IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO 78 OF 2018

BETWEEN

MURIU MUNGAI & COMPANY ADVOCATES.....APPELLANT

AND

CHINA CIVIL ENGINEERING CONSTRUCTION

CORPORATION (K) LTD.....RESPONDENT

(Being an appeal from the Ruling and order of the High court sitting at Mombasa P.J. Otieno J., delivered on the 16th February, 2018

in

Misc. Civil Application No. 68 of 2016)

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JUDGMENT OF THE COURT

[1] ***Muriu Mungai & Co Advocates*** (appellants) filed a bill of costs on 19th April, 2016 before the Deputy Registrar against the respondent for professional legal services rendered. The bill was taxed at Ksh.148,856,561.90. At the heart of this appeal is the issue of whether the appellants are entitled to the said costs as taxed by the taxing officer and auxiliary thereto is the determination of the challenge that was mounted by the appellants regarding the interpretation of the provisions of ***rule 11 (1)*** of the **Advocates Remuneration Order (Order)** was complied with. The said order states;

> **"Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects"**

And whether the parties were governed by the provisions of the retainer agreement and whether the Judge misapprehended the applicable principles in establishing the value of the subject matter.

[2] A brief synopsis of the matter is that the appellant and respondent had entered into a retainer agreement with respect to remuneration of an advocate pursuant to ***Section 4*** of the **Advocates Act (Act)** in respect of the provision of legal services rendered by the appellant. The said agreement regulated among others the chargeable fees and it provided for arbitration in the event of any claims or disputes arising from the agreement. The appellant represented the respondent in **HCCC No 2 of 2016, African Gas & Oil Ltd -v- China Engineering Construction Corporation (K) Limited**. The said suit was settled by consent letter dated 4th February, 2016. However the parties did not agree on the remuneration/legal fees to be paid to the appellants for the legal services provided in the said suit and that is what resulted in the appellants' bill of costs which upon taxation was assessed at the Ksh.148,856,561.90.

[3] The respondent was aggrieved by the order of taxation and filed an objection on 11th September, 2017 objecting to the entire decision and seeking to be furnished with the reasons. The taxing officer duly issued the ruling reasons for the amount assessed in respect of three items. On 12th September, 2017 the respondent filed an application by way of chamber summons which was principally predicated under ***rule 11 (2)*** of Order seeking *inter alia* to set aside the order of

taxation. The appellant too made strong opposition to both the notice of objection and chamber summons with no less than a notice of motion that sought to strike out those pleadings. These three matters fell for hearing before P.J.O. Otieno J. and in his ruling delivered on 16th February, 2018 the Judge found no merit in the motion by the appellants. As regards the notice of objection and the chamber summons, he found the former was not bad in law on account of form and in regard to the later, the taxing master had erred in principle and the order of taxation was reversed thereby referring the matter of taxation before any other deputy registrar.

[4] This is the gravamen of this appeal that challenges the decision of the learned Judge. There are a total of 8 grounds of appeal but they can be paraphrased just as counsel did during the plenary hearing and in his written submission to wit; that the Judge erred in law and fact by admitting a blanket notice of objection contrary to ***rule 11 (1)*** of the **Advocates Remuneration Order**; failing to adhere to ***rule (2)*** of the **Advocates Remuneration Order** and *stare decisis*; issuing a ruling that is self-contradictory and incongruent on the first and second issues identified for determination and the applicable schedules and for finding that the value of the subject matter was not capable of being determined from the pleadings.

[5] The appeal was opposed, during the hearing, Mr Kongere learned counsel appeared for the appellant and Mr William Muthee appeared for the respondent. Both parties filed written submissions and made some oral highlights.

[6] On the part of the appellant counsel emphasized that the provisions of ***rule 11 (1)*** of the **Advocates Remuneration Order** states that if a party objects to the decision of the taxing officer, that party may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects. The respondent did not comply with the said provisions when they filed a notice of objection to the entire decision of the taxing officer without identifying the specific items to enable the taxing officer record and forward the reasons for her decision. In this regard counsel made reference to the case of **Machira & Co. Advocates -v- Arthur K. Magugu & Another [2012] e KLR** where this Court pointed out that it was necessary for a party objecting to a bill of costs to give a clear notice of the items objected to as issuing vague notices would force the taxing officers to give reasons for their taxation including the items that are not objected to.

[7] Counsel for the appellant went on to submit that allowing the ruling by the learned Judge would encourage parties to give general requests for all the items which would defeat the objects of ***rule 11 (1) & (2)***. Just the same way pleadings are required to be specific and parties are not allowed to go beyond their pleadings so as to eliminate ambushes, surprises and wastage of time. Thus according to counsel the learned Judge usurped the role of Legislature by extending the meaning of what was intended in the aforesaid rule while failing to abide with the function of the judiciary which is to interpret the statute; that the Judge took it upon himself the task of amending the ***rule 11 (2)*** in the manner that it is only the **Rules Committee** in consultation with the Chief Justice are entitled to. In this regard counsel cited the case of **Mwamlole Tchapu Mbwana -v- IEBC & 7 Others [2018] e KLR** among others.

[8] On the grounds that the value of the subject matter was not capable of being determined from the pleadings, counsel argued that the respondents had filed suit in court to protect the entire investment which was worth 8 billion. Counsel restated the pleading at paragraph 15 of the plaint which stated that;

> **"***The plaintiff's claim against the defendant is therefore for an order of injunction to stop the construction works within the wayleave granted to them by KAA as the same poses great danger to the public as the excavation works are too close to the public and may cause the pipeline to rapture"*

In view of this pleading, counsel submitted that the respondent was not only concerned about the wayleave but the effect the construction would have on its investment should the pipeline rapture. It was as a result of this fear that the respondents went to court to stop the construction that would destroy the investment. Counsel cited the case of **Kipkorir, Titoo & Kiara Advocates -v-Deposit Protection Fund Board [2005] eKLR** where it was indicated that the value of a subject matter of the suit would only have to be the properties a plaintiff wanted to save.

[9] On the ground of appeal the Judge contradicted himself when on one hand he stated that the value of the subject matter could not be ascertained from the pleadings but on the other by commending the taxing officer for applying the provisions of ***schedule 6(1) b*** of the Advocates Remuneration Order.

[10] Rising on his feet to oppose the appeal was Mr. Muthee learned counsel for the respondent who had also filed written submission and list of authorities that he highlighted. According to counsel for the respondent, on the 12th September, 2017 they filed a notice of objection under ***rule 11 (1)*** of the **Advocates (Remuneration) Order** objecting to the entire decision of the taxing officer was made on 30th August, 2017 and thereby requesting the taxing officer to provide the reasons for her decision. By the ruling delivered on 30th August, 2017 it is clear that the taxing officer addressed only three (3) items being instruction fees that was taxed at Ksh.128,296,841.40; this was based on the value of the subject matter that was supposedly Ksh.8 billion.

The others were item 14 being correspondence and item 17 being court attendances. Since these were the only items considered there was no likelihood of any confusion that would substantively depart from the provisions of ***rule 11 (1)*** which is not in mandatory terms. The persuasive case by the High Court of; **Ochieng Onyango Kibet & Ohaga Advocates -v- Peter Muthoka [2017] eKLR** was cited. The notice of objection in that case filed by the applicant raising an issue with the ruling of the court without specifying the items was objected to; however the Judge found that the requirement to specify items an applicant objects to in the notice of objection is a procedural requirement or at best a technicality which should not be used to deny a party access to justice. The provisions of ***Article 159 (2) (d)*** which mandates courts not to cloud substantive matters of justice with procedural technicalities.

[11] Counsel for the respondent went on to argue that even if the provisions of ***rule 11(2)*** of the **Advocates Remuneration Order** were not strictly followed a chamber summons was filed simultaneously with the said objection. Counsel went on to distinguish the facts obtaining in the ***Machira case*** (supra) the difference being that the notice of objection was filed outside the time. Counsel agreed with the learned Judge that the value of the subject matter was not determinable from the pleadings to base the instruction fees on the value of Ksh. 8 billion. In this regard he relied on the case of ***Kipkorir, Tito & Ikiara*** (supra) where this Court found where there is substantial compliance with the provisions of ***rule 11(2)*** of the Order, and the taxing officer indicated the formula applied to access the instruction fees a reference can be filed without waiting for the reasons. This did not derogate from the principle of *stare decisis* or amount to usurpation of the legislative powers of the Rules Committee.

[12] On the value of the subject matter, counsel agreed with the Judge that what was in dispute was not the entire project of the respondents that was in excess of Ksh .8 billion, but the wayleave granted to them by the Kenya AirPort Authority of a land measuring 12.3 meters which was to be left intact and was not supposed to be encroached on by the road. The injunction sought was to stop the construction works within the way leave and a declaration that the respondent was entitled to exclusive use of the wayleave. This resonates with the holding in the ***Kipkorir, Titoo & Kiara Case*** (suppra) where this Court observed that the subject matter of the suit should be the property that a party seeks to save and or protect. In conclusion counsel submitted that the subject matter of the suit was the way-leave section and it is impossible to state the value of the same. Furthermore the suit was compromised before the full hearing and consent judgment entered between the parties and it is not possible to determine the value of the subject matter from the settlement. Counsel urged us to dismiss the appeal.

[13] The aforementioned is a brief outline of the matters contained in the respective submissions by counsel, the impugned judgment and the record of appeal. In considering the issues that arose, it is important to revisit the guiding principles that guide the High Court in its exercise of the powers under ***rule 11*** of the order. The decision appealed from is a ruling on a notice of objection to the order of taxation and a chamber summons seeking a stay of execution and setting aside of the said order of taxation filed by the respondent who was aggrieved.

This called for exercise of the discretionally power of the court. As this Court stated in Kipkorir, Titoo & Ikiara (supra) it is well settled:

> **"On a reference to a judge from the taxation by the taxing officer, the Judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph 1**
>
> **"where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases"**

The two issues for our determination therefore are whether the impugned Ruling is clearly wrong on account of: misdirection by the learned Judge regarding the provisions of ***rule 11*** of the Order and whether the Judge ignored the hallowed principles of separation of powers and *stare decisis* and expanded the established boundaries which is the preserve of the Rules Committee; whether the Judge erred by finding that the value of the subject matter could not be hinged on the value of the respondent's project and not the value of the disputed part of the land.

[14] That said we will examine the ground of appeal on whether the objection raised by the respondent was contrary to the spirit and tenor of ***rule 11 (1)*** of the Order. The notice of objection read as follows;

> **"Take notice that the respondent herein objects to the entire decision of the taxing officer made on 30th August, 2017.**
>
> **The taxing officer is accordingly requested to record and forward the reasons for her decision"**

Our understanding of this notice was that the respondent wished to be furnished with reasons for all the 26 items contained in the bill of costs. The learned Judge found and in our view correctly so that there was nothing wrong with such a request. It is a constitutional right of every party to seek information regarding matters that affect him and if the appellant felt it needed to be furnished with reasons for the 26 items surely they cannot be faulted for that. We have also given this issue another dimension by asking a pertinent question of what prejudice was suffered by the appellants following the general request as opposed to a specific one. We understand counsel for the appellant's

argument that a taxing officer cannot be expected to give reasons for all the items, as this would clog the system, this fear of such requests seems to have been eased when the taxing officer gave reasons for the 4 items that were taxed and nothing more was raised by the respondent apart from filing the reference. One may not second guess what the respondent intended to do with the reasons, regarding the bill of costs which affected it as a party. In essence, the notice of objection notified the taxing officer and the appellants of the respondent's dissatisfaction with the order of taxation. Moreover the provision of ***rule 11 (1)*** is not couched in mandatory terms, in our considered view the issue on the general notice that sought for all the 26 reasons would pass for a procedural technicality that would not warrant the entire dismissal of the notice.

[15] On the issue of whether the Judge overlooked the principal of *Stare decisis* or precedent which maintains that previous decisions are to be followed by the courts; we are of the view that every case should be considered according to its own peculiar facts but where the facts are alike, then the court is bound by precedent. According to ***Black's Law Dictionary***, 9th Edition, 1537, *stare decisis* is the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation. William M. Lile *et al*., in ***Brief Making and the Use of Law Books***, 321 (3rd edition 1914)on the doctrine of *stare decisis* states that –

> **"The rule of adherence to judicial precedents finds its expression in the doctrine of stare decisis. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases."**

In this regard, we agree that the instant case is distinguishable from the ***Machira Case*** (supra) where the notice of objection was declared incompetent due to the fact that it was filed out of time. Similarly this Court in the ***Kipkorir, Titoo & Kiara Case*** (supra) while dealing with the same interpretation of ***rule 11*** of the Order stated that where there was substantial compliance with the rule, and the taxing officer indicates the formula applied to assess the instruction fees, the adequacy or not of the reasons is another matter. In this regard it was discernable from the reasons that the taxing officer applied the value of the investment which was USD 80,000,000.00.

[15] Moving on to the dispute over the subject matter against which the instruction fees was assessed, the learned trial Judge fastidiously analysed the pleadings that was the subject matter and considered that the suit in issue was filed in January, 2016 and was settled by consent in March, 2016 some 2 or three months later. This is what the Judge posited in his own words in a pertinent portion of the impugned ruling;-

> ***"The consent decree exhibited to the Application for reference show it all. It shows that the parties agreed on how to allow the defendant proceed with the construction while protecting and safeguarding the pipeline against intrusion or just damage to the pipeline on the wayleave area.***
>
> ***1 The material availed by the plaintiff (pleading) and the decree (settlement or judgment) reveal that there was never a dispute about the investment of USD80,000,000/=. The dispute was about the wayleave area and the plaintiffs fear that the defendant could trespass thereon and damage pipes and occasion an injury not only to the plaintiffs' gas pipes but to the general public. This comes out clearly from the plaint at paragraphs 13 and 15. Where it is pleaded and averred.***
>
> ***"Paragraph 13***
>
> ***"The actions by the Defendant and her authorized agents are clearly illegal and are apt not only to cause economic loss to the Plaintiff were the pipeline to rapture but they also pose a real and imminent danger to the surrounding area which is densely populated and thus could result in a catastrophy.***
>
> ***Paragraph 15***
>
> ***The Plaintiff's claim as against the Defendant is therefore for an order of injunction to stop the construction works within the wayleave granted to them by KAA as the same poses great danger to the public as the excavation works are too close to the public and may cause the pipeline to rapture".***
>
> ***My finding on the subject matter in dispute in HCCC No. 2 of 2016 is that it did not concern the investment of some USD80,000,000 but the extent to which the defendant would access and deal with the wayleave granted to the plaintiff by the Kenya Airports Authority.***
>
> ***Therefore, when the taxing officer held that "the value of the subject matter could be determined from the pleadings and the same is USD80,000,000/=", she fell into error and that error ought to be corrected by this court upon the reference filed by the client. If find that there was an outright error in principles and therefore I set aside the taxation and direct that the file be remitted back for taxation by a taxing officer at Mombasa High Court other than Hon. D. Wasike, Deputy Registrar."***

[16] We are unable to fault the learned Judge on this conclusion for reasons that in matters of taxation, the arguments such as the ones advanced above are the ones that are taken into consideration. The taxing officer considers *inter alia*, the value of the subject matter from the pleadings, the complexity of the matter and the time taken. In this case it is discernable that it was not the respondent's entire investment that was in dispute even though if the dispute was not solved it was possible the damage could have affected the investment and also endangered the members of public. The width and breath of the dispute was the wayleave granted by the KAA which was 12.3 metres which was to be left intact and the road was not supposed to encroach it. The injunction sought was to stop the construction works within the wayleave and a declaration that the respondent was entitled to its exclusive use. We find the Judge correctly applied his mind to the issues

for consideration, fees for work done cannot take into account future possibilities of the damage that was likely to occur or not occur. The appellants defended a claim in regard to the trespass or encroachment of 12.3 meters consisting of the wayleave as the entire investment of the respondent was not in dispute.

Accordingly we find no merit in this appeal which we order dismissed with costs to the respondent.

Dated and delivered at Mombasa this 28th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR