



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bruce Odeny & Company Advocates v Octopus (K) Limited & another (Miscellaneous Civil Application E165 of 2021) [2023] KEHC 23134 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23134 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION E165 OF 2021  
RE ABURILI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**BRUCE ODENY & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**OCTOPUS (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**WILLIAM ROMAN MCTOUGH ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. By Notice of Motion dated 25<sup>th</sup> March 2022 and filed on the 28<sup>th</sup> March 2022 brought under Section 11 of the *Advocates Act*, Cap 16 Laws of Kenya and Section 1A, 1B & 3A of *Civil Procedure Act*, the respondent sought the following orders;
  - a. Spent
  - b. That this reference be deemed to have been duly lodged within the time prescribed.
  - c. That the reference be heard and determined expeditiously.
  - d. That the Taxation Ruling dated 10th March 2022 delivered in Miscellaneous Civil Application No. E165 of 2021 be set aside and or varied.
  - e. The Bill of Costs dated 30th November 2021 in its entirety be taxed before another Taxing Officer or this Honourable Court.
  - f. The costs of this application be provided for.
2. The Application is predicated on the grounds set out on the face of the Application and on the Supporting Affidavit dated 25<sup>th</sup> March 2022, sworn by Vincent Mokaya. The respondent contends



- that the Deputy Registrar failed to consider material facts namely that the advocates for the applicant failed to give proof of services rendered in the suit and that in general, the Deputy Registrar totally disregarded and ignored the provisions of the Advocates Remuneration Order.
3. The respondent/client further averred that the Deputy Registrar erred by neglecting the tariff set out in the Remuneration Order prescribing the amount payable in such cases and further that the Bill of Costs was manifestly excessive and oppressive.
  4. The respondents further averred that upon the delivery of the ruling on taxation by the Deputy Registrar on the 10<sup>th</sup> March 2022, they formally wrote to the Deputy Registrar vide a Notice of Objection to Taxation dated 11<sup>th</sup> March 2022 but there has not been any response to the same to date and thus they filed the instant reference.
  5. The application is opposed vide Grounds of Opposition dated 1<sup>st</sup> April 2022 on the following grounds;
    - i. The application is fatally defective.
    - ii. The application is incompetent, unknown in law and otherwise an abuse of the court process.
    - iii. The application offends paragraph 11 of the Advocates Remuneration Order.
    - iv. The respondent has not demonstrated any sufficient grounds to impugn exercise of judicial discretion by the Taxing Master to warrant the Honourable Court's interference.
    - v. The respondent is not deserving of the orders sought.

### Submissions

6. The parties indicated before court that they had filed their submissions however only the Advocates herein filed their submissions.
7. It was submitted that in the present case, the taxing officer delivered her ruling on the 10<sup>th</sup> March 2022 and proceeded to state that the detailed ruling with reasons was available as per Rule 11 (2) of the *Advocates Remuneration Order* but the respondent neither obtained a certified copy of the said ruling nor filed the reference as directed.
8. It was submitted that where the reasons for taxation on the disputed items in the Bill are already contained in the ruling, there is no need to seek for further reasons simply because of the wordings of paragraph 11 (2) as was held in the case of *Abmed Nassir v National Bank of Kenya Limited* [2006] E.A. and further reiterated in the case of *Evans Thiga Gaturu v Kenya Commercial Bank Limited* [2012] eKLR.
9. It was submitted that the respondent subsequently requested for reasons for the taxing officer's decision on the 15<sup>th</sup> March 2022 which was a day after the period of requesting the same had lapsed and that the respondent subsequently filed the Motion subject of this suit on the 28<sup>th</sup> March 2022, 4 days after the prescribed days for filing the reference had lapsed and contrary to paragraph 11 (2) of the *Advocates Remuneration Order*.
10. The applicant submitted that the motion before this court was incompetent and offended the provisions of Paragraph 11 (4) of the Advocates Remuneration Order as the said motion was not by Chamber Summons as required by law and further, that despite seeking to have the reference deemed filed, the said reference has not been attached as required under the said Paragraph 11 (4) and as such, the application ought to be struck out.



11. It was submitted that the taxing officer applied the correct principle in taxing the said Bill which was unopposed and that the respondents were using the instant reference to present a case that they ought to have presented before the taxation.

### **Analysis & Determination**

12. I have considered the pleadings, the court records, the written submissions and the relevant provisions of the law. In the absence of submissions by the respondent/client, I would have dismissed the application but since this is a simple matter, I will delve into its merits based on the affidavits on record. I find the following are issues for determination:
- i. Whether the application challenging the bill of costs dated 30<sup>th</sup> November 2021 is merited
  - ii. Who should bear the cost of this application.

### **Whether the instant application challenging the Bill of Costs dated 30<sup>th</sup> November 2021 is competently filed**

13. The respondents have sought to stay the ruling dated 10<sup>th</sup> March 2022 on the bill of costs dated 30<sup>th</sup> November 2021 on the grounds that the said bill of costs was not served upon them and that the taxing officer ignored and disregarded the provisions of the Advocates Remuneration Order.
14. It is settled law that any grievance emanating from a Ruling on Taxation can only be ventilated through Paragraph 11 of the Advocates Remuneration Order. In *Machira & Co. Advocates v Magugu* [2002]2 E.A Hon. Justice Aaron Ringera (as he then was) held as follows: -

“As I understand the practice relating to Taxation of Bills of Costs, 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 a Judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

15. Similarly, in *Gacau Kariuki & Co. Advocates v Allan Mbugua Ng'ang'a* [2012] eKLR it was held thus: -

“I am also of the same school of thought as the learned judges’ as expressed above. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the taxing master has misdirected himself on a matter of principle. If the same is found to have been the case the usual course is to remit the matter back to the taxing master with the necessary directions. The decision whether or not to proceed with taxation is an exercise of discretion and if he proceeds ex parte in circumstances in which he should not have so proceeded, in my view, that would amount to an error of principle and the Judge may remit the matter back with directions that the bill be re-tax in the presence of the parties. It is therefore my view, and I so hold, that the only recourse available to the client herein was to come by way of a reference.” [own emphasis]

16. Rule 11 of the *Advocates Remuneration Order* makes provision for the procedure an aggrieved party must adopt. It provides:
- (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.
17. The procedure contemplated above is:
- a. The aggrieved party issues a notice within 14 days on the items objected
  - b. The Taxing Officer shall forthwith give reasons for his decision
  - c. Upon receipt of the reason, the objector shall within 14 days file an application to the High Court setting out grounds for objection
  - d. If dissatisfied with the High Court, the objector shall with leave of court appeal to the Court of Appeal.
18. The procedure as stated above carries a mandatory requirement. Undoubtedly, the respondents did not comply. It is trite that rules of procedure are handmaidens and not mistresses of justice, and they are meant to aid in the administration of justice and not to cause injustice. (See Nairobi Civil App. No. 810 of 2001: - *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* [2001] eKLR)
19. Article 159(2) (d) of the *Constitution* and the oxygen principles as drafted were meant to cure technicalities in the process of administrating justice. However, this court concurs with the findings of Kiage J in Nairobi CoA Application No. 228 of 2013 *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, where he held that:
- “I am not in the least persuaded that Article 159 of the *Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an 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 posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”
20. The Court has noted that no plausible reason was advanced by the Respondent/client for non-compliance, save for the fact that the respondent stated that following the taxing officer's ruling of 10<sup>th</sup> March 2022, the respondent sent a letter dated 11<sup>th</sup> March 2022 objecting to the said decision and sought reasons for the said decision.



21. In *Abmednasir Abdikadir & Co. Advocates supra* Ochieng, J, (as he then was) similarly, held as follows:
- “Although rule 11(1) of the *Advocates Remuneration Order* stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons 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 subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling...Therefore the reference having been filed way out of the period prescribed should have been dismissed but having been given due consideration in substance, the same dismissed.”
22. Where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of *Kerandi Manduku & Company vs. Gatbecha Holdings Limited* Nairobi (Milimani) HCMA No. 202 of 2005, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent.
23. In the instant case, it is clear that the taxing officer gave her reasons within her ruling dated 10<sup>th</sup> March 2022. There was no reason for the respondent to seek for further reasons. It follows therefore that the ruling on taxation having been made on 10<sup>th</sup> March 2022, If the client was aggrieved, they ought to have filed the reference within 14 days from the date thereof. If, on the other hand, the client was of the view that there were no reasons contained in the decision, the client could request for the same in writing, in which case, he would be bound to wait for the same. If, however, at a later stage the client decided to prefer the reference notwithstanding the failure by the Taxing Master to give reasons for the taxation, after the lapse of the 14 day period, it is my view that the client would be bound to apply for extension of time to file a reference as stipulated under paragraph 11(4) of the Advocates Remuneration Order, in which case, one of the grounds if not the only ground would be the failure by the Taxing Master to furnish him with the reasons which, according to the decision in *Kipkorir, Titoo & Kiara Advocates (ibid)*, is a ground for allowing a reference. However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given if, even by the time of making the said reference, the said reasons had not been furnished.
24. I further note that the respondents filed the instant application on the 28<sup>th</sup> March, 4 days after they ought to have filed the same.
25. Accordingly, I find that the respondents filed the reference outside the 14 days of the delivery of the decision and without leave of the Court to extend such period.
26. Further, the respondent sought to have the reference deemed as filed whereas they did not attach any reference to the said application leaving the court to imply that the instant application was the reference.
27. Accordingly, the instant application dated 25/3/2022 is hereby dismissed for being filed out of time and/or without leave of court being granted and therefore this court shall not delve into the merits of the decision of the taxing master.



28. Having dismissed the application filed by the client challenging the taxation of the advocates' costs, I now direct that the advocate's application dated 21/3/2022 for entry of judgment in terms of the taxed costs between advocate and client shall be heard orally on 31/10/2023.
29. On who should bear the costs of the application herein dismissed, I order that each party bear their own costs.
30. This Ruling and orders shall apply to HC Misc Application No. 166 of 2021 between the same parties hereto.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**R. E. ABURILI**

**JUDGE**

