



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**MISCELLANEOUS CAUSE NO. 471 OF 2013**

**IN THE MATTER OF THE ADVOCATES ACT**

**AND**

**IN THE MATTER OF TAXATION OF COST BETWEEN ADVOCATE & CLIENT**

**BETWEEN**

**MASIKA & KOROSS ADVOCATES:.....ADVOCATES/APPLICANTS**

**VERSUS**

**CHINA WU YI COMPANY LIMITED:.....CLIENT/RESPONDENT**

**RULING**

1. This is a reference application brought by way of a Chamber Summons Application dated 14<sup>th</sup> October 2014. It is taken out under Rule 11 (2) of the Advocates Remuneration Order, 2009.
2. The application is seeking for orders that the Honourable Court be pleased to set aside the ruling of the taxing officer so far as it relates to items 1 and 2 of the Bill of Costs dated 1<sup>st</sup> November 2013. It is further seeking for orders that the Court be pleased to adjust the figures, re-assess the fees due in respect to the said items at such reasonable amounts as the Court may determine. In the alternative the items be referred back to the taxing master with appropriate directions.
3. The application is based on the grounds stated on the face of the application and is supported by the affidavit of ALEX MASIKA sworn on 14<sup>th</sup> October 2014.
4. The deponent, an Advocate of the High Court of Kenya states that they filed an Advocate-Bill of costs dated 1<sup>st</sup> November 2013. The said Bill of costs was subsequently taxed and a ruling delivered on 10<sup>th</sup> September 2014. The Advocates being dissatisfied with the ruling filed a Notice of Objection on 17<sup>th</sup> September 2014 and requested for the ruling/reasons for taxation. The taxing officer thereafter supplied the Applicant with the reasons for taxation by virtue of a letter dated 7<sup>th</sup> October 2014.
5. The Advocate avers that in light of the ruling and reasons given, the disallowance of Item No. 2 of the bill of costs and the sums allowed in respect to item No. 1 of the said bill was manifestly low as to occasion an injustice in light of the value of the subject matter.
6. It is the Applicant's case that the taxing officer misdirected herself and erred in principle in omitting to consider relevant factors. Among them, the interest of the parties particularly the

- interests of the Respondent and the complexity of the matter. As a result item No. 1 of the bill of costs as taxed was manifestly low and inadequate while item no. 2 was completely disallowed despite the taxing master agreeing that the matter may have been complex. It is further the applicant's case that the instruction fees allowed is not reflective of the value of the subject matter which is approximately Four billion Kenya shillings.
7. The Applicant therefore urges this Court to grant the orders sought in the interests of justice and fairness.
  8. The Client/Respondent did not file a response to the reference application despite being served. There is an affidavit of service on the court records sworn by Emmanuel Wanyonyi as proof that the Respondent was indeed served.
  9. Having satisfied myself that service was effected upon the Respondent, I allowed the matter to proceed ex parte. The Applicant filed its list of authorities on 30<sup>th</sup> October 2014.

## **LEGAL ANALYSIS**

10. This is a reference application which is governed by Rule 11 (2) of the Advocates Remuneration Order.
11. It is now trite law that this Court will interfere with the discretion of the taxing officer only on grounds that the taxing officer has erred on principle. See; **Steel Construction Petroleum Engineering (Ea) Ltd Vs Uganda Sugar Factory [1970] Ea 492.**
12. I have read the taxing officer's decision. In taxing the instruction fees the taxing officer relied on Schedule V of the Advocates Remuneration Order. It was the taxing officer's view that though the matter was a complex one, instruction fees must be reasonable. It was her view that costs should not be allowed to rise to such a level as to limit access to the Courts. As such the Court should not be seen as endorsing disproportionate costs. To that end she relied on the case of **Premchard Raichand Ltd and Another Vs. Quarry Services of East Africa Limited (1972) E.A 162.** In the end, the taxing officer allowed an amount of **Kshs. 1, 500,000** as instruction fees.
13. The Applicant is dissatisfied with the said amount for reasons already stated in this ruling.
14. As regards the subject matter of taxation, the Respondent had instructed that Applicant to act on its behalf at the Public Procurement Administrative Review Board in application No. 29 of 2013. The Respondent had requested the Applicant to lodge an appeal with the Public Procurement Oversight Authority over the termination of the procurement process of Tender No. KSMS/PROC/038/12/13. (See annexure "ASM1 a").
15. It is not in dispute that the value of the tender that was subject of review at the Public Procurement Administrative Review Board was in excess of Kshs. 4 billion. The Applicant communicated to the client that they would charge their professional fees under Schedule V of the Advocates Remuneration Order, 2009 in accordance with paragraph 22. It is submitted by the Applicant that the review was successful and the Respondent was subsequently awarded the tender. This is not in dispute.
16. The taxing officer relied on the case of **Premchard Raichand Ltd and Another Vs. Quarry Services of East Africa Limited (1972) E.A 162** for the argument that costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy. In the same authority, it is also proposed that the level of remuneration of advocates must be such as to attract recruits to the profession. Therefore, the Court needs to strike a balance between the two principles aforementioned. In the circumstances, the Instruction fees of Kshs. 1, 500,000/= is not commensurate to the value of the subject matter which is at Four billion Kenya shillings.
17. Procurement matters are generally complex in nature. The taxing officer concurred that the matter was complex. It is discernible that the volumes of the tender documents to be perused were large. The interest at stake was also high, the value of the subject matter being at Four billion Kenya shillings. In the circumstances, it is my view that the amount of Kshs. 1,500,000/= was manifestly low as to occasion an injustice to the Applicant.
18. The taxing officer taxed off item 2 in its entirety on the basis that Item 1 took into account the value and importance of the matter. I agree with the taxing master. This has indeed been taken care of under Item 1 as elaborated above. In considering the instruction fees, the taxing master takes into account the nature and importance of the matter as well as its complexity. Therefore, allowing item 2 will amount to duplication.

19. Having made the above observations, the reference application brought by way of Chamber Summons Application dated 14<sup>th</sup> October 2014 is hereby allowed in the following terms:-

- a. *The Ruling of the taxing officer so far as it relates to item No. 1 of the Bill of Costs dated 1<sup>st</sup> November 2013 is hereby set aside.*
- b. *The Bill of Costs dated 1<sup>st</sup> November 2013, is to be re-taxed before the same taxing master with regard to Item No. 1, taking into account the observations made herein under paragraph 17.*
- c. *There is no order as to costs.*

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Omwanza holding brief for Masika for Advocates/Applicants

No appearance for Client/Respondent

Teresia – Court Clerk