



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC.APPLICATION NO. 25 OF 2018**

**(FORMERLY MISC. CIVIL APPLICATION NO. 159 OF 2014)**

**(CONSOLIDATED WITH MISC. APPL. NOS. 115, 116, 117, 118, 119, 126,  
127, 128, 129, 130, 131, 132, 151, 152, 153, 154, 155, 156 AND 157 OF 2014)**

**KIOGORA MUTAI & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**JOSEPH KITHINJI GITONGA.....1<sup>ST</sup> RESPONDENT**

**NANCY KARUTA GITONGA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Background:**

At all material times, KIOGORA MUTAI & CO. ADVOCATES (hereinafter referred to only as “the applicant”) acted as advocates for JOSEPH KITHINJI GITONGA and NANCY KARUTA GITONGA (hereinafter referred to only as “the respondents”). The respondents had instructed the applicant to act for them in the sale of 19 apartments that were erected on a parcel of land known as L.R No. 2/167, Nairobi and in the incorporation of a limited liability company known as Lacasa Gardens Limited. After the applicant had rendered professional services to the respondents, a dispute arose between them over legal fees payable to the applicant. The applicant filed a total of 20 bills of cost for taxation as against the respondents.

The applicant filed a bill of cost for the services rendered in respect of each apartment and a separate bill of cost for incorporating the aforesaid limited liability company. The said bills of cost filed in; Misc. Appl. Nos. 115, 116, 117, 118, 119, 126, 127, 128, 129, 130, 131, 132, 151, 152, 153, 154, 155, 156, 157 and 159 of 2014 were consolidated with Misc. Appl. No. 159 of 2014 as the lead file. The consolidated bills of cost were taxed by the taxing officer, Hon. I.N.Barasa SDR. In a ruling delivered on her behalf by Hon. D.Orago DR on 22<sup>nd</sup> May, 2019, the said taxing officer taxed the 20 bills of cost as follows;

**MISC APPL. NO. 115 OF 2014-APARTMENT NO. A7.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 12,000,000/- and rejected the applicant’s contention that it acted for both the vendor and purchaser in the transaction and as such was entitled to charge for the services rendered to both. The taxing officer held that there was no evidence to support this claim. The taxing officer also rejected the fees that was claimed by the applicant for entering into negotiations with the Commissioner of Stamp Duty so that the transaction could be exempted from stamp duty. The taxing officer held that the applicant had not provided any evidence that it had incurred any expense in the course of the said negotiations. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1: Kshs. 150,000/-

Add 16% VAT Kshs. 24,000/-

Kshs. 174,000/-

Add disbursements Kshs. 600/-

Total Kshs. 174,600/-

**MISC APPL. NO. 116 OF 2014-APARTMENT NO. A8.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 13,000,000/-. The taxing officer rejected the applicant's contention that it acted for Lacasa Gardens Limited as vendor and the respondents as purchasers in the transaction and as such it was entitled to charge for the services rendered to both. The taxing officer held that there was no evidence to support this claim. The taxing officer also rejected the fees that was claimed by the applicant for entering into negotiations with the Commissioner of Stamp Duty so that the transaction could be exempted from stamp duty. The taxing officer held that the applicant had not provided any evidence that it had incurred any expense in the course of the said negotiations. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1: Kshs. 150,000/-

Add 16% VAT Kshs. 24,000/-

Kshs. 174,000/-

Add disbursements Kshs. 600/-

Total Kshs. 174,600/-

**MISC APPL. NO. 117 OF 2014-APARTMENT NO. A9.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 6,000,000/- and that the applicant acted for the respondents as vendors and the respondents' daughter, Anne Gitonga as purchaser in the transaction and as such the applicant was entitled to charge for the services rendered to both. The taxing officer held that her power was limited to assessing the costs payable and as such she could not award interest on costs that was sought by the applicant. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1: Kshs. 125,000/-

Add 16% VAT Kshs. 20,000/-

Kshs. 145,000/-

Add disbursements Kshs. 600/-

Total Kshs. 145,600/-

**MISC APPL. NO. 118 OF 2014-APARTMENT NO. A1.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 12,000,000/-. The taxing officer held further that her power was limited to assessing the costs payable and as such she could not award interest on costs that was sought by the applicant. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1: Kshs. 150,000/-

Add 16% VAT Kshs. 24,000/-

Kshs. 174,000/-

Add disbursements Kshs. 1,500/-

Total Kshs. 175,500/-

**MISC APPL. NO. 119 OF 2014-APARTMENT NO. B5.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 14,000,000/-. The taxing officer held further that her power was limited to assessing the costs payable and as such she could not award interest on costs that was sought by the applicant. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1: Kshs. 176,890/-

Add 16% VAT Kshs. 28,302.40/-

Kshs. 205,192.40/-

Add disbursements	<u>Kshs. 500/-</u>
Total	<u>Kshs. 205,692.40/-</u>

**MISC APPL. NO. 126 OF 2014-APARTMENT NO. B9.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 6,000,000/- and that the applicant acted for the respondents as vendors and the respondents' daughter, Ann Gitonga as purchaser in the transaction and as such the applicant was entitled to charge for the services rendered to both. The taxing officer held that her power was limited to assessing the costs payable and as such she could not determine the issue as to whether or not the respondents were misled by the applicant into transferring the apartment the subject of this bill of cost to their daughter Ann Gitonga thereby disentitling the applicant to the costs sought and whether the applicant was entitled to interest on costs. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1: Kshs. 125,000/-	
Add 16% VAT	<u>Kshs. 20,000/-</u>
	Kshs. 145,000/-
Add disbursements	<u>Kshs. 500/-</u>
Total	<u>Kshs. 145,500/-</u>

**MISC APPL. NO. 127 OF 2014-APARTMENT NO. B7.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 12,000,000/- and rejected the applicant's contention that he acted for both the vendor and purchaser in the transaction and as such was entitled to charge for the services rendered to both. The taxing officer held that there was no evidence to support this claim. The taxing officer also rejected the fees that was claimed by the applicant for entering into negotiations with the Commissioner of Stamp Duty so that the transaction could be exempted from stamp duty. The taxing officer held that the applicant had not provided any evidence that it had incurred any expense in the course of the said negotiations. The taxing officer held further that her power was limited to assessing the costs payable and as such she could not award interest on costs that was sought by the applicant. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1: Kshs. 150,000/-	
Add 16% VAT	<u>Kshs. 24,000/-</u>
	Kshs. 174,000/-
Add disbursements	<u>Kshs. 600/-</u>
Total	<u>Kshs. 174,600/-</u>

**MISC APPL. NO. 128 OF 2014-APARTMENT NO. A10.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 6,000,000/- and that the applicant acted for the respondents as vendors and the respondents' daughter, Ann Gitonga as purchaser in the transaction and as such the applicant was entitled to charge for the services rendered to both. The taxing officer held that her power was limited to assessing the costs payable and as such she could not determine whether the applicant was entitled to interest on costs that was sought by the applicant. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1: Kshs. 125,000/-	
Add 16% VAT	<u>Kshs. 20,000/-</u>
	Kshs. 145,000/-
Add disbursements	<u>Kshs. 500/-</u>
Total	<u>Kshs. 145,500/-</u>

**MISC APPL. NO. 129 OF 2014-APARTMENT NO. B10.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 12,000,000/- and that there was no evidence that applicant acted for the respondents as vendors and the respondents' daughter, Ann Gitonga as purchaser in the transaction to entitle the applicant to charge for the services rendered to both. The taxing officer held further that her power was limited to assessing the costs payable and as such she could not determine the issue as to whether or not the respondents were misled by the applicant into transferring the apartment the subject of this bill of cost to their daughter Ann Gitonga thereby disentitling the applicant to the costs sought and whether the applicant was entitled to interest on costs that was sought by the applicant. The taxing officer held further that the applicant was not entitled to costs for negotiating for Stamp Duty exemption. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1:	Kshs. 150,000/-
Add 16% VAT	<u>Kshs. 24,000/-</u>
	Kshs. 174,000/-
Add disbursements	<u>Kshs. 600/-</u>
Total	<u>Kshs. 174,600/-</u>

**MISC APPL. NO. 130 OF 2014-APARTMENT NO. B8.**

The taxing officer made a finding that the value of the apartment the subject of this bill of costs was Kshs. 12,000,000/-. The taxing officer rejected the applicant's contention that it acted for Lacasa Gardens Limited as vendor and the respondents as purchasers in the transaction and as such it was entitled to charge for the services rendered to both. The taxing officer held that there was no evidence to support this claim. The taxing officer also rejected the fees that was claimed by the applicant for entering into negotiations with the Commissioner of Stamp Duty so that the transaction could be exempted from stamp duty. The taxing officer held that the applicant had not provided evidence that it had incurred any expense in the course of the said negotiations. The taxing officer also rejected the claim for interest on the ground that her power was limited to assessing costs payable. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1:	Kshs. 150,000/-
Add 16% VAT	<u>Kshs. 24,000/-</u>
	Kshs. 174,000/-
Add disbursements	<u>Kshs. 600/-</u>
Total	<u>Kshs. 174,600/-</u>

**MISC APPL. NO. 131 OF 2014-APARTMENT NO. A2.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 12,000,000/-. The taxing officer rejected the applicant's contention that the value to be attached to the apartment was that which was assessed by the Government Valuer for the purposes of Stamp Duty which was Kshs. 13,000,000/-. The taxing officer also rejected the claim for interest on the ground that her power was limited to assessing costs payable. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1:	Kshs. 151,890/-
Add 16% VAT	<u>Kshs. 24,302.40/-</u>
	Kshs. 176,192.40/-
Add disbursements	<u>Kshs.600/-</u>
Total	<u>Kshs. 176,792.40/-</u>

**MISC APPL. NO. 132 OF 2014-APARTMENT NO. B1.**

The taxing officer accepted Kshs. 12,000,000/- as the value of the apartment the subject of this bill of cost. The taxing officer rejected the applicant's contention that it acted for both the vendor and the respondents as purchasers in the transaction and as such it was entitled to charge for the services rendered to both. The taxing officer held that there was no evidence to support this claim. The taxing officer also rejected the fees that was claimed by the applicant for entering into negotiations with the Commissioner of Stamp Duty so that the transaction could be exempted from stamp duty. The taxing officer held that the applicant had not provided evidence that it incurred any expense in the course of the said negotiations. The taxing officer also rejected the claim for interest on the ground that her power was limited to assessing costs payable. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1:	Kshs. 150,000/-
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Add 16% VAT	<u>Kshs. 24,000/-</u>
	Kshs. 174,000/-
Add disbursements	<u>Kshs. 600/-</u>
Total	<u>Kshs. 174,600/-</u>

**MISC APPL. NO. 151 OF 2014-APARTMENT NO. B4.**

The taxing officer accepted Kshs. 12,000,000/- as the value of the apartment the subject of this bill of cost. The taxing officer rejected the applicant's contention that it acted for both the vendor and the respondents as purchasers in the transaction and as such it was entitled to charge for the services rendered to both. The taxing officer held that there was no evidence to support this claim. The taxing officer also rejected the fees that was claimed by the applicant for entering into negotiations with the Commissioner of Stamp Duty so that the transaction could be exempted from stamp duty. The taxing officer held that the applicant had not provided evidence that it had incurred any expense in the course of the said negotiations. The taxing officer also rejected the claim for interest on the ground that her power was limited to assessing costs payable. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1:	Kshs. 150,000/-
Add 16% VAT	<u>Kshs. 24,000/-</u>
	Kshs. 174,000/-
Add disbursements	<u>Kshs. 600/-</u>
Total	<u>Kshs. 174,600/-</u>

**MISC APPL. NO. 152 OF 2014-APARTMENT NO. A5.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 12,000,000/-. The taxing officer rejected the applicant's contention that the value to be attached to the apartment was that which was assessed by the Government Valuer for the purposes of Stamp Duty which was Kshs. 13,000,000/-. The taxing officer also rejected the claim for interest on the ground that her power was limited to assessing costs payable. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1:	Kshs. 153,990/-
Add 16% VAT	<u>Kshs. 24,638.40/-</u>
	Kshs. 178,628.40/-
Add disbursements	<u>Kshs. 500/-</u>
Total	<u>Kshs. 179,128.40/-</u>

**MISC APPL. NO. 153 OF 2014-APARTMENT NO. A3.**

The taxing officer accepted Kshs. 13,350,000/- as the value of the apartment the subject of this bill of cost. The taxing officer declined to award interest on costs and taxed the bill as follows:

Total under Part A of Schedule 1:	Kshs. 170,865/-
Add 16% VAT	<u>Kshs. 27,338.40/-</u>
	Kshs. 198,203.40/-
Add disbursements	<u>Kshs. 600/-</u>
Total	<u>Kshs. 198,803.40/-</u>

**MISC APPL. NO. 154 OF 2014-APARTMENT NO. B3.**

The taxing officer made a finding that the value of the apartment the subject of this bill of cost was Kshs. 12,000,000/-. The taxing officer

rejected the applicant's contention that the value to be attached to the apartment was that which was assessed by the Government Valuer for the purposes of Stamp Duty which was Kshs. 13,000,000/-. The taxing officer also rejected the claim for interest on the ground that her power was limited to assessing costs payable. The taxing officer taxed the bill of cost as follows:

Total under Part A of Schedule 1:	Kshs. 151,890/-
Add 16% VAT	<u>Kshs. 24,302.40/-</u>
	Kshs. 176,192.40/-
Add disbursements	<u>Kshs. 1,500/-</u>
Total	<u>Kshs. 177,692.40/-</u>

**MISC APPL. NO. 155 OF 2014-APARTMENT NO. A6.**

The taxing officer accepted Kshs. 12,000,000/- as the value of the apartment the subject of this bill of cost. The taxing officer rejected the applicant's contention that it acted for both the vendor and the respondents as purchasers in the transaction and as such it was entitled to charge for the services rendered to both. The taxing officer held that there was no evidence to support this claim. The taxing officer also rejected the fees that was claimed by the applicant for entering into negotiations with the Commissioner of Stamp Duty so that the transaction could be exempted from stamp duty. The taxing officer held that the applicant had not provided evidence that it had incurred any expense in the course of the said negotiations. The taxing officer also rejected the claim for interest on the ground that her power was limited to assessing costs payable. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1:	Kshs. 150,000/-
Add 16% VAT	<u>Kshs. 24,000/-</u>
	Kshs. 174,000/-
Add disbursements	<u>Kshs. 600/-</u>
Total	<u>Kshs. 174,600/-</u>

**MISC APPL. NO. 156 OF 2014-APARTMENT NO. B6.**

The taxing officer accepted Kshs. 12,000,000/- as the value of the apartment the subject of this bill of cost. The taxing officer rejected the applicant's contention that he acted for both the vendor and the respondents as purchasers in the transaction and as such it was entitled to charge for the services rendered to both. The taxing officer held that there was no evidence to support this claim. The taxing officer also rejected the fees that was claimed by the applicant for entering into negotiations with the Commissioner of Stamp Duty so that the transaction could be exempted from stamp duty. The taxing officer held that the applicant had not provided evidence that it had incurred any expense in the course of the said negotiations. The taxing officer also rejected the claim for interest on the ground that her power was limited to assessing costs payable. The taxing officer taxed the bill as follows:

Total under Part A of Schedule 1:	Kshs. 150,000/-
Add 16% VAT	<u>Kshs. 24,000/-</u>
	Kshs. 174,000/-
Add disbursements	<u>Kshs. 600/-</u>
Total	<u>Kshs. 174,600/-</u>

**MISC APPL. NO. 157 OF 2014-APARTMENT NO. B2.**

The taxing officer accepted Kshs. 12,000,000/- as the value of the apartment the subject of this bill of cost. The taxing officer rejected the applicant's contention that it acted for both the vendor and the respondents as purchasers in the transaction and as such it was entitled to charge for the services rendered to both. The taxing officer held that there was no evidence to support this claim. The taxing officer also rejected the fees that was claimed by the applicant for entering into negotiations with the Commissioner of Stamp Duty so that the transaction could be exempted from stamp duty. The taxing officer held that the applicant had not provided evidence that it had incurred any expense in the course of the said negotiations. The taxing officer also rejected the claim for interest on the ground that her power was limited to assessing the costs payable. The taxing officer taxed the bill of costs as follows:

Total under Part A of Schedule 1:	Kshs. 150,000/-
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Add 16% VAT	<u>Kshs. 24,000/-</u>
	Kshs. 174,000/-
Add disbursements	<u>Kshs. 600/-</u>
Total	<u>Kshs. 174,600/-</u>

**MISC APPL. NO. 25 OF 2018(FORMERLY NO. 159 OF 2014)-APARTMENT NO. A6.**

The taxing officer found the sum of Kshs. 50,000/- that was claimed by the applicant as instruction fees for incorporating Lacasa Gardens Limited to be in accordance with the scale. The taxing officer rejected the respondents' contention that the applicant did not complete the transaction. The taxing officer however rejected the applicant's claim for interest on the ground that her power was limited to assessing costs payable. The taxing officer taxed the bill as follows:

Total under Part A of Schedule III: Kshs. 51,260/-	
Add 16% VAT	<u>Kshs. 8,201.60/-</u>
	Kshs. 59,461.60/-
Add disbursements	<u>Kshs. 6,410/-</u>
Total	<u>Kshs. 65,871.60/-</u>

The consolidated bills of cost were taxed at a total of Kshs. 3,362,080.20.

**Reference to this court.**

The applicant and the respondents were both dissatisfied with the decision of the taxing officer and filed notices of objection to the same. The applicant filed its Notice of Objection to taxation dated 4<sup>th</sup> June, 2019 on 6<sup>th</sup> June, 2019 in which it took issue with taxation of item 1 in Misc. Application Nos. 127, 129, 130,131,132,154, 155,156 and 157 all of 2014 and the taxing officer's decision not to award interest on costs in all the bills of cost. In its reference brought by way of Chamber Summons dated 10<sup>th</sup> July, 2019, the applicant asked the court to; set aside the taxing officer's decision not to award interest on costs as provided for under paragraph 7 of the Advocates Remuneration Order, 2009; set aside the taxing officer's decision not to award the applicant instruction fees for acting for both the vendor and the purchaser; set aside the taxing officer's decision not to award the applicant stamp duty exemption negotiation fees, and make a determination on the issues raised or order re-taxation of the bills of cost by a different taxing officer in respect of the disputed items.

On their part, the respondents objected to the decision by the taxing officer on two grounds namely; that the taxing officer erred in awarding costs to the applicant in Misc. Applications No. 117 of 2014, No. 126 of 2014 and No. 129 of 2014 in respect of services that were rendered by the applicant without the permission of the respondents and that, the taxing officer erred in failing to take into account a sum of Kshs. 580,000/- that the respondents had paid to the applicant on account of fees and which ought to have been deducted from the final amount certified to be due to the applicant. In their Chambers Summons application dated 14<sup>th</sup> June, 2019, the respondents sought orders; that the decision of the taxing officer in respect of Misc. Applications No. 117 of 2014, No. 126 of 2014 and No. 129 of 2014 be set aside; that the sum of Kshs. 580,000/- already paid by the respondents to the applicant be deducted from the amount found due to the applicant or be taken into account and that in the alternative, the contested bills of cost be reviewed and taxed by the court or be remitted with appropriate directions to the taxing officer for reconsideration as the court deems fit.

**Analysis of the parties' respective cases and determination of the issues arising.**

The two applications (references) by the applicant and the respondents were heard together by way of written submissions. The applicant filed its submissions on 10<sup>th</sup> December, 2019 while the respondents filed their submissions on 12<sup>th</sup> November, 2019. I have considered the two applications together with the affidavits filed in support of and in opposition thereto. I have also considered the submissions by the advocates for the parties. I will consider the application by the respondents dated 14<sup>th</sup> June, 2019 first since it was the first in time. As I have mentioned earlier in this judgment, the respondents have in their reference faulted the taxing officer for awarding costs to the applicant for unauthorized services which were the subject of the bills of cost in Misc. Application Nos. 117 of 2014, 126 of 2014 and 129 of 2014. The respondents had also taken issue with the taxing officer's failure to deduct from the taxed costs a sum of Kshs. 580,000/- that the respondents claimed to have paid to the applicant on account of fees. On the alleged unauthorized services for which fees was claimed and awarded by the taxing officer, the respondents claimed that the applicant transferred Apartment Nos. A9, B9 and B10 which were the subject of bills of cost in Misc. Application Nos. 117 of 2014, 126 of 2014 and 129 of 2014 to the respondents' daughter Ann Gitonga without the respondents' permission. The respondents claimed in the alternative that, if at all they gave the applicant permission to effect such transfer, the same was given as a result of misrepresentation of the law by the applicant for which no fees could be charged by the applicant.

In its replying affidavit in response to the respondents' application, the applicant contended that the issue as to whether the respondents had given the applicant instructions in respect of the services that were the subject of the contentious bills of cost were the subject of other court proceedings and as such was not before the taxing officer for determination. The applicant contended that in any event, even if the taxing officer had jurisdiction to determine the issue, the respondents did not furnish any evidence showing that they were victims of the applicant's misrepresentation of the legal issues relating to the services in dispute. The applicant contended that the services were rendered with the

respondents' full knowledge and participation and as such it was dishonest for the respondents to claim that the same were carried out without their instructions.

On the second limb of the reference, the respondents contended that they had furnished the taxing officer with proof that they had paid to the applicant Kshs. 580,000/- on account of fees and as such the amount ought to have been deducted from the costs certified to be due to the applicant. In its replying affidavit, the applicant admitted having received Kshs. 580,000/- from the respondents. The applicant contended however that the amount was not received on account of legal fees but for Stamp Duty for some of the leases in respect of which Stamp Duty was payable. The applicant contended that since the said sum of Kshs. 580,000/- was not paid to it as legal fees and disbursements, the same was not deductible from the costs assessed to be due to it. The applicant contended further that even if the amount was paid to it on account of legal fees and disbursements, it was not the duty of the taxing officer to settle accounts between the parties. The applicant averred that in the event that the court found the said payment to be deductible from the costs payable to it, the amount to be deducted should be less by 25% which was retained by Kenya Revenue Authority.

I have considered the parties' rival arguments on the respondents' application. My view on the same is as follows: In Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd. [2014] eKLR, the court stated that:

**“The circumstances under which a judge of the High Court interferences with the taxing officer’s exercise of discretion are now well known. These principles are:**

**1. that the court cannot interfere with the taxing officer’s discretion on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle;**

**2. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;**

**3. if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;**

**4. it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”**

In the South African case of, Visser v Gubb 1981(3) SA 753 (C) 754H – 755 C that was cited with approval in the case of KTK Advocates v Baringo County Government (2017) eKLR, the court stated as follows:

**“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue.... The court must be of the view that the taxing officer was clearly wrong, i.e its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”**

It is on the foregoing principles that the respondents' application and the applicant's application that I will consider later falls for consideration. I have found no reason to fault the taxing officer's decision to award the applicant costs in respect of the services that were the subject of Misc. Application Nos. 117 of 2014, 126 of 2014 and 129 of 2014. The respondents' contention in my view was not that the applicant did not render the services that were the subject of the bills of cost that were filed in the foregoing applications. The respondents' contention was that the services were rendered but without authority and that if authority was given, such authority was given on the basis of negligent legal advice that was given by the applicant to the respondents. I am in agreement with the applicant that these are not issues that could be determined by the Deputy Registrar on a taxation. The taxing officer had no power to determine whether the applicant gave negligent legal advice to the respondents or not and the effect of such advice on the right of the applicant to legal fees for services rendered. In my view, those issues should have been raised in separate proceedings. It is my finding therefore that the taxing officer did not fall into error in awarding costs to the applicant in respect of Misc. Application Nos. 117 of 2014, 126 of 2014 and 129 of 2014.

On the issue of deduction of the sum of Kshs. 580,000/- from the fees certified as due to the applicant as costs, my view is that if the payment of that amount to the applicant was not disputed, the same should have been deducted from the costs that was assessed as due to the applicant. From the evidence on record, the applicant admitted having received the said sum of Kshs. 580,000/- from the respondents. The applicant contended however that the said sum of Kshs. 580,000/- was not received on account of legal fees or disbursements but on account of Stamp Duty. I am of the view that due to the nature of the transactions in which the applicant was instructed to act for the respondents, any payment that was made to the applicant by the respondents on account of Stamp Duty was for disbursement and the applicant had an obligation to account to the respondents for the same. There is no evidence that the applicant accounted for this payment in its bills of cost. The applicant had contended that 25% of this amount was to be retained by Kenya Revenue Authority and that if there was a refund to be made to the respondents, it should be less that amount. I am of the view that there is no basis for the applicant's refusal to have the sum of Kshs. 580,000/- that was paid to it and which it had not accounted for deducted from the costs due to it. If there is any amount that was retained by Kenya Revenue Authority, the same could be deducted from the said sum of Kshs. 580,000/-. The applicant did not however place any evidence before the taxing officer or this court showing that pursuant to the provisions of the Stamp Duty Act that it relied on, Kenya Revenue Authority had retained or had made a decision to retain 25% of the said sum of Kshs. 580,000/-. I am in agreement with the

applicant that it is not the duty of the taxing officer to settle accounts. However, that is only applicable where there is a dispute as to accounts between the parties. In this case, there was no dispute that the sum of Kshs. 580,000/- was paid to the applicant by the respondents on account of disbursements and that the respondents had not accounted for the same in its bills of cost. In the circumstances, the taxing officer should have made an order that the said amount be deducted from the costs that were assessed to be due to the applicant. Due to the foregoing, the respondents' application succeeds only on this issue. The court will make final orders at the end of the judgement.

I will now consider the applicant's Chamber Summons application dated 10<sup>th</sup> July, 2019. As I mentioned earlier, the applicant challenged the decision of the taxing officer on two grounds namely; that the taxing officer erred in disallowing the applicant's claim for interest on costs; that the taxing officer erred in disallowing the applicant's claim for instruction fees for acting for both the vendor and purchaser in Misc. Application Nos. 127, 129,130,131,132,154,155, 156 and 157 all of 2014 and that, the taxing officer erred in disallowing the applicant's claim for fees for negotiating stamp duty exemption for the respondents. In their affidavit in reply to the applicant's application sworn by the 1<sup>st</sup> respondent, the respondents contended that the applicant's application was incompetent for having been filed outside the 14 days period prescribed under the Advocates Remuneration Order. The respondents contended further that the taxing officer was correct in her finding that the applicant was not entitled to charge fees for acting for vendor and purchaser without evidence that it rendered services to both. The respondents also supported the decision of the taxing officer on the issue of interest.

On the issue regarding the competence of the applicant's application, it is not disputed that the applicant filed a Notice of Objection to taxation under paragraph 11(1) of the Advocates Remuneration Order on 6<sup>th</sup> June, 2019. Under paragraph 11(2) of the Advocates Remuneration Order(ARO), the applicant was required to file its reference to this court within 14 days from the date when the taxing officer supplied it with the reasons for taxation on the items the subject of the objection. It is not clear from the record as to whether the taxing officer responded to the applicant's Notice of Objection and request for reasons. It is normally the practice where the taxing officer delivers a detailed ruling like in this case for him to inform the parties requesting for reasons that the same are contained in the ruling and such response would suffice for the purposes of the running of time under paragraph 11(2) of the ARO. In this case, there is no evidence that the applicant was informed by the taxing officer that the reasons for her decision were contained in the ruling. The applicant contended that since it was not furnished with the reasons for the taxation, the time within which the applicant was to file a reference remained open and as such its reference that was filed on 17<sup>th</sup> July, 2019 was filed within time.

I am in agreement with the contention by the applicant on this issue. Under paragraph 11(2) of the ARO, time within which a reference is to be filed starts running from the time the taxing officer furnishes the objector to the taxation with the reasons for taxation on the disputed items. Where no such reasons are given and the objector is not informed that the reasons are contained in the ruling, the time for filing a reference does not start running. However even without such reasons or communication from the taxing officer that the reasons are contained in the ruling, the reference must be filed within a reasonable time if the objector has been furnished with a copy of the ruling. I have noted from the record that the applicant sought a copy of the ruling and the same was given to it. It is however not clear as to when a copy of the ruling was given to the applicant. I am satisfied that the reference by the applicant was filed within a reasonable time from the date when the ruling on taxation was delivered. Due to the foregoing, the objection to the applicant's application based on limitation of time is overruled.

On the issue of interest, the same is provided for under paragraph 7 of the ARO which provides as follows:

**“7. Interest may be charged**

**An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.”**

I am in agreement with the applicant that the taxing officer had power to award interest on costs and that the taxing officer erred when she stated that her power was limited to assessing costs and did not extend to awarding interest. The question that the taxing officer should have asked herself in my view was whether the applicant was entitled to interest on costs and if so from when. The applicant contended that it had furnished the respondents with bills pursuant to paragraph 7 of the ARO and as such it was entitled to interest on costs since the bills were not settled. It was not disputed that the applicant had delivered bills to the respondents. The bills were however contested. That explains why the applicant filed its bills of cost for taxation. I am of the view that since the applicant's bills were not agreed upon, the same could not attract interest until the fees payable was assessed and certified by the court. With the evidence that the applicant had delivered bills to the respondents for settlement prior to filing its bills of cost for taxation, the taxing officer erred in rejecting the applicant's claim for interest on costs which should have been awarded to accrue from the date of taxation.

On the issue of the taxing officer's failure to award instruction fees to the applicant in Misc. Application Nos. 127, 129,130,131,132,154,155, 156 and 157 of 2014 for acting for both the vendor and purchaser, I find no reason to disturb the decision of the taxing officer. The taxing officer held that there was no evidence placed before her by the applicant in support of the claim. The burden was upon the applicant to demonstrate that it was instructed by both the vendor and the purchaser in the transactions in dispute and that it did render the services to both. The applicant placed before the court a number of leases to demonstrate that it acted for both the management company, Lacasa Gardens Limited as vendors and the respondents as purchasers. There is no evidence that the applicant was instructed by Lacasa Gardens Limited to act for it in these transactions or that Lacasa Gardens Limited which was merely a management company for the apartments sold the apartments to the respondents. In any event, Lacasa Gardens Limited was not a party to any of the bills of cost in contention and no valid reason was given why the respondents were to bear the costs payable by it if any. It is my finding that the taxing officer did not err in rejecting the applicant's claim for instruction fees for acting for the vendor and purchaser in Misc. Application Nos. 127, 129,130,131,132,154,155, 156 and 157 of 2014.

With regard to the fees for negotiating Stamp Duty exemption, the issue was not raised by the applicant in its Notice of Objection to taxation by the taxing officer. I am of the view that it is not open to a party to a taxation to raise in a reference items that were not objected to in the Notice of Objection. In any event, I am not persuaded that such cost or expenses are recoverable under paragraph 19 of ARO as claimed by the applicant. Due to the foregoing, the applicant's reference succeeds only with regard to the issue of interest on costs.

In the final analysis and for the foregoing reasons, the respondents' application dated 14<sup>th</sup> June, 2019 and the applicant's application dated 10<sup>th</sup> July, 2019 succeed in part. I am satisfied that valid grounds have been established warranting interference with the taxing officer's decision. In Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board (2005) 1 KLR 528 the court stated as follows:

**“And if a judge on reference from a taxing officer 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 taxing officer (see – D'Souza v Ferrao [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji Naran Patel (No. 2) [1978] KLR 243.”**

In First American Bank of Kenya Ltd v Gulab P Shah & Others (2002)1 E.A. 61 Ringera J. stated that:

**“I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.”**

I share the same view in the case before me. Having regard to the time the dispute between the parties on the issue of costs has been pending in court, I am of the opinion that it would serve the interest of justice for the court to exercise its discretion in favour of dealing with the issues raised in the two references instead of remitting the bills of cost with directions to the taxing officer for reconsideration.

### **Conclusion.**

In conclusion, I hereby make the following orders;

1. The decision of the taxing officer dated 22<sup>nd</sup> May, 2019 is reviewed and varied in the manner set out hereunder.
2. The taxed costs in Misc. Appl. Nos. 115, 116, 117, 118, 119, 126, 127, 128, 129, 130, 131, 132, 151, 152, 153, 154, 155, 156, 157 and 159 of 2014 shall attract interest at the rate of 14% per annum with effect from 22<sup>nd</sup> May, 2019 until payment in full.
3. The sum of Kshs. 580,000/- that was paid by the respondents to the applicant on account of disbursements shall be deducted from the costs payable to the applicant save for any part thereof proved to have been retained by Kenya Revenue Authority.
4. Each party shall bear its own costs of the references.

**Delivered and Dated at Nairobi this 24<sup>th</sup> day of September 2020**

**S. OKONG'O**

**JUDGE**

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

Ms. Kiama for the Applicant

N/A for the Respondents

Ms. C. Nyokabi- Court Assistant