IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A.)

CIVIL APPEAL NO. 328 OF 2017

BETWEEN

PETER MUTHOKA.....FIRST APPELLANT

JOSEPH MUMO KIVAI.....SECOND APPELLANT

AND

OCHIENG, ONYANGO, KIBET & OHAGA ADVOCATES.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya

at Nairobi ***(Nzioka, J.)*** *dated* ***31st May, 2017***

in

MISC. APPL. NO(S). 130 & 190 OF 2014)

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JUDGMENT OF THE COURT

This appeal turns on the narrow question of how a Taxing Master ought to determine for purposes of instruction fees, the value of the subject matter for purposes of an advocate - client bill of costs where a suit has been settled between the parties.

The appellants herein **Peter Muthoka (Muthoka)** and **Joseph Mumo Kivai (Kivai)** (the clients), had previously retained the law firm of **Ochieng, Onyango, Kibet** and **Ohaga Advocates** (the advocates), to represent them in various matters particularly to defend them in High Court Civil Suit No. 503 of 2011, **CMC HOLDINGS LIMITED & CMC MOTORS LIMITED -vs- ANDY FORWARDING SERVICES LIMITED & 2 OTHERS**, a suit wherein the plaintiffs sought, *inter alia*, a declaration that the clients and others had breached their fiduciary duties to the said plaintiffs thereby occasioning them losses amounting to **Kshs.1,563,000,000**, which they claimed plus interest.

That suit was compromised in terms of a Settlement Deed dated 8th February, which was recorded in court on 11th September, 2013, before Musinga J (as he then was), marking the suit as settled by consent.

A dispute over fees seems to have arisen thereafter between the advocates and the clients whereupon the advocate filed an Advocates - Client Bill of Costs dated 2nd April, 2014, in which they sought from the client the sum of Kshs.128,649,110.40. That bill of costs was subsequently amended on 13th October, 2014, to a total of Kshs.45,762,667.29 from which the sum of Kshs.10,048,000 paid by the client was subtracted to leave an amount of Kshs.35,714,667.29 which the advocates claimed.

Instruction fees comprised the largest item at Kshs.55,376,437.50 in the original bill and Kshs.19,649,500.00 as amended, followed by getting up fees at Kshs.18,458,812.50 and Kshs.6,549,833.33, respectively.

Both the advocates and the clients filed written submissions for and in opposition to the amended bill of costs as directed by the High Court's Deputy Registrar on 2nd December, 2017, and thereafter appeared for the taxation before **Sandra Ogot**, the Hon. Deputy Registrar and Taxing Master. She thereafter delivered her ruling on the taxation on 22nd September, 2015, whereby she taxed the bill against Muthoka at Kshs.29,226,451.22 less the sum of Kshs.10,000,000 already paid, and the one against Kivai at Kshs.29,213,099.90. In arriving at these figures the taxing master used the sum of **Kshs.1,563,000,000,** reimbursement whereof was sought in the suit, as the basis for determining

instructions fees.

Aggrieved by that ruling on taxation, Muthoka issued notice of objection thereto under **Rule 11** of the **Advocates Remuneration Order** in the following terms;

> **"To:**
>
> **Deputy Registrar,**
>
> **High Court of Kenya**
>
> **NAIROBI.**
>
> **NOTICE OF OBJECTION TO THE DEPUTY REGISTRAR'S TAXATION OF THE APPLICANT'S AMENDED ADVOCATE CLIENT BILL OF COSTS DATED 13TH OCTOBER, 2014 UNDER RULE 11 OF THE ADVOCATES REMUNERATION ORDER**
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> **The respondent herein, Peter Muthoka objects to the Deputy Registrar's decision dated 22nd September, 2015, on the Applicants amended Advocate Client Bill of costs dated 13th October, 2014 as it relates to the contested items on the said bill.**
>
> **The respondent herein further requests for the Taxing Master's reasons for the said decision as provided for under the Advocates Remuneration Order, Rule 11(2)**
>
> **DATED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2015**
>
> **……..…….**
>
> **AHMEDNASIR, ABDIKADIR & COMPANY**
>
> **ADVOCATES FOR THE RESPONDENT"**

That notice of objection was followed by a Chamber Summons application pursuant to **sub-rule (2)** of the said rule together with various other provisions of law seeking orders;

> ***"1. That the Honourable Court be pleased to vacate and set aside in its entirety the ruling and reasoning of the Honourable Sandra Ogot, Deputy Registrar, dated and delivered on the 22nd September, 2015, taxing the amended advocate-client bill of costs dated 13th October, 2014, at Kenya Shillings Nineteen Million, Two Hundred and Twenty Six Thousand, Four Hundred and Fifty One and Twenty Two Cents (Kshs.19,226,451.22) and refer the matter for fresh taxation before a Taxing Master."***

In the grounds appearing on the face of the summons it was stated, *inter alia*, that the taxing master misdirected herself in law in arriving at her decision that was untenable in law; misdirected herself in exercising her discretion on grounds that were unclear, unreasonable and untenable in allowing the instructions fees; took into consideration issues that she should not have; and failed to consider issues she ought to have in the circumstances.

There was a similar application by Kivai and the two appear to have been consolidated and heard as one.

That application was heard by Nzioka J who, by a ruling delivered on 31st May, 2017, found it devoid of merit and dismissed it, upholding the taxing master's assessment. Further aggrieved, the clients filed this appeal in which they complain in the memorandum of appeal that, the learned judge erred in law and in fact in;

> ***"a. … dismissing the Chamber Summons application dated 7th October, 2015, without a reasonable basis known in law;***
>
> ***b. … disregarding an express evidential finding by the taxing master that there was indeed a Deed of Settlement dated 7th of February, 2014;***
>
> ***c. … determining that the value of the subject matter in respect of the suit was only ascertainable from the pleadings and not the deed of settlement dated 7th of February, 2014;***
>
> ***d. … determining that the deed of settlement dated 7th of February, 2014 was not brought before the Deputy Registrar, notwithstanding the ruling by the taxing master;***
>
> ***e. … failing to consider the totality of the evidence that was presented before her with the regards to the deed of settlement dated 7th of February, 2014;***
>
> ***f. … arriving at a conclusion that the only factor in determining the value of the subject matter will be the pleadings despite***

making a finding that the subject matter can only be ascertained from pleadings or judgment or settlement;

g. … holding that the Honourable Deputy Registrar took into consideration the principles of taxation in making her decision and exercising her discretion judiciously;

h. … in failing to appreciate the principles of taxation in rendering her decision;

i. … in unjustly enriching the respondents."

The parties filed written submissions which we have perused. They were also the basis of the submissions made before us during the plenary hearing of the appeal. For the clients, learned Senior Counsel **Mr. Ahmednassir Abdullahi**, cast the appeal in a single issue: *what is the taxation regime that a taxing master applies in taxing a bill of costs once parties reach a settlement that compromises the suit*? He went on to urge that both courts below got it wrong because notwithstanding, that a settlement had been reached and recorded in the parent suit, they used the pleadings therein to determine the value of the subject matter for purposes of instructions fees. He pursued that argument by asserting that under **Schedule VI** of the **Advocates Remuneration Order (ARO),** taxation is statute-regulated and is time-specific so that while the suit is alive the taxing master uses the pleadings; if there is a judgment, the judgment applies; and if there is a settlement, the bill of costs can only be based on the terms of settlement.

Learned Senior Counsel went on to contend that any breach of the scheme of taxation creates *"a centra-statute situation"* which amounts to an illegality. To the present case, he urged, the settlement was common ground and it was the basis of the consent recorded before the High Court. Its existence had been brought to the attention of the taxing master yet, inexplicably, she went back to the pleadings when determining the value of the subject matter. Counsel faulted the learned Judge for holding at paragraph 38 of her ruling that it was not clear whether the Deed of settlement had been brought to the attention of the taxing master when it certainly had been. He referred to the consent letter dated 20th February, 2013, and filed at the High Court on 9th September, 2013, requesting that *"the suit be marked as fully settled on the terms set out in the Settlement Deed dated 8th February, 2013."* The letter was signed by **Iseme Kamau & Maema Advocates** for the plaintiffs; **Kaplan & Stratton Advocates** for the 1st defendant and **Ochieng, Onyango, Kibet & Ohaga** for the 2nd and 3rd defendants. He thus contended that it is the Settlement Deed that would be the proper basis for determining the fees payable and not the pleadings. He referred us to the case of ***JORETH LIMITED -vs- KIGANO & ASSOCIATES [2002]*** **IEA 92** as representing the correct approach to taxation.

Citing this Court's decision in ***KENYA PIPELINE CORPORATION -vs- GLENCORE ENERGY (UK) LIMITED [2015] eKLR*** and ***NJOGU & COMPANY ADVOCATES -vs- NATIONAL*** **BANK OF KENYA LIMITED [2016] eKLR**, Mr. Abdullahi charged that the advocates had a duty to disclose the existence and terms of the deed of settlement and even produce a copy thereof before the taxing officer. It was therefore misleading and fraudulent for them to have sought to rely on the pleadings to seek the court's assistance to recover fees based on the wrong formula which rendered the taxed costs an illegality from which they ought not to be allowed to benefit. We must state, right away, that we think the claim that the advocates were being fraudulent is extravagant.

For the Advocates, learned counsel **Mr. Ochieng Oduol,** first fired off that his learned counterpart had tried to confuse the jurisprudence on this subject and that the clients' case had *"mutated as it moved from forum to forum"* until this Court and they were clearly acting out of bad faith. Counsel conceded that a consent was recorded in the terms we have previously referred to, but explained that the Settlement Deed was confidential and had never been availed to the Advocates and they were not privy to its contents.

On what should be the basis for determining the subject matter value for taxation, he contended that *"the pleadings, judgment and settlement can be taken together,"* even as he conceded that both the **6th Schedule** to the **ARO** and the **KIGANO decision** (Supra) were explicit that the value of the subject matter is to be gleaned from the pleadings, the judgment or the settlement. When we posed whether those items are to be taken conjunctively or disjunctively, counsel did not provide a clear response. He urged us not to interfere with the decision of the courts below because they were exercising discretion which we should be slow to disturb unless for the limited reasons given by the predecessor of this Court in ***MBOGO -vs- SHAH [1968] EA 93***, which did not obtain herein.

Finally, **Mr. Oduol** urged that we ought not to interfere with the determination of the taxing officer and confirmed by the learned Judge because it involves questions of quantum and it is the taxing officer who is best suited to deal with them. Absent a showing that there has been an error of principle, and in his view there was none, the same should be left undisturbed. He relied on ***THOMAS JAMES ARTHUR -vs- NYERI ELECTRICITY UNDERTAKING [1961] EA 92*** and ***FIRST AMERICAN BANK OF KENYA -vs- SHAH & OTHERS [2002] 1 EA 64,*** and urged us to dismiss the appeal with costs.

Responding to those submissions, Mr. Abdullahi countered that the clients have never refused to pay fees and have in fact made payment. Their only objection, he asserted, related to the legal regime employed by the taxing master. He stated that the provisions of the 6th Schedule to the ARO are in disjunctive terms and that it was an error of principle for the taxing master to rely on pleadings where there was a settlement recorded, as happened in the instant case. Such settlement has the effect of displacing the pleadings as a basis for determining the subject matter value. He pointed out that this is a position the clients have always maintained right from when the application to set aside the taxation was first argued before Tuiyot J but he disqualified himself before determining the application. Counsel took issue with the advocates' raising of extraneous issues and attempting to orally explain matters relating to the Settlement Deed in the face of the clear terms of the consent recorded by the parties to the suit. He reiterated his assertion that the provision in contention is in disjunctive terms which the **KIGANO decision** (Supra) affirms, and is good law. Given the error of principle, he submitted, this is a proper case for our interference to set aside the taxation and send the matter back to the taxing master for re-taxation on the basis of the proper regime.

We have given due consideration to the rival submissions filed and made before us, as well as the authorities cited. All things considered, and as we stated at the outset, the single issue in this appeal is whether the applicable basis for determining the subject matter value in arriving at the instructions fees was the pleadings as urged by the advocate and accepted by the taxing master and the learned Judge, or the Settlement Deed, as contended by the clients. It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial

discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in ***MBOGO -vs- SHAH*** (Supra), then the decision though discretionary, may properly be interfered with. See also ***ATTORNEY GENERAL OF KENYA -vs- PROF. ANYANG' NYONG'O & 10 OTHERS,*** **EACJ App. No. 1 OF 2009**.

It has long been the law as was stated in ***ARTHUR -vs-NYERI ELECTRICITY*** (Supra), that where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional cases. What we now have to decide is whether there was an error of principle which would have called upon the learned Judge to interfere with the taxing masters' decision.

The clients' case, as we understand it, is not about quantum. Had it been, the learned Judge would not be entitled to interfere, without a showing of exceptionality in the form of the fee being so manifestly excessive as to lead to the inference that it proceeded from an error of principle. See ***FIRST AMERICAN BANK OF KENYA -vs- SHAH & OTHERS [2000] LLR No. 1486,*** where however, the complaint is about an error of principle, however, and it is established that such an error did occur, then the judge would be entitled, indeed, obligated to interfere as a matter of law.

It all turns on the construction that is to be attached to the principle contained in the **6th Schedule Part A** of the **Advocates Remuneration Order**. The provision is as follows;

> ***"1. Instruction fees***
>
> ***....***
>
> ***The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it—***
>
> ***....***
>
> ***(b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and ...."*** (Our emphasis)

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.

What we have said is in direct harmony with what this Court stated in ***JORETH LIMITED -vs- KIGANO & ASSOCIATES*** (Supra),

> ***"We would at this stage, point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess Instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, and direction by the trial judge and all other relevant circumstances."***

Now, in the present case the taxing Officer did not follow this formula and the learned Judge failed to reverse her on that score, as she should have. It is quite clear from the learned Judge's ruling that she was fully cognizant of the requirements to base assessment of costs on the pleadings, judgment or settlement as set out in that passage, which she reproduced. It is also quite clear that she appreciated the existence of the Deed of Settlement and the obligations that would flow from it. She however, cast doubt on whether the taxing master was aware of the existence of the said of Settlement. Her reasoning was as follows;

> ***"38. Based on the legal principles stated above, it is clear that the value of the subject matter can only be ascertained from pleadings, judgment or a settlement if any. In the instant case there was no judgment. I however note that there is a Deed of Settlement executed by the parties dated 7th February, 2013, annexed to the Supplementary Affidavit sworn by Peter Muthoka***

dated 10th June, 2016. He avers in the said Affidavit that the Deputy Registrar erred both in law and facts in failing to consider that there was a settlement reached between the parties. What is not clear to the court is whether at the time the Honourable

Deputy Registrar was dealing with this matter, this deed of Settlement was brought to her knowledge. I have noted that on 22nd September, 2015, she delivered her ruling on two Bills of costs herein. That is of course after the Deed had been executed. I have looked at the court file and note that the initial Bill of costs herein was filed in court on 2nd April, 2014 and the Amended Advocate-Client Bill of costs dated 13th October, 2014 filed in court on 14th January, 2015. The Honourable Deputy Registrar heard the parties on the Bill of costs on 18th March, 2015. I have gone through the submissions made by the Parties before the Honourable Deputy Registrar, and I cannot see where the Parties brought this Deed of settlement to the knowledge of the Deputy Registrar. To the contrary, the Parties have heavily referred to the pleadings.

39. In the given circumstances, the only factor to consider in determining the value of the subject matter will be the pleadings.

With great respect, we are of opinion that the learned Judge misdirected herself and her conclusion that the taxing master was not aware and probably had no knowledge of the Deed Settlement does not accord with the record. First, it is quite clear from **item 34** of the **amended bill of costs** itself that one of the attendances made by the advocates was on 11th September, 2013 particularized as follows;

"Appearing before Justice Musinga for recording of a settlement dated 8th February, 2013"

That ought to have been notice enough to the taxing officer that the matter she was taxing fell under the settlement regime. Indeed, the taxing master in her ruling refers to the client having *"submitted that the matter was settled without going to full trial vide a settlement deed dated 8th February, 2013 …"* Without a doubt, therefore, the learned Judge fell into error in ascribing to the taxing master non-knowledge of the Settlement Deed in the face of express pronouncement by the latter that the same had been brought to her attention. We think, with respect that had the learned Judge appreciated as she ought to have, that there was indeed a Deed of Settlement, she would have come to the inescapable conclusion that the taxing master committed an error of principle in not making the same the starting point of her assessment.

We reiterate this Court's holding in ***KIPKORIR TITOO & KIARA ADVOCATES -vs- DEPOSIT PROTECTION FUND BOARD [2005]*** **eKLR;**

"We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA, (1) that would be an error in principle. And if a Judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer. (See - D'Sonza Vs Ferrao (1960) EA 602. (See Devshi Dhanji Naran Patel (No.2) [1978] KLR 243." (Our emphasis)

Being of that persuasion, it is inevitable that this appeal succeeds. The ruling and order of the High Court dated 31st May, 2017, is set aside. We substitute therefor an order that the Chamber Summons dated 7th October, 2015, is allowed with costs. The amended Advocate-Client Bill of Costs filed on 14th January, 2015, is remitted for taxation before a taxing master other than **Sandra Ogot**, Deputy Registrar.

The appellants shall have the costs of this appeal.

DATED and delivered at Nairobi this 21st day of June, 2019

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR