



REPUBLIC OF KENYA



**Directline Assurance Company Limited & 4 others v Sureinvest
Company Limited & 15 others (Commercial Case E278 of 2019)
[2024] KEHC 13421 (KLR) (Commercial and Tax) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E278 OF 2019
MN MWANGI, J
OCTOBER 25, 2024**

BETWEEN

**DIRECTLINE ASSURANCE COMPANY LIMITED 1ST PLAINTIFF
ROYAL MEDIA SERVICES LIMITED 2ND PLAINTIFF
ROYAL CREDIT LIMITED 3RD PLAINTIFF
SAMUEL KAMAU MACHARIA 4TH PLAINTIFF
PURITY GATHONI MACHARIA 5TH PLAINTIFF**

AND

**SUREINVEST COMPANY LIMITED 1ST DEFENDANT
STENNY INVESTMENTS PTY LIMITED 2ND DEFENDANT
TRIAD NETWORKS LIMITED 3RD DEFENDANT
AKM INVESTMENTS LIMITED 4TH DEFENDANT
INSURANCE REGULATORY AUTHORITY 5TH DEFENDANT
KEVIN DERMOT MC COURT 6TH DEFENDANT
JANICE TERESIA WANJIKU KIARIE 7TH DEFENDANT
GEOFFERY GORDON RADIER 8TH DEFENDANT
JAMES KABERERE 9TH DEFENDANT
JOHN MAONGA, DANIEL NDONYE, CERTIFIED PUBLIC SECRETARIES T/A
MAONGA NDONYE ASSOCIATES 10TH DEFENDANT
JANUS LIMITED 11TH DEFENDANT**



WINNIE JUMBA P/A LIVINGSTONE ASSOCIATES	12 TH DEFENDANT
COMMISSIONER OF INSURANCE	13 TH DEFENDANT
JOHN KATIKU	14 TH DEFENDANT
RODGERS KINOTI M'ARIBA	15 TH DEFENDANT
MERCY KIANA MWANGI	16 TH DEFENDANT

RULING

1. The 6th defendant/applicant filed a Chamber Summons application dated 2nd December 2021 pursuant to the provisions of Rule 11(2) of the Advocates (Remuneration) Order, seeking orders for review and/or setting aside of the Taxing Officer's ruling dated 18th November 2021. He also seeks an order for his bill of costs dated 14th April 2021 to be remitted for fresh taxation, and in the alternative, that this Court assesses instruction fees due to him at Kshs.7,000,000/= or at such sum as it deems reasonable and just.
2. The application is premised on the grounds on the face of the Summons and it is supported by an affidavit sworn on 3rd December 2021, by Kevin Dermot McCourt, the 6th defendant herein. He averred that this suit was withdrawn by the plaintiffs with costs to the defendants on 17th March 2021. He then filed his bill of costs dated 14th April 2021 for Kshs.7,402,182.00 due to the significant work done by his Advocates before the withdrawal. That in a ruling delivered on 18th November 2021, the Taxing Officer taxed his bill of costs at Kshs.2,116,060.00 with instruction fees at Kshs.2,000,000/=. He contended that the Taxing Officer's award on instruction fees was too low, considering that the Advocate's instruction fees in Nairobi High Court Miscellaneous No. E1004 of 2020 – Hamilton Harrison & Mathews Advocates v Directline Assurance Limited, which arose from these proceedings, was taxed at Kshs.5,000,000/=.
3. He stated that there should be consistency in awards made on costs, but in this case the Taxing Officer's award is inconsistent with the award previously made in Nairobi High Court Miscellaneous No. E1004 of 2020 as it is less than half of what was awarded in the said suit. He contended that the Taxing Officer's decision amounts to an error in principle. Mr. McCourt emphasized that the plaint in this suit was detailed, with 82 paragraphs and 27 pages, covering areas of company, insurance, and arbitration law. He stated that given that the 1st plaintiff's annual turnover of Kshs.3.2 Billion, instruction fees of Kshs.7,000,000.00 would be fair and reasonable.
4. In opposition to the Reference, the plaintiffs/respondents filed grounds of opposition dated 28th April 2022 raising the following issues –
 - i. This Honourable Court has no jurisdiction to hear the application as filed;
 - ii. Regulation 11 of the *Advocates Act*, as interpreted by the Honourable Court in *Twiga Motors Ltd -v- Dalmas Otieno Onyango* [2015] eKLR, *Soundd Entertainment Ltd -v- Anthony Burungu & Company Advocates* [2014] eKLR, *Paul Gicheru T/A Gicheru & Company Advocates -v- Kargua (K) Construction Ltd* [2008] eKLR, *Karume Investments Ltd -v- Kenya Shell Limited & Anor* [2015] eKLR, and *Mbiyu Mwaura v Thomas Ngarachu Ngugi & 5 others* [2021] eKLR, mandates that an objection to Taxation be made to the Honourable Taxing Officer, in writing, within 14 days of the decision sought to be reviewed/set aside and where the reasons are contained in the said Taxation Ruling, a Taxation Reference be filed



within fourteen (14) days of receipt of the Taxation Ruling itself; the 6th defendant/applicant has not complied with the above Regulation;

- iii. The failure to adhere to the procedure and the timelines set in the said Regulation 11 of the Advocates Act renders an application incompetent, and therefore, liable to be struck out;
- iv. As was held by the Court of Appeal in *Speaker of the National Assembly -v- James Njenga Karume* [1992] eKLR, where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed;
- v. Without prejudice to what is stated above -
 - a. The application does not meet the minimum threshold for setting aside an award;
 - b. Where there has been an error in principle, this Honourable Court will interfere but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and this Honourable Court will intervene in exceptional cases;
 - c. This Honourable Court will interfere when the award of the Honourable Taxing Officer is so high or so low as to amount to an injustice to one party and the award herein has not been shown to fall in that category; and
 - d. There are no grounds to warrant setting aside.
5. In a rejoinder, Mr. Kevin Dermot McCourt, the 6th defendant herein, filed a further affidavit sworn on 5th July 2022. He stated that when the Taxing Officer delivered her ruling on 18th November 2021, she only read the conclusion and stated that a copy of the said ruling would be availed to the parties the following week. Mr. Mc Court further stated that his Advocates received a copy of the said ruling by email on 24th November 2021 at 17:06 hrs. He then filed the instant Reference on 3rd December 2021, which was within the allowed timeframe under Paragraph 11(2) of the Advocates (Remuneration) Order, 2014.
6. The instant application was canvassed by way of written submissions. The 6th defendant's submissions were filed on 6th June 2022 by the law firm of Hamilton, Harrison & Mathews Advocates, while the plaintiffs' submissions were filed by the law firm of Kamau Kuria & Company Advocates on 29th June 2022.
7. Mr. Kiragu Kimani (SC), learned Counsel for the 6th defendant submitted that that the Reference herein was filed within the 14-day period provided for under Paragraph 11(2) of the Advocates (Remuneration) Order, having been filed 9 days after receipt of the Taxing Officer's ruling. He relied on the case of *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, and further submitted that Courts can only interfere with the decision of a Taxing Officer if it is shown that there was an error in principle as is the case herein.
8. He further relied on the Court of Appeal decision in *Premchand Raichand Ltd & another v Quarry Services of East Africa Ltd & others* [1972] EA 162, and stated that there is inconsistency in awards by the Taxing Officer in Nairobi High Court Miscellaneous No. E1004 of 2020, which arose from these proceedings, and in this case. He noted that despite the ruling in the aforesaid case being brought to the Taxing Officer's attention, it was not considered. Senior Counsel asserted that the Taxing Officer committed an error in principle that warrants this Court's intervention.



9. Mr. Munyori, learned Counsel for the plaintiffs cited the provisions of Rule 11 of the Advocates (Remuneration) Order and the decisions in *Karume Investments Limited v Kenya Shell Limited & another* (supra) and *Mbiyu Mwaura v Thomas Ngarachu Ngugi & 5 others* (supra), and submitted that the 6th defendant did not comply with the mandatory provisions of Rule 11 of the Advocates (Remuneration) Order before filing the instant Reference, rendering the application herein incompetent.
10. He referred to the Court of Appeal case of *Premchand Raichand Ltd & another v Quarry Services of East Africa Ltd & others* (supra) and contended that the 6th defendant has not made out a case to warrant the setting aside of the Taxing Officer's ruling. He further contended that while this Court can interfere with a Taxing Officer's decision if there is an error in principle, issues of quantum are primarily within the expertise of the Taxing Officer. He stated that this Court can only intervene in exceptional cases where the award is so high or so low that it results in injustice.
11. Counsel cited the case of *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] 1 EA 64, and the Court of Appeal case of *Joreth Ltd v Kigano & Associates* [2002] 1 EA, and argued that when the value of the subject matter is not ascertainable, as in this case, the Taxing Officer has the discretion to assess instruction fees. He submitted that the same involves considering the basic instruction fees as per Statute and deciding whether to adjust it based on factors like the nature and importance of the matter, the parties' interests, the conduct of proceedings, and other relevant circumstances. He submitted that even though instruction fees in Nairobi High Court Miscellaneous No. E1004 of 2020 was taxed at Kshs.5,000,000.00, the Taxing Officer in the matter that forms the subject of this Reference, was not bound by that finding.

ANALYSIS AND DETERMINATION.

12. Upon consideration of the instant application, the affidavits filed in support thereof, the grounds of opposition by the plaintiff, and the written submissions by Counsel for the parties, the issues that arise for determination are –
 - i. Whether the applicant complied with the provisions of Rule 11 of the Advocates Remuneration Order; and
 - ii. Whether the ruling of the Taxing Officer should be set aside.

Whether the applicant complied with the provisions of Rule 11 of the Advocates Remuneration Order.
13. A Taxing Officer's decision can only be challenged by way of a Reference to the High Court in accordance with the provisions of Rule 11 of the Advocates (Remuneration) Order. That was the Court's holding in the case of *Machira v Magugu* [2002] 2 EA 428, where it was held that –

... any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the Bill of Costs is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates Remuneration Order...
14. The procedure for challenging a Taxing Master's decision in the High Court is provided for under Rule 11(1) & (2) of the Advocates (Remuneration) Order 1962, which states as hereunder –
 1. Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.



2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection...
15. Rule 11(1) of the Advocates (Remuneration) Order provides that a party dissatisfied with the decision of a Taxing Officer ought to first give the him/her a Notice in writing within fourteen (14) days of his/her decision, of the items of taxation to which he objects. This Notice is what is commonly referred to as a Notice of Objection. Thereafter, the Taxing Officer is required to forward to the objector the reason(s) for his decision, and the objector may within fourteen (14) days from the receipt of the said reasons, make an application commonly referred to as a Reference to a Judge by way of Chamber Summons, setting out the grounds of objection.
16. It is not disputed that prior to the filing of this Reference, the 6th defendant did not comply with the provisions of Rule 11(1) of the Advocates (Remuneration) Order, as he did not issue the Taxing Officer with a Notice of Objection. The 6th defendant contends that the Reference herein having been filed nine (9) days after receipt of the Taxing Officer's ruling, was filed within the timelines prescribed under Rule 11 of the Advocates (Remuneration) Order. He however does not address his non-compliance with the provisions of Rule 11(1) of the Advocates (Remuneration) Order.
17. Upon perusal of the Taxing Officer's ruling delivered on 18th November 2021, it is evident that it contains reasons for her decision. However, it is now well settled that a party dissatisfied with the Taxing Officer's decision is not exempted from complying with the provisions of Rule 11(1) of the Advocates (Remuneration) Order, because the reasons of the Taxing Officer's ruling are contained in her ruling. One is still expected to comply with the said provisions by filing a Notice of Objection, and the Taxing Officer has a duty to respond to the Notice by either giving the reasons for her decision in the response or to indicate that the reasons for her decision are contained in his or her ruling.
18. The Supreme Court in the case of *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR, considered the importance of adherence to laid down procedures in approaching a Court of law and stated thus -

This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2) (d) of *the constitution*, which proclaims that, "...courts and tribunals shall be guided by... [the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts."



19. Further, in *Matiri Mburu & Chepkemboi Advocates vs Occidental Insurance Company Limited* [2017] eKLR, the Court in striking out a Reference held as hereunder -

The provisions of Paragraph 11 of the Remuneration Order serve several purposes. Firstly, the requirement that a party seeking reasons gives a notice of items objected to, serves to narrow down the issues, and secondly, give notice to the adverse party and the taxing master of his objection. Thus, the taxing master, adverse party and ultimately the reference court in their respective roles can focus on the specific matter objected to rather than entire Bills of Costs, which often run into several pages. The objective is obvious: the expeditious disposal of taxation disputes. Thus, compliances with the requirements of paragraph 11 of the Remuneration Order is not a mere technicality that can be pushed aside peremptorily as the Applicant appears to suggest. The provisions of Article 159(2)(d) of *the Constitution* were not intended to overthrow procedural or technical requirements, but to guard against “undue regard to procedural technicalities” in the administration of justice.

20. In my considered view, a Notice of Objection is akin to a Memorandum of Appeal. Further, it is trite law that the High Court’s jurisdiction to hear and determine a Reference is invoked upon compliance with the provisions of Rule 11(1) of the Advocates (Remuneration) Order. Therefore, I find that the 6th defendant’s failure to file and serve a Notice of Objection is fatal. It is not a technical issue that can be wished away by the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010 for the sake of substantive justice, as it goes to the root of the High Court’s jurisdiction to deal with a Reference. In view of the foregoing, this Court finds that its jurisdiction to hear and determine the instant Reference has not been properly invoked for lack of compliance with Rule 11(1) of the Advocates (Remuneration) Order.
21. The upshot is that the instant application is defective for want of compliance with Rule 11(1) of the Advocates (Remuneration) Order. It is hereby struck out with costs to the plaintiffs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 25th day of October 2024. Ruling delivered through Microsoft Teams online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Sirawa h/b for Mr. Kiragu Kimani (SC) for the 6th defendant/applicant

Dr. Kamau Kuria for the plaintiffs

Mr. Mugo h/b for Mrs Wambugu for the 4th defendant

Mr. Chege for the 8th & 9th defendants

Ms B. Wokabi – Court Assistant.

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