



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC MISC. APPLICATION NO. 148 OF 2014**

**NYIHA, MUKOMA & COMPANY ADVOCATES.....APPLICANT**

**VERSUS**

**REYNOLDS MWANGI KINYANJUL.....1<sup>ST</sup> RESPONDENT**

**CORALHUST PROPERTIES LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

On or about 7<sup>th</sup> March, 2008, the respondents through a company known as Pinnacle Projects Limited instructed the applicant to give them legal advice and to prepare certain legal documents in relation to a construction project that the respondents wanted to undertake at Kitisuru, Nairobi on L.R. No. 17/66 (Original No. 17/35/1) (hereinafter referred to as “the suit property”). Following those instructions, the applicant gave legal advice to the respondents and also prepared a number of documents in relation to the said project namely:

- (i) Conveyance dated 12<sup>th</sup> January, 2008;
- (ii) Guarantee and indemnity dated 30<sup>th</sup> July, 2010;
- (iii) Re-conveyance dated 9<sup>th</sup> October, 2012; and
- (iv) Memorandum and Articles of Association of the 2<sup>nd</sup> Respondent.

For reasons which are not clear from the record, the respondents withdrew instructions from the applicant and instructed another firm of advocates to act for them in relation to the said project. Thereafter, a disagreement ensued between the applicant and the respondents over legal fees payable to the applicant for the services rendered. Several letters were exchanged by the parties in an attempt to resolve the dispute amicably. On 24<sup>th</sup> July, 2013, the respondents offered to pay the applicant a sum of Kshs.1,130,000/= in full and final settlement of their fees which offer was rejected by the applicants. On 2<sup>nd</sup> February, 2016, the 2<sup>nd</sup> respondent through a letter of the same date agreed to pay to the applicant a sum of Kshs.2,932,377/08 in settlement of its fees after subdivision of the suit property and sale of a portion thereof. This commitment appeared not to have been honoured.

On 26<sup>th</sup> May, 2014 the applicant filed its bill of costs for taxation as against the respondents. The bill that had 26 items was drawn in the sum of Kshs.2,932,937/08. The applicant’s bill of costs was taxed at Kshs.312,147/92 on 10<sup>th</sup> January, 2017 by Hon. I. N. Barasa. During the taxation, only items 1, 4 and 5 of the bill of costs were contested by the respondents. In a detailed ruling, the taxing officer taxed the applicant’s bill under schedule V of the Advocates Remuneration Order, 2006. The taxing officer taxed item 1 of the bill of costs as drawn in the sum of Kshs.250,000/=. Item 2 was also taxed as drawn. Although item 3 of the bill was not contested, the taxing officer taxed the same at Kshs.5,712/- thereby taxing off Kshs.30,403/=. The reason that was given for taxing off the said amount was that the Memorandum and Articles of Association in respect of which the fee was claimed had only 34 folios. Item 4 was also taxed at Kshs.1,176/=. A sum of Kshs.2,098,824/= was taxed off this item. Again the reason given by the taxing officer for taxing off this substantial amount was that the conveyance between the 1<sup>st</sup> and 2<sup>nd</sup> respondents in respect of which the fee was claimed consisted only of 7 folios. Item 5 was taxed at Kshs.1,176/=. A sum of Kshs.131,250/= was taxed off for the reason that the re-conveyance documents for which the fees was claimed had only 7 folios. The remaining items of the bill (items 6 to 26) were taxed as drawn.

The applicant was dissatisfied with the decision of the taxing officer and brought the present reference through Chamber Summons application dated 24<sup>th</sup> July, 2017 after time was extended for them to do so. There is no evidence on record that the applicant filed a notice of objection or that it requested the taxing officer for reasons for taxation of the items in respect of whose taxation it was dissatisfied, in accordance with paragraph 11 of the Advocates Remuneration Order. In its application, the applicant sought the following orders:

- (i) That the ruling and/or decision delivered herein on 10<sup>th</sup> January, 2017 by the taxing officer, I. N. Barasa by which the

Advocate/Client bill of costs dated 19<sup>th</sup> May, 2014 was taxed at Kshs.312,147.92 be set aside and/or vacated.

(ii) That the said bill of costs be remitted back for taxation by a different taxing officer.

(iii) That in the alternative, the honourable court does tax the said bill of costs.

(iv) That the costs of the application be provided for

The application which was supported by the affidavit of James Nyiha advocate was brought on several grounds. The applicant contended that the taxing officer erred in failing to appreciate the value of the subject matter which should have been determined from the market price of the suit property which was Kshs.70,000,000/= at the material time. The applicant contended further that the taxing officer erred in taxing the bill of costs under schedule V of the Remuneration Order rather than schedule 1 thereof. The applicant averred further that the taxing officer erred by failing to appreciate the work that was done by the applicant in preparing and registering the Memorandum and Articles of Association for the 2<sup>nd</sup> respondent and conveyance and re-conveyance documents. The applicant averred further that the taxing officer failed to consider the contents of the applicant's further affidavit sworn by Ibrahim Mwangi Gichuru on 30<sup>th</sup> May, 2016 to which the 2<sup>nd</sup> respondent's letter of undertaking to pay the applicant's fees was attached.

I have not seen on record, the respondent's response to the applicant's application if any was filed. The application was heard by way of written submissions. The applicant filed its submissions on 3<sup>rd</sup> October, 2018 while the respondents filed their submissions in reply on 25<sup>th</sup> October, 2018. I have considered the applicant's application together with the supporting affidavit. I have also considered the written submissions by the respective advocates for the parties together with the authorities cited in support thereof. The principles that guide the court when dealing with a reference from a decision of a taxing officer are now well settled. The law is that a judge sitting on a reference will not interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs. See, the decisions in Joreth v Kigano & Associates [2002] E. A. 92 and Kipkorir, Titoo & Kiara Advocates v Deposit protection Fund Board [2005] 1 KLR 528. The issue that arises for determination in the present application is whether the taxing officer made an error of principle to warrant interference with her exercise of discretion. Having carefully reviewed the bill of costs that was filed by the applicant, the submissions before the taxing officer and her ruling, I am in agreement with the applicant that the taxing officer made several errors of principle in her taxation of the applicant's bill of costs. Before I go deeper into the merit of the application, I wish to dispose of a preliminary issue that was raised in the respondents' submission. The respondents submitted that the applicant's application was incompetent the same having been filed contrary to the requirements of paragraph 11 of the Advocates Remuneration Order. The respondents contended that the applicant did not file a notice of objection to taxation within 14 days of the ruling of the taxing officer setting out the items whose taxation it was objecting to and requesting for the reasons for the taxing officer's decision on those items.

As I have stated earlier, I have not seen on record a copy of the notice of objection to taxation filed pursuant to paragraph 11 of the Advocates Remuneration order. The applicant did not respond to the submissions by the respondents on this issue. I am in agreement with the submissions by the respondents and the authorities cited in support thereof that failure to file a notice of objection to taxation under Paragraph 11 of the Advocates Remuneration Order prior to filing a reference is fatal to the application. This is because it is through a notice of objection that both the court and the respondent get to know the items in the bill of costs which are the subject of the intended reference. As things stand at the moment, the applicant's application is at large. The applicant has sought to set aside the entire decision of the taxing officer which includes the items which were taxed as drawn. This situation would have been avoided if the applicant had filed a notice of objection to taxation setting out the items in the bill of costs whose taxation it was challenging. The reference would have been directed only at the said items. Although the applicant has in its submissions challenged only the taxation of items 3, 4 and 5 of the bill of costs, this is inconsistent with the reliefs sought in its application. The applicant as I have stated above challenged the taxation of the entire bill of costs at Kshs.312,147.95 and sought the setting aside of the entire award.

I am of the view that the respondents were entitled to know the case against them so as to be able to prepare to face the same. It would be a violation of the rules of natural justice and an abrogation of a right to fair hearing if a party was to be allowed to frame his case in a manner that is so confusing as to put the opposite party in a position that he is unable to adequately prepare and respond to the case. This court normally abhors determining suits on technicalities. I have considered on my own motion whether the application can be saved under Article 159 (2) (d) of the Constitution. As was held by the court in the cases of Ufundi Co-operative Savings and Credit Society v Njeri Onyango & Company Advocates [2015] eKLR and Kenya Airports Authority v Queens Insurance Agency, Nairobi HCC No. 1430 of 2000, the filing of a notice of objection to taxation is a fundamental step for a party seeking to file a reference and failure to do so is not a technical issue which can be overlooked under Article 159 (2) (d) of the Constitution for the sake of substantive justice. In the circumstances it is my finding that the applicant's reference is not properly before the court. The application is fatally defective for failure to comply with a fundamental step in the filing of a reference.

The foregoing finding would have been sufficient to dispose of the application. I wish however to consider the merit of the application assuming that it had been properly brought before the court. I am in agreement with the applicant that apart from item 1 of the bill of costs which was taxable under schedule V of the Remuneration order 2006, the taxing officer fell into error when she proceeded to tax the entire bill of costs under schedule V of the Remuneration Order. The taxing officer stated as follows:

*"The evidence points to unconcluded transactions. The applicant cannot charge scale fees. I will therefore tax the bill of costs under Schedule V of the Advocates Remuneration order."*

It was not disputed that the services rendered by the applicant to the respondents which were the subject of the bill of costs in contention were in respect of non-contentious matters. It was also not contested that the fees for non-contentious matters is provided for in Schedule 1 of the Remuneration order. I am of the view that the fact that the services that were rendered by the applicant to the respondents in respect of the non-contentious matters aforesaid were not completed was not a valid ground to tax the bill under schedule V of the Remuneration Order. Under paragraph 18(f) of the Remuneration Order that was relied on by the taxing officer in support on her decision on this issue, schedule V is only applied in respect of uncompleted services rendered in non-contentious matters for which no remuneration is provided for in Schedule I. It is my finding that the taxing officer erred in taxing items 3, 4, 5 of the applicant's bills of costs under Schedule V of the Advocates

Remuneration order whereas the remuneration in respect thereof was provided for in schedule I of the Remuneration Order. Again, although items 3, 4 and 5 of the bill of costs related to services whose remuneration was provided for under Schedule 1 of the Remuneration order as aforesaid, the taxing officer instead of assessing the fees payable to the applicant under these items treated the same as perusals or correspondence in respect of which fees is charged per folio.

I am not in agreement with the respondents that the taxing officer did not award any costs under these items because they were factored in the instruction fees under item 1 of the bill of costs. It is clear from item 1 of the bill of costs that the fees claimed under items 3, 4 and 5 were not included in that item. It is my finding that the taxing officer erred in her failure to assess the costs payable to the applicant under items 3, 4 and 5 of the bill of costs. Finally, I am of the view that looking at the circumstances of the case as a whole including the offers for payment that the respondents had made to the applicant prior to the filing of the bill of costs and thereafter which indicated that the respondents were willing to pay to the applicant over Kshs.1,000,000/= as costs, the costs of Kshs.312,147.92 awarded to applicant by the taxing officer was so low as to amount to an error of principle.

For the foregoing reasons, if the applicant's reference had been properly brought to court, I would have set aside the taxation of the bill of costs dated 19<sup>th</sup> May, 2014 with reference to items 3, 4 and 5 thereof and remitted the bill for taxation by another taxing officer. However, in view of the finding that I had made earlier with regard to the competence of the applicant's reference, the Chamber Summons application dated 24<sup>th</sup> July, 2017 is not for granting. The application is accordingly struck out as defective and incompetent with costs to the respondents.

**Delivered and Dated at Nairobi this 27<sup>th</sup> day of June, 2019**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Ms. Nakato h/b for Mr. Nyiha for the Applicant

Ms. Apolot h/b for Ms. Muthee for the Respondents

Mr. Waweru-Court Assistant