REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS APPL. NO. 32 OF 2017

IN THE MATTER OF THE ADVOCATES ACT CAP 16 AND

THE ADVOCATES (REMUNERATION) ORDER, 2009

AND

IN THE MATTER OF THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER, 2014

AND

IN THE MATTER OF THE ADVOCATE-CLIENT BILL OF COSTS

BETWEEN

MUMIAS SUGAR COMPANY LIMITED.....APPLICANT

AND

PROFESSOR TOM OJIENDA & ASSOCIATES.....RESPONDENT

[Being a Reference filed pursuant to the leave of court granted on 20th March, 2018 against Hon. P.W. Mbulikah's (the taxing officer's) Ruling in Misc Application No. 32 of 2017]

RULING

The Client, **MUMIAS SUGAR COMPANY LIMITED**, has come to court to challenge the decision of the learned Taxing Officer.

1. The decision was made on an Advocate/Client Bill of Costs which had been filed by the Advocate, **PROFESSOR TOM OJIENDA & ASSOCIATES.**

2. The Bill of Costs was taxed in the sum of Kshs 47, 271,392/=.

3. In challenging the decision of the Taxing Officer, the Client's first contention is that the taxing officer lacked jurisdiction to tax the Bill because at the time it was lodged in court, the Advocate was still acting for the Client.

4. It was the submission of the Client that it was untenable for an advocate to tax his bill while still acting for a client.

5. The advocate does appear to be contesting that position. But he says that as by the time he filed his Bill of Costs, he had written to

the client asking the client to pick up their files, from the advocate's office.

6. The advocate has told the court that he was no longer interested in continuing to represent the client.

7. The advocate exhibited three letters dated 6th March 2017, 17th March 2017 and 17th July 2017, as evidence that he had ceased to act for the client.

8. As the advocate has said in his Replying Affidavit, there was nothing that could compel him to continue representing the client, if he had decided that he could no longer represent the said client.

9. And in this case, the advocate says that the client had failed to pay fees to the advocate, notwithstanding the advocate's efforts to get paid.

10. The advocate submitted that;

"….. the taxing master determined the issue of prematurity of the Bill of Costs dated 14th March, 2017 and determined that it was rightfully before her through all the evidences that were provided during the taxation."

11. I have carefully perused the record of the proceedings before the taxing officer, but I found no explicit determination on the issue as to whether or not the Bill of Costs had been lodged prematurely.

12. Pursuant to **Order 9 Rule 13(1) of the Civil Procedure Rules**

"Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last known address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:

Provided that, unless and until the advocate has –

a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and

b) procured the order to be entered in the appropriate court; and

c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal."

13. It has not been shown that when the advocate herein had written to the client, saying that he was no longer acting for the said client, another advocate had given notice of change of advocates.

14. Therefore, even if the advocate deemed himself as having ceased to act for the client, he is deemed to have continued to be the client's advocate until such time as the advocate had complied with the provisions of **Order 9 Rule 13 (1) of the Civil Procedure Rules.**

15. In any event, the advocate did, at paragraph **14** of his Replying Affidavit, state thus;

"THAT* the Respondents did not purport to cease *acting for the Applicants but we are no longer on record for the Applicants herein, making this Bill of Costs tenable before the law."

16. If that is the position, (that the advocate had not ceased to act for the client), that would imply that they were still on record for

the client.

17. I am unable to appreciate how the advocate can say that he was no longer on the record for the client, yet he had also not ceased to act for the same said client.

18. There is no law that expressly prohibits an advocate from lodging his Advocate/Client Bill of Costs for taxation before either the task is completed or before the advocate ceases to act for the client.

19. However, as the Court said in the case of **GICHUKI KING'ARA & CO. ADVOCATES V. MUGOYA CONSTRUCTION & ENGINEERING LTD 2010 eKLR**, to allow an advocate present his Bill for taxation before the work he was retained to do is completed,

"…….. would create a bad precedent whereby an Advocate could tax his bill at will before the business for which he was retained is concluded, and this could result to a multiplicity of taxations in the same retainer, which would be greatly prejudicial to the client."

20. In this case, there is no evidence that the advocate had ceased to act for the client in the Parent case, which gave rise to the Advocate/Client Bill of Costs.

21. That is because there is neither an order granting leave to the advocate to cease acting, nor is there evidence that another advocate had taken over in the Parent case.

22. The letters from the advocate, telling the client that the advocate had ceased to act for the said client, and asking the client to collect their files from the advocate, do not constitute a cessation of the Advocate/Client relationship.

23. The advocate had been instructed in respect to a case which was before the **SUGAR ARBITRATION TRIBUNAL.**

24. The client faults the taxing officer for applying Schedule **VI** of the **Advocates Remuneration Order**, as in its view, the schedule is only applicable to matters which were before the High Court, whilst the matter herein was before a tribunal.

25. There is no dispute about the fact that the case was before the tribunal.

26. As far as the client was concerned, the tribunal had a status equivalent to the subordinate court.

27. But the advocate reasoned that by dint of the provisions of

Section 31 of the **Sugar Act**, the Sugar Arbitration Tribunal had a status similar to that of the High Court.

28. Section 31 provides as follows:

"(1) There is established a tribunal to be known as the Sugar Arbitration Tribunal for the purposes of arbitrating disputes between any parties under this Act.

(2) The Tribunal shall consist of –

(a) a chairman who shall be a person qualified for appointment as a Judge of the High Court of Kenya and

(b) two other members, being persons with expert knowledge of the matters likely to come before the Tribunal and who are not persons with a direct material interest in the sugar industry, all of who shall be appointed by the Minister in consultation with the Attorney General."

29. Nowhere in **Section 31** of the **Sugar Act** is it stipulated that the Tribunal established under that statute has a status similar to that

of the High Court.

30. If anything, the Sugar Arbitration Tribunal shall **ONLY** have the powers of the High Court in very limited and specified aspects of;

(a) administering oaths to the parties and to witnesses in proceedings before it;

(b) summoning witnesses and requiring production of documents;

(c) making orders for the payment of costs.

31. By specifying the particular aspects in respect to which the Tribunal would have powers similar to those of the High Court, the **Sugar Act** is deemed to have acknowledged that the Tribunal does not have any of the other powers that the High Court has.

32. The very limited powers donated to the Tribunal is in tandem with the provisions of **Article 169(1)(d)** of the **Constitution** which expressly provides that:

"Subordinate Courts are –

……..

……..

(d) any other court or local tribunal as may be established by an Act of Parliament other than the Courts established as required by Article 162 (2)."

33. I find that the Sugar Arbitration Tribunal has not been granted a status similar to the High Court. It has the status of the Subordinate Courts.

34. Therefore, the taxing officer erred, in principle when she applied **Schedule VI** during the taxation of the Bill of Costs.

35. The next issue that needs my attention is the Value of the Subject Matter.

36. In her Ruling, the learned taxing officer noted that the advocate had not exhibited the Statement of Claim. However, the Defence was on record.

37. She also noted that in the Witness Statement of **Paul Waitu**, it was indicated that the company had contracted sugarcane farmers to the tune of Kshs 2.5 Billion.

38. Another observation made by the taxing officer was that the Certificate of Urgency dated 23rd August 2012 asserted that Kshs 1.75 Billion would be the loss of investment of the company.

39. Having made those observations, the taxing officer held that the value of the subject matter was Kshs 1.75 Billion, because in her considered opinion, that is what the company had averred as being at stake.

40. A perusal of the written submissions lodged by the parties before the taxing officer reveals that the advocate never pegged his case on either of the sums mentioned by the taxing officer in her Ruling.

41. The advocate cited the case of **JORETH LIMITED V. KIGANO & ASSOCIATES, CIVIL APPEAL NO. 66 OF 1997** [**2002**] **1 E.A 92**, in which the Court of Appeal held as follows:-

"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 such 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, any directions by the trial Judge and all other relevant circumstances."

42. It is therefore clear that when the value of the subject matter was not is not ascertainable from the Judgment, or the Settlement (if any) or from the pleadings, the taxing officer has a discretion to determine it. The said discretion must be applied judiciously.

43. The only way that any person can ascertain whether or not the discretion had been applied judiciously is by evaluating the reasons given by the person making the decision.

44. The reasons do not have to be long or elaborate; they could be as simple as recognizing and giving effect to the doctrine of precedent.

45. When no reasons are given for arriving at a particular decision, there is a real possibility that an appellate court may conclude that the decision maker had not applied his or her mind judiciously.

46. In this case, the taxing officer did not have the benefit of seeing the Statement of Claim. However, she saw and gave consideration to two figures which were mentioned in the Certificate of Urgency and in a Witness Statement.

47. However, the taxing officer did not offer any explanation why she settled on the sum of Kshs 1.75 Billion, as opposed to Kshs 2.5 Billion. Therefore, I am unable to ascertain whether or not the value was arrived at after the taxing officer had applied her mind judiciously.

48. In the circumstances, I find that it is in the interests of Justice to have the Bill of Costs taxed afresh, so that the parties can both have the benefit of a reasoned determination on the question concerning the value of the subject matter.

49. As the Bill of Costs is to be remitted for taxation afresh, I find that it would be wrong of me to say much more, especially concerning the quantum of the Instruction Fee. I must refrain, as I hereby do, from micro-managing the taxing officer who will be taxing the Bill, as that might be tantamount to stifling the discretion of the taxing officer.

50. However, I feel obliged to point out that the taxing officer must bear in mind the fact that this is an Advocate/Client Bill of Costs. There has not been any Party and Party Bill of Costs taxed in the Parent case.

51. If there had been a taxation of the Party and Party Bill of Costs, the taxing officer could have had the option of awarding the Advocate/Client costs by ordering that there be an increase of the Party and Party Costs by one-half.

52. There is no justification whatsoever, in my considered opinion, for taxing an Advocate/Client Bill of Costs, and then increasing it by 50%.

53. If the taxing officer has good reason for increasing the Instruction Fee, he or she may do so during the process of taxing the Bill.

54. If the reason for increasing the Instruction Fee was;

"….. the nature and the importance of the cause or the matter; the interest of the parties; the general conduct of the proceedings, or any direction by the trial Judge or any other relevant factors,"

the taxing officer would have to specifically indicate the factors which he or she relied upon.

55. In this case, the taxing officer did not give any reasons to warrant an increase in the Instruction Fee. I find that by increasing the Instruction Fee without giving any legally sound reason, is an error in principle.

56. The advocate submitted that the fee of Kshs 31,415.12, which has been suggested as being appropriate;

"…… would amount to an injustice upon the Respondent. The amount of Kshs 31,415.12 is extremely low for the firm of senior counsel to measure as favourable compensation for the work done."

57. In my understanding, the seniority of an advocate was not a factor to be taken into account by the taxing officer when taxing a Bill of Costs.

58. If an advocate was senior and therefore believed that he was entitled to earn a fee which was higher than that prescribed in the Advocates Remuneration Order, his options were to either agree on a fee with his client or agree with the client on a method that would be used to calculate the fee for the services he had been instructed to render.

59. If an advocate had not entered into an agreement with his client on either a specific sum as his fees or on a mode of calculating his fee, the taxing officer would only be guided by the Remuneration Order. The seniority or otherwise of an advocate was not one of the factors to be taken into account.

60. After all, it is not a rule of practice that Senior Counsel or more experienced advocates would invariably charge higher fees than other advocates.

61. I note that in his submissions before the taxing officer, the advocate asked for Kshs 14,031,931.28, which he described as;

"……. fair and considerate as according to the Remuneration Order, which as can be said not the exact value of the subject matter being that fees has been reduced to the exact fee which is Kshs 899,462,085."

62. It is interesting that whilst the advocate placed the value of the subject matter at Kshs 899,462,085/=, the taxing officer literally doubled that sum, to Kshs 1.7 Billion.

63. The effect of doubling the said value was a doubling of the Instruction fee as well, from what the advocate asked for (Kshs 14 Million) to Kshs 26 Million.

64. As there is no legally plausible explanation for that decision, I find that the taxing officer must have applied the wrong principles.

65. I also find that the learned taxing officer erred when she levied **VAT** on all the taxed sums, which include Court Fees and other disbursements.

66. Where a party had paid Court Fees or other disbursements, the said payments would not attract **VAT** when a Bill of Costs was being taxed.

67. When Court Fees or other disbursements have been paid, if any such payment attracts a levy such as **VAT**, the said levy would have already been paid.

68. If the payment was made by the advocate, he would be seeking reimbursement from the client. In the event, such reimbursement of money which had already been paid, would not ordinarily attract **VAT**.

69. Where any particular disbursement is being claimed by an advocate, the taxing officer who allows such a payment to be recovered, should ensure that he or she verifies that such money had been disbursed.

70. And if the taxing officer were to order that **VAT** be paid on any particular disbursement, the said taxing officer would need to give reasons why **VAT** was payable on the said disbursements.

71. As regards disbursements generally, it is good practice for the taxing officer to verify that the party claiming the same had

actually remitted payments.

72. In this case, the taxing officer simply stated that in respect to the "*Other Items*", she had taxed the same as they had been drawn by the advocate, in his Bill of Costs.

73. In the event, I find that there is no proof that the taxing officer actually applied her mind, towards verifying that the reimbursements cited in the Bill of Costs, relate to money which the advocate had paid out in respect to services which he had been instructed to provide.

74. Much as it is possible that the advocate had made the payments for which he was now seeking reimbursement, it is equally possible that some of the payments may not have been made as claimed.

75. Good practice demands that when a taxing officer awards an order for the reimbursement of money allegedly paid out on behalf of the person whose Advocate/Client Bill of Costs was being taxed, the taxing officer should always verify that the disbursements claimed, had actually been paid.

76. When the taxing officer ordered for the payment of money which had allegedly been disbursed by the advocate, on behalf of the client, yet the taxing officer had not verified whether or not the funds had been disbursed, that was an error in principle.

77. In the result, the reference from taxation is successful. I set aside the entire decision which was rendered by the taxing officer on 11th October 2017.

78. I further order that the advocates Bill of Costs be placed before a different taxing officer, for appropriate consideration.

79. The costs of the reference from taxation are award to the Client.

DATED, SIGNED and **DELIVERED** at **KISUMU** This **6th** day of **February** 2019

FRED A. OCHIENG

JUDGE

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