



REPUBLIC OF KENYA



**DM Mutinda Advocates v Ministries (Miscellaneous Application
135 of 2018) [2023] KEHC 3605 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 135 OF 2018**

FR OLEL, J

APRIL 25, 2023

**IN THE MATTER OF THE ADVOCATE/CLIENT BILL OF COSTS
AND
IN THE MATTER OF THE ADVOCATE ACT CAP 16 LAW OF KENYA
AND
IN THE MATTER OF THE HIGH COURT AT MACHAKOS ELR
JUDICIAL REVIEW APPLICATION NO.275 OF 2016**

BETWEEN

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DM MUTINDA ADVOCATES APPELLANT

AND

VICTORY FAITH MINISTRIES RESPONDENT

RULING

Introduction

1. Pending for determination before this court are two applications. The advocate/applicant did file a notice of motion application dated 8th July 2021 where he sought that judgement be entered in his favour for the sum of Ksh.152,889/- together with interest thereon from 22nd November 2018. The application was opposed by the Respondent who filed his Replying Affidavit dated 5th October 2021 on 12th January 2022. The applicant also filed a Supplementary Affidavit in response to the said Replying Affidavit on 24th January 2022.
2. The second application coming up for determination in the chamber summons application filed by the client/Respondent on 31st October 2022. The client/Respondent seeks that this court be pleased



to accept the applicant's reference to this court, seeking to challenge the taxing officer's decision on taxation done on the 22nd November 2018, without the taxing officer's reasons and direct that the reasons can be deciphered from the decision. Secondly the client/Respondent did seek for orders that the said decision on taxation delivered on 22nd November 2018 be set aside and it be remitted for taxation before a different taxing officer. This application was opposed by the Advocate/Respondent who filed his Replying Affidavit dated 23rd January 2023.

Background Facts

3. The Advocate's application sought for judgement to be entered in his favour for the sum of Ksh.152,889/- together with interest thereon from 22nd November 2018. In his grounds in support of the application and Supporting Affidavit he depones that the advocate/client bill of costs was taxed on 22nd November 2018 and the same be yet to be settled by the client/respondent. He prayed that his application be allowed.
4. The client/Respondent did oppose that said application vide his Replying Affidavit filed to court on 12th January 2022 where he stated that the application for judgment was pre mature and constituted an abuse of the process of the court. There was no certificate of taxation, which could not be issued for the reasons that taxation had been objected to by the client/respondent who filed his objection on 29th November 2018. The taxing officer too had not responded to the said objection. The Advocate/Applicant did file a Supplementary Affidavit stating that the Respondent did not file a reference on time and thus the taxed costs remain unchallenged.
5. The client/Respondent too did file his application dated 31st October 2022 where they sort for orders that the court be pleased to accept his reference to this court seeking to challenge the taxing officers decisions on taxation without the taxing officers reasons and direct that the reasons can be deciphered from the decision. They also sought for the taxation to be set aside and it be retaxed afresh. They averred that they were aggrieved by the said decision and timeously objected to the same but were unable to file the references since the taxing master had failed to give reasons for his decisions.
6. The client/Applicant also stated that he had been advised by his current advocate that where reasons are apparent on the face of the taxation/Ruling, the objector need not wait for duplication of the reasons. The client/applicant finally stated that there was errors on the face of the record with regard to several aspects for the bill taxed which needed to be reviewed. The Advocate/Respondent did respond to this application through his Replying Affidavit dated 23rd January 2023, where he stated that one can only object to a taxation by filing a chamber summons outlining the grounds of objection within 14 days, which was not done in this instance. The application had been made out of time with no cogent reasons explaining the delay. He Advocate/Respondent prayed that the said application be dismissed with costs.

Advocates submission in opposing chamber summons dated 31.10.2022 and in support of the notice of motion dated 8th July 2021.

7. The Advocate/Respondent submitted that the client/Applicant had admitted to the fact that they did not comply with provision of Rule 11(1) and (2) of the Advocates Remuneration Order which spells out the time within which the file an objection (14 days). The client/applicant reasons for failing to do so were not plausible as the taxing master's decisions were clear on the face of the ruling dated 22.11.2018. Therefore there was no reason as to why the taxing master needed to explain himself again.
8. Secondly, the Advocate/Respondent did submit that while the court was clothed with powers to grant extension of time to file a reference under rule 11(4) of the Advocate Remuneration order, that power



was discretionary and should only be exercised upon satisfactory and sufficient reasons advanced. The Advocate/Respondent relied on [*George Kagima Kariuki and 2 others versus George M Gichima and 2 others*](#) (2014) eKLR and [*Stanley Kaboro Mwangi and 2 others versus Kanyamwi Trading Company Ltd*](#) (015)KLR.

9. The Advocate/Respondent submitted that where a ruling on taxation advances its reasons on the face of the said ruling, there was no need for new reasons to be advanced. He relied on the citation of *Ahmednasir Ardikadir and Co. Advocate versus National Bank of Kenya (2)* (2006) EA 5, [*Odero Obaro & Co. advocates versus Aqua Agencies Limited*](#) (2021)eKLR and [*Evans Thiga Gatura Advocates versus Kenya commercial Bank Limited*](#) (2012)eKLR.
10. Further the prayer for extension of time was thus not merited and logically since no reference was filed no appeal was pending and thus the application should be dismissed.
11. With respect to the application dated 8th July 2021, the Advocate prayed that judgment be entered on his favour in the sum of Ksh.152,889/- plus interest as there was no valid challenge against the same. The notice of objection to taxation was not a reference which is used in appealing on taxation matters as set out under rule 11(1) and (2) of the [*Advocates Remuneration Order*](#).
12. The certificate of taxation which had been issued on 20/9/2021 was final and was never challenged, set aside or altered the same ought to be allowed. They relied on [*Lubuella and Associates Advocates versus N.K Brothers limited*](#) (2014) eKLR.

Respondents written submission on the Applications dated 31st October 2022 and in opposition to Application dated 8th July, 2021

13. The client/Respondent opposed the application dated 5th October 2021 and stated that it was premature and constitutes an abuse of the process of the court. Secondly there was no certificate of taxation upon which judgment could be entered. The client/Respondent had filed a reference and it would be unfair to proceed and enter judgement while the reference was still pending. The client submitted that he had filed an objection within 7 days of the ruling hence complied with rule 11(1) of the [*Advocates Remuneration Order*](#).
14. There was no time limit given y Rule 11(1) within which the taxing officer was to provide reason for the taxation and there was nothing the objector is required to do as he waits for the reasons. It is upon receipt of the reasons that the objector was to file a reference against the judgement.
15. That under provision of section 51(2) of the Advocates Remuneration Act, it was imperative that a certificate of costs be issued and it is the same certificate that is used to apply for judgement and not a ruling on the bill of costs as annexed by the advocate. The Advocates notice of motion was therefore incompetent and/or was premature and thus ought to be struck out.
16. Further the client/Respondent sought to draw the courts attention to the fact that he was initially representing himself and was later advised by his advocate that in line with some case law, an objector need not wait for duplication of reasons by the taxing officer before mounting a reference. The client therefore pleaded with this court to accept his reference through his application as filed and be pleased to set aside the taxation delivered on 22nd November 2018. Further the client submitted that the rules were silent and/or there was no rule or order which obligated the objector to file the reference within a specific period after filing the notice of objection. The 14 days as submitted by the Advocate was misconceived. The client/Respondent relied on [*Kipkorir Titoo & Kiara Advocates versus Deposit Protection Fund Board*](#) Nrb CA No.220 of 2004 (2005) eKLR.



17. Finally with respect to the taxed advocate client bill of costs. The client/Respondent submitted that there was not proof that the advocate was registered under VAT and the same was wrongly awarded. The Advocate/Applicant too did not ask for VAT on the bill of costs dated 19th April 2018 and there was no basis for awarding him the same. The client also faulted the taxing master for awarding the advocate fee of Ksh.100,000/- as instruction fee without considering the nature and importance of the said application, the complexity, difficulty and/or novelty of the matter, value of subject matter and time expended which was an error in principle.
18. The client also faulted the award of a blanket Ksh.3000/- for each attendance which was on higher scale without a judge's certification that the attendance be charged on a higher side. The taxation as carried out was improper, went against the scale provided for under the Advocates remuneration order and ought to be set aside and the bill remitted back for taxation by a different magistrate.

Analysis and Determination

19. Three issues emerge from the pleading and submission filed and logically it would be prudent to first deal with the client's chamber summons application dated 31st October 2022 before dealing with the Advocates application dated 8th July 2021. This is for the simple reason that if the said application dated 31st October 2022 has merit, the court will not have to deal with the Advocate application dated 8th July, 2021 seeking to convert the certificate of costs into judgment.
20. The three main issues for determination are;
 - a. Is there a proper reference filed before court & if yes should the court be pleased to extend time and deem it properly filed.
 - b. Should the court allow the advocate application dated 8th July 2021 convert the certificate of taxation dated 20th September 2021 into judgment.
21. Rule 11(1) and (2) of the *Advocates Remuneration Order* provides that;
 - i. 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.
 - ii. 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 receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerning setting out the grounds of his objection.
22. It is not in dispute that the advocate/client bill of costs was taxed on 22nd November 2018. The client though acting in person was well advised and/or knowledgeable enough to file his objection within 7 days (by 29th November 2018). The client seems to have gone to sleep and forgot to pursue his objection to taxation and was only woken up when the advocate filed his application dated 8/7/2021 seeking to convert the taxed costs into judgment. The client instructed an advocate who filed the application/reference dated 31st October 2022.
23. The client in his application sought to justify the delay in filing the references on the basis that the taxing officer has not given reasons for his decision rendered on 22nd November 2018 and it was not possible to decipher from the Ruling the reason of the taxation. The client also deposed that he had been advised by his advocate that some judges had ruled that where the reasons are apparent from the face of the taxation/ruling the objector need not wait for duplication of the reasons.



24. The client was obligated by provision of Rule 11(1) and (2) of the *Advocate Remuneration Order* to file his reference by way of chamber summons within 14 days of receipt of the reason for taxation from the taxing master and did not do so, presumably accuse “he was awaiting such reasons” until advised otherwise by his counsel in October 2022. From the ruling dated 22.11.2018 it is clear that reasons for the taxation were provided therein and there was no need for the client to have waited for other reasons to be provided.
25. As succulently stated in *Ahmednasir Abdikadir and Co. Advocates versus National Bank of Kenya* (2006) EA 5.
- “where the reason for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of sub rule (2) of Rule 11 of the Advocate Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already continued in the formal and considered ruling.”
26. Again in *Evans Thiga Gatura Advocates versus Kenya Commercial Bank Limited* (2012)eKLR Odunga Judge observed that
- “However, where there are reasons on the face of the decision, it would be futile to expert the taxing officer to furnish further reason. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that inefficiency may be the very reason for preferring a reference”.
27. While provision of rule 11(2) of the *Advocates Remuneration Order* provides as applicant should file have reference within 14 days of receiving the reasons from the taxing master, in this instant it was clear from a plain reading of the Ruling that the reason for taxation were given in the ruling dated 22nd November 2018. There was no need for the taxing master to have provided further reasons. The client was diligent enough to have filed his objection within 14 days as provided for under Rule 11(1) of the *Advocate Remuneration Order* he should have known and/or should have sought advice as to how to deal with filing of the reference.
28. The client after filing the notice of objection went to sleep. There is no follow up letter in the court file where he writes to the Deputy Registry any reminder seeking reasons, nor did he once move court to have his objection heard. The client pleaded ignorance of the law, but this cannot be an excuse even provision of Article 159 of *the constitution* of Kenya 2010 cannot come to the aid of the client.
29. In *Nicholas Kiptoo Arap Korir Salat versus IEBC and 6 others* (2013) eKLR Kiage Judge stated that;
- “... I am not in the least persuaded that Article 159 of *the Constitution* of Kenya and the oxygen principles which both command courts to seek to do substantive justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were even meant to aid in the overthrow or destruction of rule of procedure and to create and anarchical free for all in the administration of justice. This court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal post for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is the even handed and dispassionate application of rules that the court give assurances that



there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concern.”

30. In *Raila Odinga versus IEBC and other* (2013)eKLR the Supreme court observed that;

“ Article 159(2)(a) of *the constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.”

31. I do find that the Application reference dated 31st October 2022 is incompetent having been filed four (4) years late and the explanation given for the delay is not plausible and/or satisfactory to enable the court unlock the courts flow of discretion to their favour. The same is hereby dismissed with costs.

Finding on application dated 8th July 2021

32. The Advocate did apply to have his taxed costs of Ksh.152,889/- together with interest thereon be converted into judgement. The main objection filed by the client other that what has already been determined is the fact that there was no certificate of costs by the taxing master attached to the said application and this fell foul of provision of Section 51(2) of the *Advocates Act*.

33. I have perused the court file and indeed there is a certificate of costs, signed by the taxing mater dated 20th September 2021. The same was also served upon the client on 22nd September, 2022 by a processor server known as Ezekiel Masai. The Advocate having complied with all provision of the law should be allowed to enjoy the fruit of his judgment and I do therefore allow the advocate application dated 22nd July 2021.

Disposition

34. The final order of this court are as follows;

- a. The client application dated 31st October 2022 is dismissed with costs.
- b. The advocate application dated 8th July 2021 is allowed and Judgment is entered in his favour for the sum of Ksh.152, 889/- together with interest thereon at court rates from 22nd November 2018 until payment in full.
- c. The advocate all-inclusive costs for both application’s is hereby assessed at Ksh.50,000/- all inclusive.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF APRIL 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 25TH DAY OF APRIL, 2023.

In the presence of;

.....**for the Applicant**

.....**for Respondent**



.....**Court Assistant**

