REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(JUDICIAL REVIEW DIVISION)

MISCELLANEOUS CIVIL APPLICATION NUMBER 7 OF 2012

IN THE MATTER OF THE ADVOCATES ACT AND IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER, 2009

AND

IN THE MATTER OF TAXATION OF ADVOCATE/CLIENT BILL OF COSTS

BETWEEN

THE TRUTH JUSTICE

AND RECONCILIATION COMMISSION…..……APPLICANT

VERSUS

THE CHIEF JUSTICE

OF THE REPUBLIC OF KENYA…...…….……1ST RESPONDENT

BETHUEL KIPLAGAT…….……..……OBJECTOR / 2ND RESPONDENT

(Being a reference for the decision of the Taxing Officer, A N Ongeri (Mrs) DR on 29th January, 2013)

RULING

Introduction

1. This ruling is from a reference by the Objector herein who was a respondent in these proceedings, **Bethuel Kiplagat** from a decision on taxation of costs. The reference as is the usual procedure is brought by a Chamber Summons application dated the 12th of March 2013 expressed to be brought under Rule 11(2) of the ***Advocates (Remuneration) Order***, 2009 an all other enabling provisions of the law, in which the Objector herein seeks the following orders:

a. **The decision of the taxing officer delivered on the 29th of January, 2013 as far as the same relates to taxation of Item One (1) of the Objector's Bill of Costs, the quantum awarded thereon and the reasoning with respect to the said Award be and is hereby set aside.**
b. **The Honourable Court be pleased to re-tax Item One (1) of the said Bill of Costs.**

c. **In the alternative to prayer (2) above, the Honourable Court be pleased to remit the Bill of Costs dated the 25th July 2012 for re-taxation of Item One (1) before a different taxing officer with appropriate directions therefor.**
d. **The costs of this Application be provided for.**

2. These proceedings were the result of by a decision made by **Warsame,** J (as he then was) on 24th February, 2012 by which the learned Judge dismissed the Applicant's application for leave to apply for judicial review proceedings with costs to be borne personally by the commissioners of the applicants.
3. Pursuant to the said decision the objector filed his Bill of Costs which was taxed by the Taxing Master in the total sum of Kshs 238,032/= on 29th January, 2013. It was the decision which triggered the instant reference.

The Objector's Case

4. The Objector's application was supported by an affidavit sworn by Kevin Dermot McCourt, the objector's advocate on 12th March, 2013. According to him, in taxing item one (1) of its Bill of Costs the taxing master erred in principle by failing to take into account the proviso under Schedule VI of the ***Advocates Remuneration Order*** 2009 which requires the taxing master to take into consideration the nature and importance of the matter, the amount involved, the interests of the parties as well as the general conduct of the proceedings.
5. It was deposed that the taxing master erred in making the finding that item one (1) of its Bill of Costs was grossly exaggerated because the suit was never filed. It is the objector's position that the application for leave was equivalent to filing the suit.
6. According to the Objector, the taxing master erred in principle by not considering the censure by **Warsame, J** (as he then was) that exemplary costs should be a mechanism which can be employed in circumstances where litigants file frivolous and vexatious cases.
7. The Objector contended that the taxing master failed to consider their submissions on the fact that the Applicants were willing to pay their Advocates a legal fee that was higher than what the Objector sought in his Bill of Costs. The Objector concludes that the taxing master's decision in terms of item one (1) is devoid of any basis in law and as such the court has jurisdiction to issue the orders sought.

The Applicant's Case

8. In opposing the application, the Respondent herein, **Truth, Justice and Reconciliation Commission**, filed a replying affidavit sworn by **Major General (Rtd) Ahmed Sheikh Farah**, one of the Applicant's Commissioners on 16th April 2013. It was the Applicant's case that the dispute that was before the court was based on an application by the Applicants seeking leave of the court to file a judicial review, which the 2nd Respondents defended in court. It was the Applicant's view that no substantive suit in form of a Notice of Motion was ever filed in court.
9. Since under the ***Advocates Remuneration Order 2009***, the basic instruction fees for Judicial Review application as provided for under Schedule VI paragraph 1 (j), was Kshs. 28,000, it was averred on behalf of the Respondent that the taxing master considered all the relevant factors including the written submissions by counsel and awarded the objector a fairly generous sum of Kshs. 200,000 as instruction fees for defending the application for leave which was, in the deponent's view, justified.
10. With respect to the purported fee agreement between the Applicants and its Advocates, the deponent's contention was that the same ought to be disregarded as it was obtained irregularly and does not relate to the instant matter but rather to a previously finalized matter being High Court Judicial Review Application Number 95 of 2011 involving the same parties. It was therefore the Applicant's position that this application is frivolous and lacks merit and the same should be dismissed with costs.

Objector's Submissions

11. On behalf of the Objector it was submitted that the Application for leave was not granted ex-parte because **GBM Kariuki, J** (as he then was), ordered that the matter be heard inter partes which necessitated the objector filing grounds of opposition which referred to other suits filed in court between the Applicant and Objector, and were therefore detailed and fully researched fully setting out in details the history of the litigation. Upon hearing the application for leave, it was submitted, **Warsame, J** delivered a detailed and lengthy ruling wherein he dismissed the said application with exemplary costs to the Objector.
12. The taxing master was faulted for failing to take into account the fact that for any order of judicial review, the granting of leave was mandatory and as such, an application for leave was the equivalent of filing the main suit. It was argued that since at the leave stage, an applicant must demonstrate that he is eligible for judicial review he is required to file evidence and documents which are again filed once leave is granted. The Objector further claims that the fact that the Honourable Judge determined that the Applicants lacked capacity to seek leave meant that the Applicant's eligibility for judicial review was a nullity *ab initio*. In the Objector's view, he should not be punished for his success in opposing the application for leave but instead ought to be rewarded with adequate costs so as to prevent frivolous applications from being heard. In support of the submissions he relied on **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 65.**

Applicants Submissions

13. On the part of the Applicant it was submitted that there are established applicable principles in references filed under Rule 11 (2) of the ***Advocates Remuneration Order, 2009***. He relied on the holding in **Premchand Raichand Ltd & Anor vs. Quarry Services of East Africa Limited & Others (No. 3) [1972] EA 162** and that it would be an error of principle to tax a bill or an item of bill under the wrong provision of the remuneration order. The Applicants further submitted that it would be an error of principle if the taxing officer in exercising his discretion would increase or decrease an amount provided for by any provision of the remuneration order, taking into account irrelevant factors or omitting to consider the relevant factors and cited in support the case of **Transnational Bank Limited vs. Elite Communications Ltd & Anor 2005.**
14. The Applicants reiterated that the dispute in issue was based on an application by the Commission seeking the leave of the court to file a judicial review application and that a substantive suit in form of a notice of motion was never filed. In its view, the instruction fees as indicated in the ***Advocates Remuneration Order 2009*** Schedule VI paragraph 1 (j) presupposes a situation where a substantive motion was filed and fully argued in court.
15. It was the Applicants' view that the taxing officer considered all the relevant factors including the written submissions by counsel and awarded the objector a fairly generous sum of Kshs. 200,000.00 as instruction fees for defending the application for leave which is the only item in contention
16. With respect to the Advocate/Client costs, the Court was urged to disregard the same on the ground that the same was obtained irregularly from the Applicant and does not relate to this matter but a previously finalized matter.

Determination

17. I have considered the foregoing.
18. Before going into the issue in dispute proper, it is important to properly understand at what stage in judicial review proceedings are the said proceedings properly deemed to have been commenced. Judicial Review, are mandatorily required as a matter of law to be commenced by way of leave. Accordingly Order 53, rule 1(1) of the ***Civil Procedure Rules*** provides:

No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

19. The word "leave" is defined by ***Black's Law Dictionary***, 9th Edn. at page 974 as "*Judicial permission to follow a non-routine procedure*". "Leave" is clearly therefore a permission to take a

particular judicial procedure and in this case it is permission to commence judicial review proceedings.

20. It is therefore clear that an application for judicial review is not made until after leave is granted. If the grant of leave was to be construed as an application for judicial review, it would in my view constitute an absurdity. If the Rules Committee was of the view that an application for leave constitute the suit as is contended by the objector, the said Committee would in my view have used the phrase such as "*an **application for an order of mandamus, prohibition or certiorari shall be commenced by leave"*** or similar provision.

21. The issue is, however not moot. The Court of Appeal in **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** held that proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. Similarly in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** it was held by a three Judge bench of this Court that it is consequent upon leave being granted that an application is brought. In **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996,** this Court held that application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application.

22. Therefore both on the letter of the law and on authorities, judicial review proceedings are commenced after leave threfor is granted. Thereafter a Notice of Motion is filed in the same cause and the documents filed in support of the application form part of the main application for judicial review. In other words unless leave to file further documents is sought and granted the applicant is only excepted to file a Notice of Motion subsequent to the leave being granted. This was the position taken by **Nyamu, J** (as he then was) in **Paul Kipkemoi Melly vs. The Capital Markets Authority Nairobi HCMA No. 1523 of 2003** where he held:

> **"All affidavits must be served with the notice and the statement on the Registrar and a party at the hearing of the Notice Motion seeking the actual orders must rely on the affidavit verifying the statement at the time of leave. A statement can however be amended with leave and further affidavits can be allowed upon notice, if third parties raise new matters…. There is nothing that offends S 9 of the Law Reform Act in allowing a party to file a proper verifying affidavit in an emergency situation because of the word "affidavits" in plural."**

23. This position was restated in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321** by the same Judge as follows:

> **"There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application for leave stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However under Order 53, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order 53 have no legal basis for filing another or further affidavits. To this extent the applicant's case is complete at leave stage and practicing advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent's case is a hangover, which is not acceptable under the Judicial Review jurisdiction."**

24. It is not disputed that the application did not go past the stage of the application for leave to

commence judicial review proceedings. It follows that the application for judicial review proper had not been commenced as the application was still-born.

25. The circumstances under which a Judge of the High Court interferes 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 decision 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 inference 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 practise 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; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of **First American Bank of Kenya vs. Shah and Others** (supra)

26. Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants. See **Premchand Raichand Ltd & Another vs. Quarry Services E. Africa Ltd (1972) E.A. 162.**

27. Further guidance if necessary may be obtained in the case of **Joreth Limited vs. Kigano& Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92** where the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle the instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill

of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.

28. In **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra), **Ojwang, J** (as he then was) expressed himself *inter alia* as follows:

"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, 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…. The court cannot interfere with the taxing officer's decision 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 inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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… A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved… Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for…. The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs……."

29. While remitting the matter for fresh taxation the learned Judge in the above matter gave the following guidelines:

1. **the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;**
2. **the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;**
3. **the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;**
4. **so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;**
5. **objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;**
6. **where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;**
7. **where responsibility borne by advocates is taken into account, its nature is to be specified;**
8. **where novelty is taken into account, its nature is to be clarified;**
9. **where account is taken of time spent, research done, skill deployed by counsel, the pertinent**

details are to be set out in summarised form.

30. The principles guiding taxation were similarly reiterated by the Court of Appeal of Uganda in **Makula International v. Cardinal Nsubuga & Another [1982] HCB 11** where the Court pronounced itself as follows:

"The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it."

31. In the case of **Paul Ssemogerere & Olum vs. Attorney General - Civil Application No.5 of 2001** [unreported] the Court held:

"In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference."

32. In her decision the Taxing Officer in rendered herself thus:

"In the current case, I find that the Applicant was only seeking leave to file suit to compel the 1st Respondent to appoint a Tribunal pursuant to Section 17 (2) of the TJRC Act to investigate the conduct of the 2nd Respondent. On the alternative, the Applicant wanted leave to seek an order of mandamus compelling the 1st Respondent to reinstate a Tribunal appointed earlier on 2nd December 2010. The Applicants also wanted to stop the 2nd Respondent from resuming office. However, the leave was not granted and the suit was not filed. The 2nd Respondent did not therefore have the task of defending the main suit. He defended the application for leave successfully and he ought to be paid for the work he did in the Application dated the 10th January, 2012. I therefore find the sum of Kshs. 4,500,000 sought by the 2nd Respondent as instruction fees is grossly exaggerated considering the intended suit was never filed. In my opinion Kshs. 200,000 will go a long way towards meeting the 2nd Respondent's reasonable instruction fees after taking into account all the relevant factors."

33. From the foregoing discourse, I am in agreement with the learned Taxing Officer in her finding that the proceedings were terminated before the application was filed.

34. The reasons provided by the Taxing Master for her decision were self-explanatory and are very clear. The Application for leave was filed on the 10th of January 2012 and matter was certified urgent and ordered to be heard interpartes after which the ruling on the application was delivered on the 24th of February, 2012. This is arguably a period of one and a half months and Advocates appeared in court 6 times, 3 being ex-parte, and the other 3 being inter partes with one of them being the delivery date for the ruling. I am persuaded that the taxing master addressed herself to the documents filed in court, the time spent in court, the specific issue at hand which was leave to

file the judicial review suit and I agree that indeed this matter was at its preliminary stages.

35. In this case even if the judicial review proceedings had been commenced the basic instructions fees would have been Kshs 28,000.00. As was held in **First American Bank of Kenya vs. Shah & Others Nairobi (Milimani)** (supra), the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it. In this case the learned Taxing Officer increased the instructions fees to Kshs 200,000.00 which was more than 7 times the basic fees in an application proper. In **Opa Pharmacy Ltd vs. Howse & Mcgeorge Ltd Kampala HCMA No. 13 of 1970 (HCU) [1972] EA 233**, it was held:

"Whereas the taxing officer is given discretion of taking into account other fees and allowances to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instruction fees, the taxing officer, in this case gave no reason whatsoever for doubling the instruction fee. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer's mind. The failure to give any reason for the choice, surely, must, therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one's discretion."

36. In **Danson Mutuku Muema vs. Julius Muthoka Muema & Others Machakos High Court Civil Appeal No. 6 of 1991** which was cited in **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others** (supra) **Mwera, J** (as he then was) held that whereas the Court was entirely right to give the costs within its discretion, the amount allowed being ten times the sum provided for, the Court did not think the said sum was reasonable and found that it was definitely excessive as opposed to three or four times. The Court further found that since the Taxing Officer was bound to give reasons for exercising his discretion and as none were given in his ruling save to say that he simply exercised his discretion, it was just and fair to set aside the sum he allowed.

37.that the learned taxing officer was well aware of the principles guiding taxation is clear from her ruling. she accordingly, in the exercise of her undoubted discretion increased the basic instructions 7 times. this in my view clearly shows that the learned taxing officer was aware that the matter even though was not a judicial review application proper merited more than the basic fees payable in judicial review applications. i am therefore not prepared to hold that in the circumstances of this case the increase of the basic instructions by more than 7 times justify interference. in kenya union of commercial food & allied workers (k) vs. banking insurance & finance union (k) civil appeal no. 60 of 1988, instructions fees was taxed downwards from kshs 1,000,000.00 to kshs 150,000.00 in a similar application where leave to apply for judicial review proceedings was disallowed. 38.the issue of the fees paid to the applicant's advocate was alluded to. however the applicant countered this by alleging that the said fees were irrelevant as the same was fraudulent and was in respect of a different matter. a perusal of the document in question does not show that the fee mentioned therein was in respect of this matter. in any case the fees paid by a client to his advocate whether fraudulent or not is not necessarily a guide to determination of party and party fees. apart from the fact that the advocates act outlaws undercutting and as long as an advocate does not agree on a fee which is below the minimum provided, the sky is the limit in so far as the advocate's contractual fees as against his client is concerned. as long as there is an agreement between an advocate and his client the court would not interfere. however when it comes to party and party costs the same must be taxed in accordance with paragraph 50 of the advocates (remuneration) order which provides:

Subject to paragraphs 22 and 58 and to any order of the court in the particular case, a bill of costs in proceedings in the High Court shall be taxable in accordance with Schedule VI and, unless the court has made an order under paragraph 50A, where Schedule VI provides a higher and a lower scale the costs shall be taxed in accordance with the lower scale.

39. Whereas under part B of Schedule VI of the Remuneration Order Advocate/Client fees my be determined on the basis of party and party fees under part A of the said schedule increased by one half, the converse does not apply.
40. In the result this I am not satisfied that the decision of the Taxing Officer was based on an error of principle, or the fee awarded was manifestly excessive or low as to justify interference.

order 41.in the result i find no merit in this reference which i hereby dismiss with costs to the applicant.

Dated at Nairobi this day 9th day of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr McCourt for the Objector/Applicant

Mr Rono for the Applicant/Respondent

Cc Kevin