



**KTK Advocates v Salle & another (Miscellaneous Cause E011 & E012 of 2022 (Consolidated))
[2023] KEHC 21364 (KLR) (Constitutional and Human Rights) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS CAUSE E011 & E012 OF 2022 (CONSOLIDATED)
HI ONG'UDI, J
AUGUST 15, 2023**

BETWEEN

KTK ADVOCATES ADVOCATE

AND

JEAN-PHILIPPE SALLE 1ST CLIENT

FAITH SYLVIA FLORENCE RICHES 2ND CLIENT

RULING

1. This is the chamber summons dated July 26, 2022 brought under rule 11(2) of the [Advocates \(Remuneration\) Order](#). The Applicant seeks the following orders:-
 - i. That, the Ruling of Hon. T. E. Marienga, the Taxing Master delivered on 05.07.22 pursuant to the Advocate/Client Bill of Costs taxing the Bill in the sum of Kshs.493,192.40 be set aside in its entirety and /or vacates.
 - ii. That, the Advocate/Client Bill of Costs dated 3.002.22 be remitted back for taxation before any other Taxing Master other than Hon. T. E. Marienga.
 - iii. That, in the alternative, the learned Judge be at Liberty to tax the Bill.
 - iv. That, Costs be provided for.
2. The application is supported by the affidavit of Donald B Kipkorir Advocate and the grounds on its face. Counsel has stated that he Taxing Officer (Deputy Registrar) erred in principle and the taxed costs are inordinately low. Further that she failed to consider the complexity of the Kenyan citizenship process and the validity of the rights attached to the said citizenship which is a constitutional process sui generis.



3. He also stated that the Taxing Officer erred in consolidating this application plus Misc. Application No. E012 of 2022; *KTK v. Faith Sylvia Florence Riches*, without any request from the party or direction of the Court, yet the two applications involved distinct processes. Further that the Taxing Officer failed to consider their submissions dated June 7, 2022. The supporting affidavit is an expansion to the filed grounds. Counsel also annexed documents showing communication between the deponent, Deputy Registrar, and the impugned Ruling. He explained having requested for a copy of the Ruling vide a letter dated July 6, 2022 (DBK1) and he received the said Ruling on July 15, 2022 (DBK 3). The request for the reasons was made via email (DBK 4) and a confirmation dated July 18, 2022 (DBK5) was sent via email.
4. The Client/respondent filed a replying affidavit sworn on February 22, 2023 in opposing the application. She averred that the impugned Ruling was delivered on July 5, 2022 in the presence of both counsel. A copy was received by the applicant on or about 7th July 2022 through their clerk. Despite all this the objection was not lodged within 14 days as required under rule 11(1) of the [Advocates Remuneration Order, 2014](#), and no leave was sought to file the Reference out of time.
5. She deponed that she was in full support of the Ruling by the Deputy Registrar. Further that there are no reasonable grounds or reasons in law or fact to impeach or warrant interference with the Deputy Registrar's decision. Thus the application is devoid of merit.

Parties submissions

The Applicants submissions

6. These have been filed by the applicant's Advocates and are dated March 21, 2023. On whether the laid down procedure for filing a Reference was followed counsel submitted in the affirmative, stating that they followed the steps as outlined in rule 11 of the Advocates Remuneration Order. He also relied on the case of [Paul Gicheru T/A Gicheru & Co. Advocates vs. Kargua \(K\) Construction Co. Limited](#), Eldoret HCMCA No. 124 of 2007.
7. Counsel submitted that a consolidation of the two applications was not proper as it gave an unfair advantage to the respondent as it gives the perception that this was one process which is not the case. He referred to the case of [Law Society of Kenya vs. Center for human Rights & Democracy & 12 others](#) [2014] eKLR where the Supreme Court observed;

“the essence of consolidation of suits is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any under advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”
8. On the taxing of the bills inordinately low counsel submitted that the Deputy Registrar did not consider the complexity of the matter which involved an acquisition of Kenyan citizenship. In [Jose Padilla v. Kentucky](#) 559 US 356 the US Supreme Court held:

“Immigration law can be complex and it is a legal specialty of its own. some members of the Bar.... In either State or Federal Court or both, may not be well versed in it.”
9. He submitted that it took over eight (8) years from the time of instructions to the time the client became a Kenyan citizen. Everything they did was stated in the affidavit in support of their bill of costs. It's his submission that the Taxing Officer misdirected herself. He relied on the cases of (i) *Joreth Limited vs. Kigano & Associates* civil Appeal No. 66 of 1999 [2002] 1 E. A 92, [2002] eKLR (ii) *Premchand*



Raichand Limited & others No. (1972 E.A. 162). He thus submitted that he ought to have been remunerated for the work done in this matter had the Taxing Officer done the taxation on the correct principles. Reference was made to the case of *Rogan Kamper v. Grosvenor* [1978] eKLR.

The Client/respondent's submissions

10. These are dated 3rd April 20223 and filed by Litoro & Omwebu Advocates. Counsel gave a brief of the processes, and what happened herein. He contends that the Applicant ought to have filed the Reference within 14 days as provided for under rule 11 of the *Advocates Remuneration Order* 2014. That there was nothing to confirm filing of an objection on 15th July 2022. Reference was made to the case of *Mombasa Cement Limited vs. Speaker, National Assembly & another* [2018] eKLR.
11. Relying on the case of *Purity Gathoni Githae & another v. Excelo Structures Limited & another* [2018] eKLR he submitted that the Notice envisaged under paragraph 11 of the *Advocates Remuneration Order* is akin to a Notice of Appeal and with the subsequent reference being akin to a Memorandum of Appeal. Thus, when filed outside the time frame prescribed by statute, they are nullities in law and every proceeding which is founded on it is also bad and incurably bad. See also *Macfoy vs. United Africa Limited* [1961] 3 ALL E.R. 1169.
12. Counsel noted that the Reference herein ought to have been filed by 19th July 2022. That there was no need for waiting for reasons which were already in the Ruling. He referred to (i) *Evans Gaturu Advocate vs. KCB Limited* [2012] eKLR (ii) *Paul Gicheru T/a Gicheru & Co. Advocates v. Kargua (K) Construction Company Limited (supra)* in support. To him the Applicant failed to adhere to the stipulated timelines, and did not seek leave to file the reference out of time. He submits that there is therefore no Reference for the Court's consideration.
13. On whether the Reference has merit counsel submitted that the Taxing Officer properly considered the material before her and well exercised her discretion in arriving at the decision she made. She did not misdirect herself or improperly exercise her discretion nor arrive at an inordinately low or unreasonable award due to an error of principle to warrant this Court's intervention.
14. On the issue of consolidating which he supported counsel submitted that the Taxing Officer had an opportunity to read all the available documents and saw the need to consolidate the two applications. It was also found that the application for Kenya citizenship was carried out jointly. He relied on the case of *Korean United Church of Kenya & 3 others. Vs. Seng Ha Sang* [2014] eKLR to stress that the consolidation was to assist in expediting the matter. Further that the items in the bills of costs in both files were the same. The instructions were issued jointly, and this can be picked from the correspondences.
15. On the taxed bill and while relying on the case of *Mwangi Keng'ara & Company Advocates v. Upward Scale Investment company Limited & another* [2019] eKLR Counsel submitted that the Applicant never expressed the complexity of the matter to the satisfaction of the Court from the evidence before it. That the long period taken to get the Kenyan citizenship did not mean the matter was complex. Further that for the court to interfere with the impugned Ruling it must be shown that the decision was based on an error of principle or the fee awarded was manifestly excessive. He referred to *Republic vs. Ministry of Agriculture and 20 others Ex parte Muchiri W'Njuguna* [2006] eKLR.
16. Counsel finally submitted that the matter was non-contentious, without litigation, not complex and could not justify the exorbitant, exaggerated unconscionable fees claimed in the bill of costs.



Analysis and determination

17. Having considered the Reference/Chamber summons dated 26th July 2022, the submissions, and the law I find the following issues to fall for determination.
- i. Whether the Taxing Officer (Deputy Registrar) erred in consolidating the Bill of Costs.
 - ii. Whether the laid down procedure for Reference was followed.
 - iii. Whether the Reference has merit.

Issue No. (i) Whether the Taxing Officer (Deputy Registrar) erred in consolidating the Bill of Costs.

18. There is no dispute that the Advocate/ Applicant rendered services to Jean – Philippe Salle & Faith Sylvia Florence Riches his clients in Miscellaneous Application No. E011 of 2022 & E012 of 2022 respectively. The services were in respect of applications for citizenship for the two clients. The Taxing Officer has explained why she consolidated the applications for purposes of the Ruling since the consolidation issue had not come up earlier.
19. I have looked at the Ruling dated 5th July 2022, and note that the Taxing Officer considered each bill separately and made her findings. Under paragraph 26 at page 6 of the Ruling the first bill considered is that of Jean – Philippe Salle and not Faith Sylvia Riches as indicated which an error and is hereby corrected. The one for Faith S. Salle clearly falls at page 7 as shown. Each of the bills of costs at item No. 1 shows the claim for instructions as kshs.2,000,000/= making a total of Kshs.4,000,000/=.
20. To confirm that the Taxing Officer considered the two items together she states at paragraph 11 as follows:-
- “As stated above, the Advocate/Applicant seeks a total of Kshs.4,000,000/= as instructions fees on the consolidated Bills of Costs.”
21. I therefore find that the consolidation did not amount to reduction of the bill to one but it was for purposes of doing one Ruling upon considering every item in each bill. This was for purposes of expediting the disposal of the applications. I find no fault on the part of the Taxing Officer.

Issue No. (ii) Whether the laid down procedure for Reference was followed.

22. Rule 11 of the Advocates Remuneration order 2014 which governs the filing of References provides:
- 11- Objection to decision on taxation and appeal to Court of Appeal
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 office 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.
23. The Ruling by the Taxing Officer (Deputy Registrar) was delivered on 5th July 2022 in the presence of both counsel for the parties. In a letter dated 6th July 2022 the Applicant (DBK1) requested for a copy of the Ruling. Vide another letter dated 15th July 2022 the Applicant informed the Taxing Officer of their objection to the taxed bill of costs. He requested her to confirm that the reasons for her decision are as contained in the said Ruling.
24. Counsel for the respondent has submitted that the Reference ought to have been filed on 19th July 2022 being 14 days upon delivery of the Ruling and not 26th July 2022 as done by the applicant. The applicant relied on the case of *Paul Gicheru T/A Gicheru & Company Advocates* (supra) to argue that he acted within the timelines.
25. The Ruling by the Taxing Officer contains reasons given for her decision. That is even acknowledged by the Applicant in his letter dated 15th July 2022. What other reasons was he waiting for if not just buying time? Having received a copy of the Ruling which had reasons his Reference should have been filed within 14 days as it did not fall under Rule (1) of the Advocates Remuneration Order 2014.
26. This means he filed his reference seven (7) days late and ought to have clearly sought leave to file the Reference out of time. However considering how far the matter has come and what the main issue is here I will consider this to be a technicality.
27. Article 159(2) (d) of *the Constitution* provides:
- “ (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
- (d) justice shall be administered without undue regard to procedural technicalities;
- I therefore admit the Reference and consider it as having been duly admitted within the timelines accordingly.

Issue No. (iii). Whether the Reference has merit.

28. The Applicant is not contesting most of the items as taxed by the Taxing Officer. The whole purpose of taxing a bill is to ensure justice to both the client and Advocate. Further that the general level of remuneration of advocates must be such as to attract recruits to the profession. See (i) *Royal Media Services v. Telkom Kenya Limited & 13 others* [2010] eKLR by Lady Justice Koome (as she then was). (ii) *Premchand Raichand Limited & another* (supra).
29. The general principle is that on reference to a Judge from taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs. See the case of *Kipkorir, Tito & Kiara Advocates vs. Deposit Protection Fund Board* [2005] eKLR.



30. The issue here is whether the Taxing Officer properly exercised her discretion to determine the Advocate /client bill of costs.

In *Joreth Limited v. Kigano & Associates* [2002] 1 E.A. 92, the Court while addressing this issue stated:

“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 so 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 the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances.

31. In this matter the bill did not arise out of a suit filed and determined in the Court. It related to an application for Kenyan Citizenship, in 2012 and the same was approved on 11th November 2020 and certificates collected on 28th January 2021. The Applications were under one file namely File No. R.559287 Faith Sylvia Florence Riches & Jean Philippe Sale (DBK2), at the Immigration Office.

32. Before arriving at the figure of kshs.400,000/= the Taxing Officer fully explained the reasons for her decision. This is found at paragraphs 19 – 26 of her Ruling.

It is not disputed that the release of the certificates took long. However besides the written communication in terms of follow up, the Applicant has not availed evidence to show any other steps which he undertook in the matter. It's also true that Immigration matters can be tricky at times. Counsel was dealing with two (2) specific applicants and it was upto him to avail evidence to show the complexities he encountered and how he dealt with them to justify the huge fees he is claiming.

33. On the other hand I find that though the Taxing Officer took into account all the relevant factors, the unexplained waiting period of close to eight (8) years caused counsel to undertake too many follow ups in terms of writing letters and trying to find out what the issue, was.

34. When all this is considered I find the figure of Kshs.400,000/= as instruction fees for the two respondents to be on the lower side. Relying on guidance from the case of *Joreth Limited* (supra) among others I find it prudent to increase the instruction fees from Kshs.200,000/= to Kshs.350,000/= for each making a total of Kshs.700,000/=. The rest of the items remain the same. The Reference succeeds on that element.

35. I therefore set aside the taxed sum of kshs.493,162/40 and tax the bill as follows: Sub-total on both bills of costs – Kshs.725,140.000 VAT at 16% - Kshs.116,022.40 Total - Kshs.841,162/40

36. The consolidated bill of costs in respect of Miscellaneous Application No. E011/2022 and Miscellaneous Application No. E012/2022 is hereby taxed at Kshs.841,162/40 (Kenya Shillings eight Hundred and forty one, thousand, and one hundred and sixty two shillings and forty cents) only.

37. A copy of this Ruling shall be placed in Miscellaneous Application No. E012/2022.

38. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15TH DAY OF AUGUST 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

