



**National Housing Corporation v Ngatia & Associates Advocates (Miscellaneous Civil Application 101 of 2021) [2023] KEHC 2852 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2852 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION 101 OF 2021  
JN KAMAU, J  
MARCH 27, 2023**

**BETWEEN**

**NATIONAL HOUSING CORPORATION ..... APPLICANT**

**AND**

**NGATIA & ASSOCIATES ADVOCATES ..... RESPONDENT**

**RULING**

**INTRODUCTION**

1. In its Chamber Summons application dated June 17, 2021 and filed on July 9, 2021, the Applicant herein sought that the Taxing Officer's decision dated May 28, 2021 awarding the advocates fees in HCCC No 26 of 2005 be set aside.
2. The said application was supported by the Affidavit of its Corporation Secretary, William KB Keitany that was sworn on June 17, 2021. It admitted having instructed the Respondent herein to act for it in the aforesaid case HCCC No 26 of 2005 *vide* its letter of December 8, 2016 wherein it was agreed that the Respondent's instructions fees would range around Kshs 20,000,000/=. It averred that it paid the Respondent a sum of Kshs 25,832,984/=.
3. It pointed out that after the judgment, the Respondent filed Bill of Costs dated February 11, 2021 in HC MISC No E031 of 2021 seeking instruction fees and getting up fees for both the Defence and Counter-claim for the sum of Kshs 129,368,336.88, which on May 28, 2021, the Taxing Officer taxed at Kshs 103,400,302.40. It was its contention that the Respondent was estopped from filing the said Bill of Costs by conduct and by the agreement they had.
4. It averred that it was aggrieved by the Ruling of the Taxing Master and hence filed a Notice of Objection dated May 28, 2021. It also stated that when it was furnished with a copy of the Ruling of the Taxing Officer, it noted that the same did not contain the reasons.



5. It was its contention that the taxed amount was manifestly excessive and crippling especially taking note of the prevailing economic conditions, contrary to principal and the Advocates Remuneration Order. It faulted the Taxing Master for not having taken into account that the Respondent was estopped from filing the Bill of Costs by virtue of its conduct and the agreement they had, the fact that the Taxing Officer failed to consider the work that had been put in by the Respondent's predecessor over the same subject matter and the fact that the matter was not complex.
6. It asserted that the findings were made in error and urged this court to set aside the decision of the Taxing Officer.
7. In opposition to the said application, Fredrick Ngatia, SC, the Respondent's proprietor swore an affidavit on June 6, 2022. The same was filed on June 7, 2022. The Respondent raised a preliminary objection to be determined in limine on the ground that the Reference was filed out of the time stipulated in Rule 11(2) of the Advocates Remuneration Order, 2014 and without leave of the court and was thus fatally incompetent.
8. It pointed out that the Taxing Officer had already informed the Applicant that the reasons were contained in the Ruling by May 28, 2021 and despite not having received a response to their letter dated June 11, 2021 from the Taxing Master, it nonetheless filed the Reference herein. It was its contention that nothing stopped the Applicant from filing the Reference within the stipulated period. It was categorical that this court was divested of jurisdiction to entertain a reference that was filed out of time and ought to strike it out.
9. It added that the Reference was misconceived and without any legal basis because at the time the Applicant instructed it, only a Statement of Defence had been filed, no Pre-Trial Conference had been held and witness statements had not been filed. It asserted that it subsequently sought to amend the Defence to file Counter- Claim to safeguard the Applicant's interests which application was allowed despite it having been opposed by the plaintiff therein as it had been made belatedly over eleven (11) years after the suit had been filed. It asserted that the nature of the Applicant's instructions materially changed upon the amendment of the Defence and Counter-claim. It added that it expended considerable time to comprehend the complex brief and to peruse the voluminous documents.
10. It was its further assertion that instruction fees ought to be determined by the Judgment dated December 4, 2019 pursuant to Schedule 6 (l)(b) of the Advocates Remuneration Order. It pointed out that although the Plaint and the Counter-claim were heard one after the other, they were for all intents separate suits.
11. It was emphatic that parties could not contract outside the Statute and/or the law and clarified that the Applicant's expectations that it would charge reasonable fees which would be negotiated and agreed meant that parties would negotiate and agree on fees within the confines of the applicable Remuneration Order as read together with the Advocates Act.
12. It further averred that it filed the Bill of Costs after the Applicant refused to pay its fees and disbursements on the ground that it had paid all its fees and that the Taxing Officer took into account the sum of Kshs 25,832,984.04 that the Applicant had paid it on various dates.
13. It contended that the taxed sum of Kshs 103,400,302.40 was neither manifestly excessive nor intended to enrich it but that the amount was derived from the subject matter. It was categorical that taxation of costs as per the law had no public connotation as the Applicant had alleged. It thus asked this court to dismiss the said application with costs to it.



14. In its Supplementary Affidavit that was sworn by the said William K B Keitany on September 30, 2022 and filed on October 3, 2022, the Applicant averred that the Reference was not filed out of time as it was lodged electronically on June 18, 2021 but that the printed copy was stamped on June 23, 2021. It asserted that it was not to blame for the late stamping of its application.
15. It emphasised that it filed the formal Notice of Objection on June 4, 2021 and since the decision of the Taxing Master was made on May 28, 2021, it filed the Reference within fourteen (14) days as was stipulated in Rule 11(1) of the *Advocates Remuneration Order*. It stated that it expected to have been given reasons of the items it objected to.
16. It reiterated that there was an agreement between it and the Respondent herein that the fees would be in the region of Kshs 20,000,000/= which communication was contained in several correspondence that was exchanged between them. It said that the final figure that the Respondent had sought it pay on October 22, 2018 after judgment was delivered was Kshs 13,475,000/= of which it paid Kshs 11,875,000/= because the Value Added Tax (VAT) had been overstated by Kshs 16,000,000/=. It stated that it was not aware that the Respondent would turn around and demand for fees which were in excess of Kshs 100,000,000/=.
17. It added that a lot of ground had been covered by the time the Respondent took over the matter, a fact that was captured in the Judgment that was dated September 17, 2018. It averred that the failure to file a Counter-claim in the initial Defence was not a gross omission that rendered the debt irrecoverable and the principal contentions between it and the plaintiff remained unaltered.
18. It contended that the court did not enter judgment on the basis of the Counter-claim but rather it was based on the reconciliation between it and the plaintiff therein and that in any event, the Respondent was not entitled to charge separate fees based on different figures in the defence, counter-claim and judgment. It explained that the figures of Kshs 426,304,139.30 and Kshs 874,914,421.55 stated in the Defence and Counter-claim respectively related to arrears while the sum of Kshs 1,028,103,460.90 was the reconciled debt position between it and the plaintiff. It was its further assertion that there was no basis for charging instruction fees for the defence based on the figure of Kshs 426,304,139.30 that had been claimed by the plaintiff therein.
19. It faulted the Taxing Officer for having failed to appreciate that the Defence and Counter-claim emanated from the same subject matter and were taken during a single trial and did not require separate preparations entitling the Respondent to separate instruction fees and getting up fees.
20. The Applicant's Written Submissions were dated October 3, 2022 and filed on October 5, 2022 while those of the Respondent were dated June 2, 2022 and filed on June 7, 2022. This Ruling is therefore based on the Applicant's Written Submissions.

### **Legal Analysis**

21. This court deemed it prudent to determine the preliminary objection at the very first instance as the same would have a bearing on the hearing and determination of the substantive issue that had been raised in the present application.

### **I. Competence of the present application**

22. The Respondent was emphatic that the present application was filed out of time. It relied on several cases amongst them the cases of *Vaghjiyani Enterprises Limited vs Osundwa & Company Advocates* [2021] eKLR and *NW Amolo t/a Amolo Kibanya & Co Advocates vs Samson Keengu Nyamweya* [2016] eKLR where the common thread was that an appeal against the decision of a taxing master was



- to be filed within fourteen (14) days from such decision and that where the same was filed out of time, the only option was to dismiss it as the court had no jurisdiction to hear and determine the same.
23. On the other hand, the Applicant referred to the email transmitting its present application for filing and the email from the Registrar acknowledging receipt of the same and notifying it of the case number that had been assigned to the file.
  24. Paragraph 11(1) and (2) of the [Advocates Remuneration Order](#) stipulates 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.
  25. Notably, the Taxing Master's decision was dated May 28, 2021. The Applicant filed its Notice of Objection to the decision of the taxing officer under Rule 11(1) of the [Advocates Remuneration](#) (sic) dated May 28, 2021 on June 4, 2021. It was required to file the said Notice within fourteen (14) days from the date of the said decision. It filed the said Notice of Objection within seven (7) days of the date of the said decision. It therefore complied with Paragraph 11(1) of the [Advocates Remuneration Order](#).
  26. The Applicant stated that it received the Ruling on June 4, 2021 and wrote to the Deputy Registrar High Court of Kenya Kisumu seeking confirmation and/or communication from the court vide its letter dated June 11, 2021. It did not say whether it received any response to its said letter. It merely faulted the Taxing Master for patently erroneous reasons that were set out hereinabove.
  27. The Applicant had sought reasons for all the items on the taxation. There is no indication that the Taxing Master responded to its said Notice of Objection. However, this court noted that the Applicant's counsel was present when the Taxing Master read out the decision. The Taxing Master indicated that the parties were at liberty to obtain a typed copy of the Ruling upon payment of the requisite fees.
  28. By indicating that parties were at liberty to obtain the typed Ruling upon payment of the requisite court fees, the onus shifted to the parties to obtain the Ruling immediately as the Taxing Master had complied with Paragraph 11(2) of the [Advocates Remuneration Order](#) by ensuring that the reasons were available immediately she delivered her decision. The time to take any action started running on May 28, 2021.
  29. Considering that June 1, 2021 was a public holiday, the Applicant ought to have filed its Reference by June 14, 2021 which was on the same date it filed its Notice of Objection the fourteenth (14<sup>th</sup>) day having fallen on a Saturday and the next day being a Sunday.
  30. Notably, Order 50 Rule 3 of the [Civil Procedure Rules](#), 2010 provides that:-

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open (emphasis court).”



31. However, assuming the Taxing Master did not move methodically as provided in Paragraph 11(1) and (2) of the *Advocates Remuneration Order* in that she made available the reasons of the decision on the same date she delivered it instead of providing the same after the Applicant had filed the Notice of Objection and that the Applicant received the reasons on June 4, 2021, the Applicant was then required to have filed its Reference on or before June 18, 2021. A perusal of the said Ruling showed that it was reasoned because it explained how the Taxing Master arrived at the decision.
32. The Applicant annexed a copy of an email dated June 21, 2021 to its Supplementary Affidavit in which the Deputy Registrar High Court Kisumu forwarded an invoice in the sum of Kshs 1,135/=. It also annexed copies of an email from millymbuya@gmail.com evidencing payment of the invoice on June 21, 2021 at 3.12 pm, another email of the said date from the Deputy Registrar High Court confirming receipt of the said sum and another email of the same date from millymbuya@gmail.com seeking a hearing date of the said application. A perusal of the present application shows that it was stamped on June 23, 2021. However, the receipt acknowledging the sum of Kshs 1,135/= was stamped June 21, 2021.
33. It did therefore appear to this court that the present Reference was filed out of time. The Applicant ought to have sought leave to file the same as the court had power to extend the time for filing the same.
34. Paragraph 11(3) of the *Advocates Remuneration Order* that states that:-

“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.”
35. As the present application was filed outside the stipulated time, the same lent to it being dismissed in limine.

## **II. Merit of the reference**

36. Having found the Applicant’s Reference to have been incompetent for having been filed out of time, there was nonetheless nothing that prevented the Applicant from seeking leave to file its reference out of time. It was for that reason that despite the court having noted all the parties’ respective Written Submissions regarding the merits or otherwise of the present Reference, it did not analyse the same as the Applicant could still seek leave to file a reference out of time. Whether the court would find its reference merited at the opportune time was a different matter altogether.

## **Disposition**

37. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Chamber Summons application dated June 17, 2021 and filed on June 23, 2021 was not merited and the same be and is hereby struck out with costs to the Respondent herein.
38. It is so ordered.

**DATED and DELIVERED at KISUMU this 27<sup>th</sup> day of March 2023**

**J. KAMAU**

**JUDGE**

