



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 102 OF 2017**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 8<sup>th</sup> February 2018)**

**MUMIAS SUGAR COMPANY LIMITED.....APPLICANT**

**VERSUS**

**PROFESSOR TOM OJIENDA & ASSOCIATES.....RESPONDENT**

**RULING**

1. The Application before Court is a Reference filed in reference to a ruling from Hon. W. Ngumi (the Taxing Master) in Nairobi ELRC Misc 52/2017. The Application was brought under Section 44 of the Advocates Act paragraph 11 of the Advocates (Remuneration) Order 2009, Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. The Applicant sought orders as follows:-

- 1. That this Honourable Court be pleased to issue an order of stay of any and all orders emanating from the ruling of the Hon. W. Ngumi dated and delivered on 2<sup>nd</sup> August, 2017, pending the hearing and determination of this Reference and/or Application.***
- 2. That findings and ruling of the Hon. W. Ngumi in Nairobi Employment and Labour Relations Court Misc Application No. 52 of 2017, taxation, with regard to the Respondent's bill of costs, awarding a sum of Kshs.178,630 be varied and/or set aside.***
- 3. That this Honourable Court be pleased to order that the bill of costs be re-taxed after considering the Applicant's submission on the bill by any other taxing officer.***
- 4. That this Honourable Court be pleased to interrogate the Respondent's bill of costs in light of actual work done and adopt the Applicant's proposal on taxation of the costs.***
- 5. That this Honourable Court be pleased to adjust the contested items as the justice of the case may require, in lieu of remitting the contested items to a taxing officer.***
- 6. That this Honourable Court be pleased do order that costs of this application be borne by the Respondent.***
- 7. That this Honourable Court be pleased to make any such order and/or orders as it may deem just and appropriate in the circumstances.***

3. The Application is premised on the following grounds:

- 1. That the Honourable Taxing Officer erred in law and in fact by relying on Kshs.1,000,000 as value of the subject matter as cited by the Respondent herein in the bill of costs instead of Kshs.175,520 as the value of the subject matter from judgement which was delivered by Court on 24<sup>th</sup> February 2014.***
- 2. That the Honourable Taxing Master erred in the application of law in raising the instructing fees by one half contrary to established principles of taxation and notwithstanding that the bill of costs before her was advocate client bill of costs and not party and party bill of costs.***
- 3. That the Taxing Master erred in fact and in law by ignoring and/or failing to consider the submissions of the Applicant herein***

*which the Applicant duly filed in Court on 10<sup>th</sup> July 2017, served upon the Respondent herein on 11<sup>th</sup> July 2017 and orally highlighted in Court on 26<sup>th</sup> July 2017.*

*4. That the Honourable Taxing Officer erred in law and in principle by awarding the Respondent herein disbursements of Kshs.20,000/= without any scintilla of evidence on their expenditure contrary to Rule 74 of the Advocates (Remuneration) Order 2009. She awarded the disbursements despite her acknowledging that there was an o proof provided by the Respondent herein.*

*5. That the Honourable Taxing Officer awarded costs of the bill of costs to the Respondent herein contrary to Rule 77(1) of the Advocates (Remuneration) Order, 2009.*

*6. That the Honourable Taxing Officer erred in law by taxing various items of the bill of costs without citing any provisions under which those items were taxed.*

*7. That the ruling has arithmetical errors and is equivocal, ambiguous and incapable of being enforced.*

*8. That it is proper and just in the circumstances that this Honourable Court be pleased to allow this reference to enable the bill of costs to be taxed appropriately in accordance with the law.*

*9. That it is in the interest of justice that this application be allowed.*

4. The Application is further supported by the annexed affidavit of Rachel Auta, the Legal Officer of the Applicant herein who reiterates the averments made in the Applicant's Grounds in support of the Application.

5. The Applicants aver that the taxing master did not take into consideration the submissions made by the Applicants. They aver that failure by the taxing master to consider their submissions is tantamount to condemning them unheard which is against the rule of natural justice.

6. The deponent also depones that the taxing master applied the wrong value of the subject matter as 1 million instead of 175,520/= in the taxation which value led to the escalation of instruction fees to 77,000/= instead of 49,000/=.

7. The Applicants also aver that the taxing master all erred in principle in raising instruction fees by ½ yet the bill before her was an Advocate/Client bill and not a Party to Party bill.

8. Another complaint by Applicant is that the taxing master awarded 20,000/= on item 22 at paragraph 22 of the ruling without breaking it down to show how the disbursements came to that figure. That this figure did not explain the nature and amount of each expense incurred by the Respondent herein.

9. The Applicants also submit that the entire bill has arithmetic errors. They submit that the entire bill is an unjust enrolment upon the Respondents and wish the same to be varied or set aside or be resubmitted to taxation before another officer.

10. This application was served upon the Respondents on 5<sup>th</sup> October 2017 as per the Affidavit of service filed in Court on 9<sup>th</sup> October 2017 for hearing on 11<sup>th</sup> October 2017. On this date, the Respondents failed to attend. The Respondents had previously been served with the Reference under consideration on 7<sup>th</sup> June 2017 and never filed any response. The Application is therefore unopposed.

11. I have considered the averments of the Applicant. The Applicants have complained that the taxing master considered a higher amount of 1 million as instruction fees instead of the value of 175,520/= which was awarded in the judgement.

12. To determine if this is true or not, I note that the taxing master considered the pleadings to determine what instruction fees was. The sixth Schedule of Advocates Remuneration Order provides the basis of calculating the instruction fees. This will be discerned from the subject matter.

13. From the pleadings filed, the claim was against the Respondent for wrongful termination. The Claimant sought a declaration that his dismissal was unlawful and or illegal and sought to be reinstated in the alternative, he sought to be paid terminal dues being 2 months salary in lieu of notice, salary for days worked, payment in lieu of leave refund of house deposit as well as compensatory damages equivalent to 12 months' salary. His salary was 30,752/= per month.

14. If what he sought was given in a blacket form, this would in aggregate amount to less than 500,000/=. It is not clear why the taxing master decided to take 1 million as the global figure in assessing the instructions fees.

15. In the premise, I do agree with the Applicants herein that the amount given by the taxing master as instructions fees was way beyond what was the ideal amount.

16. On the issue of the taxing master adding one half on this figure, the position is provided under the Advocate Remuneration Order Schedule 6 provides what the instruction fee shall be.

17. The Applicants further argue that the entire bill has mathematical error, which I find to be true. Given this position, I allow the application before me and direct that this bill be re-submitted for taxation before another taxing maser.

18. Costs in the cause.

**Read in open Court this 8<sup>th</sup> day of February, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Wesonga for the Applicant – Present