REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 1211 OF 2000

CRESCENT CONSTRUCTION COMPANY LIMITED ..…....... PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY ……………...………… 1ST DEFENDANT

KENYA REVENUE AUTHORITY ……………………… 2ND DEFENDANT

R U L I N G

1. The Applicant filed a Chamber Summons dated 7th May 2013 under the provisions of **Rule 11 (2)** of the Advocates Remuneration Order (hereinafter "the Order"), **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Applicant requested this Court to review the decision of the Taxing Officer on various items relating to its Bill of Costs dated 25th June 2012. The Application was based on the following grounds:

> **"(a) That the Honourable Taxing Master erred in law and principle by declining to allow item 1 as drawn on the Bill of Costs contrary to the Statutory Provisions and judicial pronouncements.**
>
> **(b) That the Honourable Taxing Master erred in law and principle by finding that there was no cogent evidence that the Plaintiff had sought a relief of Kshs. 192,000,000/= when, in fact, at paragraph 36 of the Affidavit of one, Khatib Ashraf sworn on 29th January, 1998 in support of the Plaintiff's application by way of Chamber Summons of even date, the deponent expressed apprehension over the demand by the 2nd Defendant of Kshs. 192,000,000/= on account of V.A.T. and penalties accrued thereon.**
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> **(c) That in any event, the Honourable Taxing Master erred in law and principle by failing to take into consideration the amount counter-claimed by the 2nd Defendant it having been one and the same subject matter herein and on the basis of which Judgment for Kshs. 82,454,842/= was awarded to the 2nd Defendant.**
>
> **(d) That the Honourable Taxing Master failed to consider that irrespective of the Plaint, and the Counter-Claim, there was only one key issue for the Honourable court's determination, namely how much, if at all, V.A.T. was payable herein, and if so, who by; which issue was answered by the Judgment which states how much and who by. That the amount of V.A.T. payable by the Plaintiff was indeed determined**

at Kshs. 82,454,842/= and it ought to have been regarded as the value of the subject matter for all purposes herein.

(e) That in the circumstances, the Honourable Taxing Master erred in law and principle by finding, in respect of item 37, that the 2nd Defendant's Counter-Claim did not affect the 1st Defendant, when, in fact, the questions to be determined by the Honourable Court were, inter alia, whether the 1st Defendant was liable to pay Value Added Tax, or at all, as prayed by the Plaintiff.

(f) That the Honourable Taxing Master erred in law and principle by disallowing items 9, 56, 60, 62, 80 and 91 of the bill of Costs when indeed, the case was at those instances adjourned at the instance of the Plaintiff thereby entitling the Defendants, separately, to charge an additional 15% of the instruction fees at each of those instances as properly stipulated under the Advocates Remuneration Order, 1997 Schedule VI, paragraph 2 (ii) and the Advocates Remuneration Order, 2006 Schedule VI paragraph 2 (ii).

(g) That the Honourable Taxing Master misdirected himself by finding that the subsequent Court attendances herein were uncalled for when, indeed the case was regularly and properly confirmed for hearing and listed up on subsequent dates.

(h) That the record is clear that notwithstanding the observations by the Honourable Okubasu J, which were mere observations, parties had always attended Court ready to present oral evidence as demonstrated by attendance of witnesses on several occasions and that it was not until the 14th November 2011 that a Consent Order was entered into for the determination of the matter in a manner other than through oral evidence. Getting-Up fees is therefore payable before the date of the said Consent.

(i) That the Honourable Taxing Master erred in principle by declining to allow items 10, 11, 16, 17, 21, 22, 23, 24, 25, 33, 38, 41, 104, 105, 114 contrary to the Advocates' Remuneration Order, 1997, Schedule VI paragraph 7 (d) on the one hand and items 118, 119, 120, 126, 130, 135, 136, 141, 142, 143, 145, 146 and 147 contrary to the Advocates Remuneraiton Order, 2006 Schedule VI paragraph 7 (d) on the other.

(j) That in any event, it is not clear as to what fees was charged by the Honourable Taxing Master on items 118, 119 and 120 of the Bill of Costs, given that a total of four varying figures was allowed against the said three items".

2. The said Application was supported by the Affidavit of **Daniel Sitati Sifuma** sworn on 7th May 2013. The deponent detailed that he was an Advocate of this Court practising as such with the firm of Messrs. Nyachae & Ashitiva, Advocates. Mr. Sifuma went into details of where he considered that the Taxing Officer had gone wrong in respect of his taxation of the first Defendant's Bill of Costs dated 25th June 2012 as per his Ruling delivered on 17th April 2013. At this stage, this Court need not consider a review of Mr. Sifuma's Affidavit in that connection as, on 5th June 2013, the Plaintiff/Respondent filed a Notice of Preliminary Objection dated 21st May 2013. That Preliminary Objection detailed as follows:

"1. THAT the Application is premature, misconceived, incurably defective, incompetent, frivolous, vexatious and therefore an abuse of the process of this Honourable Court.

2. THAT the Applicant has no locus by dint of Rule 11 of the Advocates Remuneration Order to file any application for reference in respect of the Taxing

Master's ruling of 17th April 2013 without first obtaining reasons for the Taxing Master's decision on the items objected to.

3. THAT this Honourable Court lacks jurisdiction under the Advocates Remuneration Order to entertain and determine the Applicant's Application dated 7th May 2013 and filed in Court on even date and brought under Rule 11 (2) of the Advocates Remuneration Order and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya since there is no record of the reasons why the Taxing Master arrived at his decision".

3. The Plaintiff/Respondent's written submissions as regards its Preliminary Objection were filed herein on 23rd January 2014. It noted that the Ruling of the Taxing Officer, Hon. R. Nyakundi was delivered on 17th April 2013 as regards the Applicant's Party and Party Bill of Costs dated 25th June 2012. The Applicant had objected to some of the items in the Ruling and, as a result, through its letter dated 18th April 2013 requested the Taxing Officer to give reasons for his decision on the items objected to. On 7th May 2013, notwithstanding that the Taxing Officer had yet to forward his reasons as above, the Applicant filed its aforementioned Chamber Summons. In the opinion of the Plaintiff/Respondent, the issues for determination were as follows:

"(i) Whether the Applicant has locus to file an application for reference in respect of the Taxing Master's Ruling delivered on 17th April 2013 without first obtaining reasons for the Taxing Master's decision on the items objected to?

(ii) Whether this Honourable Court has jurisdiction under the Advocates (Remuneration) Order to hear and determine the Applicant's Application dated 7th May 2013?"

Thereafter the Plaintiff/Respondent set out the provisions of **Rule 11** of the Order.

4. The Plaintiff/Respondent submitted that the Applicant was bound by the provisions of the Order and it had also written to the Taxing Officer seeking the reasons for his Ruling. It noted that the Taxing Officer did not forward his reasons for his decision and had not forwarded the same to date. The Plaintiff/Respondent detailed that the provisions of **Rule 11** of the Order were clearly set out that an objector could only go before a Judge after receipt of the reasons from the Taxing Officer. In this connection, the Plaintiff/Respondent referred this Court to the cases of **Kiplagat & Associates v National Housing Corporation (2008) eKLR, Wanga & Co. Advocates v Busia Sugar Company Ltd (2004) eKLR, Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board Nairobi Civil Appeal No. 220 of 2004,** as well as **Evans Thiga Gaturu Advocate v Kenya Commercial Bank Ltd HC Misc Appl. No. 343 of 2011**. It relied upon these authorities to support its case and, in the Plaintiff/Respondent's view, the Applicant's reference to this Court was incompetent for being prematurely instituted and, as a result, was an abuse of the Court process.
5. The Applicant's submissions on the Preliminary Objection of the Plaintiff/Respondent were filed herein on 25th February 2014. It noted that upon delivery of the Taxing Officer's Ruling on 17th April, 2013 the Applicant had applied for leave to file a Reference and also requested for typed reasons for the said Ruling. The Taxing Officer had ordered:

"**…. Let the Ruling be typed on priority. Leave to file a Reference allowed…."**.

It submitted that in writing its letter requesting reasons for the Ruling, all the Applicant was doing was to reiterate its earlier application made orally to the Taxing Officer. In a submission that should have been contained in an affidavit, the Applicant detailed that it had been informed that the typed Ruling contained the reasons and was ready to be collected at the Registry. It was on that basis that the Applicant made a payment of Shs. 718/- on 29th April 2013 when it picked up the typed copy of the said Ruling. It maintained that the Preliminary Objection of the Plaintiff/Respondent only raised a single ground of objection and that was whether or not the Taxing Officer had supplied

reasons in support of his said Ruling. The Applicant maintained that on a reading of **Rule 11 (2)** of the Order, there was no prescription as to how a Taxing Officer should present his reasons. In the opinion of the Applicant, it was sufficient that the reasons forming the basis of the Taxing Officer's decision were discernible from his Ruling. In this instance, the Applicant maintained that this was clearly the case in this matter. In support of its submissions, the Applicant cited the following cases as regards the Reference and the Preliminary Objection: **Kipkorir, Titoo & Kiara, Advocates v Deposit Protection Fun Board (supra), Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Ltd (supra),** and **HCCC No. 658 of 2004 (O. S.)** and **Postal Corporation of Kenya v Donald Kipkorir & 3 Ors**. Thereafter, the Applicant detailed what it termed an analysis of the Taxing Officer's Ruling which, in my view, was pertinent to the Reference and not to the Preliminary Objection. However, in conclusion, the Applicant maintained that the reasons for the Taxing Officer's Ruling were abundantly clear on the face of the Ruling itself. It maintained that the Order and the Rules thereunder were not made to be interpreted in a manner that would lead to absurdity.

6. *Article 159 (2) (d)* of the *Constitution, 2010* clearly states that courts and tribunals exercising judicial authority shall be guided to the extent that justice shall be administered without undue regard to procedural technicalities. In my view, what this implies is that courts and tribunals must be prepared to examine the rules of procedure under statutes which prescribe the same and to interpret them liberally provided that no injustice is occasioned. The interpretation of **Rule 11** of the Order as to formality or otherwise has differed certainly among High Court Judges. In my view, the decisions cited by counsel to this Court in relation to the cases of **Muriu Mungai & Co. Advocates v New Kenya Co-operative Creameries Ltd HCC No. 692 of 2007**, **Nyamogo & Nyamogo v Kenya Bus Services HCMA No. 587 of 2004**, **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2) (2006) 1EA 5** and **Kerandi Manduku & Co. v Gathecha Holdings Ltd HCMA No. Number 202 of 2005** as referred to in the **Evans Gaturu** case (supra), all related to differing interpretations of the Rule by the Judges involved in those cases. Similarly, the finding of my learned brother **Waweru J.** in **Postal Corporation of Kenya v Donald Kipkorir & 3Ors (supra)** in disagreeing with the interpretation of the Rule by **Mwera J** (as he then was) in **Oseko & Co Advocates v Occidental Insurance Company Ltd Machakos Misc Appl Nos. 149, 153,156,157, 158, 159,160 and 161 all of 2000 (unreported)** detailed the Judge's personal view of the interpretation of the Rule namely:

"I must, respectfully differ with Mwera J. if the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, why should further reasons be sought or supplied simply because the unfortunate wording of subrule (2) of Rule 11 of the Advocates (Remuneration) Order seems to demand so? What further purpose shall be served by the further reasons not already contained in the considered ruling? To borrow the words of Ringera J., did the Chief Justice, in formulating the said subrule, intend that there should be ritualistic observance thereof even when reasons for the disputed taxation are already contained in the formal and considered ruling? I think not."

Waweru J's view as regards the interpretation would seem to be on all fours with that of **Njagi J.** in the case of **Kenya Ports Authority v Kobil (K) Ltd HCCC No. 83 of 1998** when quoting from the finding of **Ringera J.** in the case of **Kobil Petroleum Ltd v Almost Magic Merchants Ltd**:

> **"that once a taxing officer has given reasons for a ruling, it is not necessary thereafter to apply for those reasons to be given subsequently."**

7. In view of the differing interpretation put on **Rule 11 (2)** by the various High Court Judges including **Mwera J.** in **Behan & Odero v National Bank of Kenya Ltd (2008) eKLR**, **Ochieng J.** in **Ahmednassir Abdikadir (supra)** and **Okwengu J** in the **Kiplagat & Associates** case all cited to the Court by the Plaintiff/Respondent, I must necessarily turn to the decisions of the Court of Appeal on this point. The opinions of my learned brothers and sisters in the High Court are persuasive but not binding upon me. However, the finding of the Court of Appeal in the **Kipkorir, Titoo & Kiara** case (supra) is binding upon this Court. The learned Judges of Appeal held in that

matter:

"It is true that the taxing officer did not record the reasons for the decision on the items objected to after receipt of the respondent's notice. It seems that the taxing officer decided to rely on the reasons in the ruling on taxation dated 23rd February, 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance."

8. The **Kipkorir, Titoo & Kiara** appeal was decided before the coming into effect of the new Constitution, 2010. In my view, since that decision in 2006, Courts are required to give an even more liberal interpretation of procedural rules. In this regard, I am encouraged by the finding of my learned brother **Odunga J.** in the **Evans Gaturu** case (supra) when with reference to **Rule 11 (2)** of the Order, he detailed at pages 14 and 15 of his Ruling as follows:

"It is therefore clear that the interpretations by the Court especially the High Court on this issue is far and varied. In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.

However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for proferring a reference."

I have closely examined the Ruling of the Hon. R. Nyakundi delivered on 17th April 2013. In my view, the learned Taxing Officer has given more than sufficient reason for the various findings he has made in relation to the differing items as contained in the Bill of Costs dated 25th June 2012. I am satisfied that there was more than substantial compliance with the provisions of the said **Rule 11 (2)** of the Order.

9. Consequently and as a result, I dismiss the Plaintiff/Respondent's Preliminary Objection dated 21st May 2013 together with costs. The Applicant may now set down its Application dated 7th May 2013 for hearing by taking a date therefor at the Registry.

DATED and delivered at Nairobi this 12th day of May, 2014.

J. B. HAVELOCK

JUDGE