



Masore Nyang’au & Co Advocates v Kensalt Limited (Miscellaneous Application 500 of 2016) [2023] KEHC 1232 (KLR) (Commercial and Tax) (26 January 2023) (Ruling)

Neutral citation: [2023] KEHC 1232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 500 OF 2016**

**PN GICHOHI, J
JANUARY 26, 2023**

BETWEEN

MASORE NYANG’AU & CO ADVOCATES APPLICANT

AND

KENSALT LIMITED RESPONDENT

RULING

1. By application dated September 23, 2022 brought under Paragraph 11(2) of the [Advocates Remuneration Order](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#), the Applicant seeks the following orders:-
 1. Spent
 2. The court be pleased to accept the Applicant’s reference to this court which sought to challenge the Taxing Officer’s decision on taxation done on the June 22, 2021 without the Taxing Officer’s reasons for the said decision and direct that the reasons can be deciphered from the decision.
 3. The court be pleased to set aside the decision of taxation delivered on June 22, 2021 on the Applicant’s bill of costs dated November 3, 2016.
 4. The court be pleased to remit the bill of costs dated November 3, 2016 for taxation before a different Taxing Officer.
 5. The court be pleased to order that HCCC No 247 of 2014 and ELC No 810 of 2014 are two distinct cases for which the Applicant is entitled to instruction fees in each and to direct the Taxing Officer to assess and determine the instruction fees in Item 1 of the Applicants bill of costs dated November 3, 2016.



6. The costs of the application be borne by the Respondent.
2. The application is premised on the grounds on the face of it and is supported by the affidavit sworn by Leo Masore Nyang'au. It is the Applicant's contention that the Taxing Officer upon rendering her decision on June 22, 2021, the Applicant filed a notice of objection and requested for reasons for the ruling. The Applicant avers that despite several requests the Taxing Officer failed to supply reasons for the taxation ruling in order for him to file a reference. The Applicant therefore seeks leave to prosecute the reference without the reasons.
3. On the reference, it is the Applicant's averment that the Taxing Officer made an error in failing to acknowledge that the two cases were not prosecuted simultaneously and thus instruction fees was due in both cases.
4. In its response to the application, the Respondent filed grounds of opposition dated November 8, 2022 citing the following grounds:-
 1. The application is bad in law being filed out of time without leave and reasonable cause.
 2. The application lacks merit given that the Taxing Officer ruling is explicit as to the reasons why she decided as she did.
 3. The application is without merit as the Taxing Officer exercised her discretion properly and judiciously to reach the decision she did.
 4. The application is an abuse of due process seeking to re-open a matter that was properly concluded more than one year ago.
 5. The application was canvassed by written submissions. While counsel for the Applicant filed submissions dated November 23, 2022, counsel for the Respondent chose to rely on its grounds of opposition dated November 8, 2022. Counsel for the Applicant submits that the Taxing Officer was under an obligation to provide reasons for taxation forthwith but there is no time limit within which the reasons should be forwarded after an objection. He submits that he waited for the reasons for over one year from June 30, 2021 when he served the objection and the Taxing Officer was obligated to give the reasons but failed and since there is no provision under Rule 11 of the *Advocates(Remuneration) Order* under which the objector can move the Judge directly or before receipt of reasons, counsel relies on Section 1A and 1B of the *Civil Procedure Act* and urges this court to allow the hearing of the reference.
 6. Counsel submits that the Taxing Officer erred in principle in holding that the applicant could not claim instruction fees for executing the same instructions yet the instructions for both cases were not the same.

Determination

7. I have considered the application, the grounds of opposition and the submissions by the Applicant. The issues for determination are:-
 1. Whether the application dated September 23, 2022 is filed out of time without leave and reasonable cause.
 2. Whether the Taxing Officer erred in law and principle while taxing the bill of costs.
 3. Whether the decision of the Taxing Officer should be set aside.



8. The procedure for challenging of the results of taxation is provided under Paragraph 11 of the *Advocates Remuneration Order* which provides as follows: -
 1. 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.
 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.
 3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.
9. The Taxing Officer delivered her dated June 22, 2021 and on June 30, 2021, the Advocate/Applicant gave a notice of objection to the decision of the Taxing Officer on the specific items stated and also sought reasons for the decision. There was no delay on the part of the Applicant. However, it is noted that the Taxing Officer did not respond to the said request.
10. The Advocate then wrote to the Deputy Registrar a letter dated June 24, 2022 and while referring to the Notice of Objection dated June 30, 2021 and also his letter dated March 10, 2022, the Applicant reminded her that she was yet to give reasons requested yet he needed it to file a reference. There is nothing to show that the letter was responded to. The Applicant then filed this application.
11. A look at the Taxing Officer's ruling however shows that it contains reasons for the decision in the taxation. By seeking reasons therefore, the Applicant was seeking duplication of the said ruling. In such circumstances in *Vincent Kibiwott Rono v Abraham Kiprotich Chebet & another [2022] eKLR*, R. Nyakundi, J had this to say:-

“The taxation ruling was delivered on January 17, 2022. The applicants wrote to the taxing officer on January 19, 2022 notifying him of the items that he wished to object to. There are no reasons that have been presented by the taxing officer as per the provisions of Rule 11(2) of the *Advocates (Remuneration) Order*. However, it is a judicial principle that a ruling contains reasons for the decision given. I associate myself with the reasoning of the court in *Bernard Gichobi Njira v Kanini Njira Kathendu & another* [supra] where the court was of the opinion that the paragraph only grants an aggrieved party in a case chance to ventilate his grievance(s) only on the itemized bill. I do not find the failure of the magistrate to give these reasons fatal to the reference as the same would be more or less a duplication of the ruling.”

12. Whereas the Applicant's request for reasons when they were already in the ruling amounts to mechanical application of the law, the Taxing Officer in my view should simply have responded to the letter dated June 30, 2021 and informed the Applicant that the reasons he was seeking for are contained in the ruling. Failure to respond to the said letters ran counter to Section 1A and 1B of the



Civil Procedure Act, where courts are enjoined to give effect to the overriding objective in exercise of its powers. The said sections provide: -

1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.”

13. Be that as it may, I am satisfied that the delay in filing this application has been satisfactorily explained and therefore paves way for the consideration of the reference.

14. On whether the Taxing Officer erred in principle in taxing the bill of costs, it is settled law that the courts will interfere with the award by the Taxing Officer only where there is an error of principle. According to the Applicant, the Taxing Officer erred by not appreciating that there were two different suits and therefore instructions fees ought to have been awarded on each of the two suits. The reasoning by the Taxing Officer on instructions fees was as follows:-

Instruction fees

The applicant received instructions from the respondent pursuant to the said instructions, filed HCC No 247 of 2014 which was withdrawn and ELC No 810 of 2014 filed.

Are the instructions different to entitle the applicant to seek to be paid twice? The answer is in the negative because the applicant only changed the forum through which the client’s instructions would be executed. Having been paid instruction fees in ELC 810 of 2014, the applicant cannot claim another instruction fees for executing the same instructions. The applicant will only be entitled to charge differently for the works done in both cases, hence other items are taxed as follows;...

15. The Taxing Officer seems to appreciate that the Applicant filed HCCC No 247 of 2014 pursuant to instructions given by the Respondent. There is no denial that the case was later withdrawn and ELC No 810 of 2014 filed. Those are two different cases and attract instructions fees irrespective of whether they involve the same parties, the same subject matter and same pleadings and that the witness statements are the same. What would be considered is not whether instruction fees is payable



in the circumstances but the amount payable. The amount payable is until the point of withdrawal and such sum is within the discretion of the Taxing Officer putting all those factors stated above into consideration.

16. In the circumstances the Taxing Officer erred in principle in her reasoning in respect of instructions fees on Item 1 and that calls for interference with her decision dated June 22, 2021.
17. In the upshot the court makes the following orders:-
 1. The decision of taxation delivered on June 22, 2021 on the Applicant's bill of costs dated November 3, 2016 is hereby set aside.
 2. The Applicant's bill of costs dated November 3, 2016 is remitted for taxation before a different Taxing Officer.
 3. HCCC No 247 of 2014 and ELC No 810 of 2014 are two distinct cases for which the Applicant is entitled to instruction fees in each.
 4. The Taxing Officer is directed to assess and determine the instruction fees in Item 1 of the Applicant's bill of costs dated November 3, 2016.
 5. The costs of the application awarded to the Applicant.

READ, SIGNED AND DELIVERED VIRTUALLY AT MILIMANI THIS 26TH DAY OF JANUARY, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr Nyang'au for Appellants/Applicants

N/Attendance by the Respondent

Grace Njuki, Court Assistant

