressed the Taxing Master as follows: -

**RE: ELC NO. 3 OF 2015**

**Azzuri Ltd –vs- Pink Properties Ltd**

***Please refer to the decision by the Taxing Master contained in the Ruling dated 3<sup>rd</sup> January 2019 with respect to the Respondent's Party & Party Bill of Costs dated 13<sup>th</sup> September 2018.***

**Kindly provide us with reasons for the decisions.”**

11. According to the Respondent both letters could not be contrived to be the notice required under Rule 11 of the Advocates Remuneration Order as the first letter only sought the certified proceedings while the second one was filed together with the Reference outside the 14 days requisite period.

12. I have looked at the first letter filed some four days after the impugned Ruling. While the format thereof certainly desires improvement it is evident to me that the same clearly gives the intention of the Applicant in writing the same to be the fact that they intended to file a reference to this court. The purpose of a notice in my view would be to communicate certain information to another person and in the absence of a prescribed format in law I am unable to fault the format chosen by the Applicant and reject the Respondent’s objection.

13. From a perusal of the impugned Ruling, the Taxing Master had already stated that she found the Bill drawn in a reasonable manner.

14. As the Honourable Justice G.V. Odunga stated **in National Oil Corporation Ltd –vs- Real Energy Ltd & Another (2016) eKLR: -**

*“... There is no magic in requiring the Taxing Master to furnish reasons before making a reference. Where reasons are contained in the decision a party ought not to seek the same simply because it is fashionable to do so. Accordingly, nothing turns on the issue that the applicant did not seek the reasons for the decision before filing the reference.”*

15. That being the case, I must now turn my attention to the reference before me. As the Court of Appeal stated in **Kipkorir, Titoo & Kiara Advocates –vs- Deposit Protection Fund Board (2005) 1 KLR 528: -**

*“On reference to a Judge from a taxation by the taxing officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer erred in principle in assessing the costs....An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the Taxing Officer acted on erroneous principles or where the Taxing Officer has over emphasized the difficulties, importance and complexity of the suit....If the Taxing Officer fails to apply the formula for assessing instructions fees or costs specified in Schedule VI(1) that would be an error in principle..... If a Judge on reference finds that the Taxing Officer has committed an error of principle, the general practice is to remit the question of quantum for the decision of the Taxing Officer....The Judge has however a discretion to deal with the matter himself if the justice of the case so requires. 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.”*

16. From the material placed before me, the Applicant had in their submissions filed before the Taxing Officer strenuously objected as they do here to the demand for the sum of KShs 1,600,000/- as instruction fees. They had submitted that the said figures was grossly inflated, exaggerated and without foundation. It was their case that the suit was mainly a boundary dispute and that ownership of the respective parties’ parcels of land was never in doubt. It was accordingly their case that the Respondent herein was only entitled to a sum of KShs 75,000/- as instruction fees.

17. That being the case, one would have at the very least expected the Honourable Taxing Master to apply the formula provided for assessing instructions fees under the Remuneration Order to the matter before her before she could arrive at the decision that she found the entire Bill “reasonably drawn.”

18. I have looked at the Taxing Master’s one paragraph Ruling dated 3<sup>rd</sup> January 2019 and I am satisfied that the same was manifestly wrong and amounted to an error in principle. For that reason, I am satisfied that it is in the interest of justice that the same be varied and or set aside.

19. Accordingly, I find merit in the reference, set aside the orders of the Honourable Wandia DR dated 3<sup>rd</sup> January 2019 in its entirety and do hereby direct that the Respondent’s Party & Party Bill of Costs dated 13<sup>th</sup> September 2018 be placed before another Taxing Officer of this Court for fresh taxation.

20. The Applicant shall have the costs of the Motion.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of September, 2020.**

**J.O. OLOLA**

**JUDGE**