



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC. CIVIL APPLICATION NO. 130 OF 2020**

**ODHIAMBO OWITI & CO. ADVOCATES.....APPLICANT/ADVOCATE**

**-VERSUS-**

**EQUATOR BOTTLERS LIMITED.....RESPONDENT/CLIENT**

**RULING**

Before me is a reference from taxation dated 6<sup>th</sup> October 2020. The Advocate/Applicant has asked the Court to set aside the taxing officer's decision on the Item 1 of the Bill of Costs.

1. The Applicant further asked the Court to re-assess the said item 1, so that the costs be awarded as drawn in the Bill of Costs.
2. Finally, the Applicant asked the Court to award them the costs of the reference.
3. The Ruling by the learned taxing officer is dated 16<sup>th</sup> September 2020.
4. Being dissatisfied with the said Ruling, the Advocate/Applicant wrote to the taxing officer on 21<sup>st</sup> September 2020, requesting for reasons for the decision.
5. The taxing officer replied by her letter dated 25<sup>th</sup> September 2020, indicating that the reasons for ruling were contained in the Ruling dated 16<sup>th</sup> September 2020.
6. Pursuant to Paragraph 11 (2) of the Advocates Remuneration Order;

***“(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.”*

7. It was the Respondent’s contention that the Applicant ought to have filed the reference within 14 days from 16<sup>th</sup> September 2020. The basis for that contention was that the reasons for the Ruling made by the taxing officer were contained within the said Ruling.

8. By its calculations, the Respondent submitted that the reference ought to have been filed by 30<sup>th</sup> September, 2020.

9. Therefore, as the reference was filed on 7<sup>th</sup> October 2020, the Respondent submitted that it was incompetent.

10. The Applicant’s understanding was that the reference was filed within the prescribed period.

11. In the case of **EVANS THIGA GATURU Vs KENYA COMMERCIAL BANK LTD [2012]eKLR** made the point that when a taxing officer had delivered a comprehensive ruling, there would be no need to ask him to furnish fresh reasons thereafter. The learned Judge said that;

*“In such circumstances, it would be  
fool hardy to expect the taxing officer  
to redraft another “ruling” containing  
reasons.”*

12. I am in full agreement with my learned brother, that when the ruling delivered by the taxing officer, already contained reasons, there would be no need to seek further reasons.

13. However, I acknowledge and appreciate that the Court’s opinion is varied on the interpretation of paragraph 11 of the Advocates Remuneration Order.

14. In **PAUL GICHERU T/A GICHERU & CO. ADVOCATES Vs KARGUA (K) CONSTRUCTION CO. LTD. HCMCA NO. 124 OF 2007** (at Eldoret), Mohamed Ibrahim J. (as he then was), expressed himself thus;

*“Under rule 11 (2) of the Advocates  
Remuneration Order, the taxing  
officer was required to record and  
forward to the objector the reasons  
for his/her decision on items 1 and  
2. This is a mandatory requirement, as  
the word used is “shall”. It is only  
after receipt of these reasons that  
an objector may within another*

*fourteen (14) days of receipt of the reasons, that he can file the application raising his objections before a judge.”*

15. The learned Judge explained that that;

*“..... if the ruling is detailed and answers the inquiry, it is arguable that it would be superfluous for the taxing officer to give other reasons or repeat himself.”*

16. Nonetheless, Ibrahim J. was the following firm legal position;

*“In any event, the Court must apply the law as it is, as there is no room for any other interpretation or need to use any other method of interpretation than the ‘Golden Rule’ to meet the ends of justice.”*

17. In my understanding, the Judges who have held that there was no need to ask for reasons when reasons were contained in the ruling of the taxing officer, were fully aware of the literal wording of the statutory provision. The said Judges rationalized, as I also did, that a ritualistic observance of the express wording of the statute was un-necessary.

18. I still reiterate that position. With utmost respect, I find myself unable to subscribe to the school of thought that it was fatally premature to lodge a reference from taxation before asking the taxing officer to give his reasons, even when the ruling obviously contains the reasons for such ruling.

19. As L. Njuguna J. held, in the case of **NYAMOGO & NYAMOGO ADVOCATES Vs KENYA PIPELINE COMPANY LIMITED [2018] eKLR**;

*“There is no magic in the act of requesting for reasons, and it would not serve a different purpose to ask for reasons when the same are contained in the ruling.”*

20. Nonetheless, after further reflection on my part, I have also come to the conclusion that it would be prejudicial to condemn a party who followed the letter of the law, by seeking for reasons from the taxing officer when the ruling in issue contained reasons. In other words, whilst the request might be un-necessary, it ought not to lead to the striking out of the reference.

21. Accordingly, I find that in this case, time begun running from 25<sup>th</sup> September 2020, when the learned taxing officer responded to the Applicant’s request for reasons. In the result, the reference was filed within the stipulated time-span.

Pleadings or Application?

22. It is common ground that the proceedings before me arose after the Advocate/Applicant had represented the Client/ Respondent in a Miscellaneous Application No. 154 of 2017.

23. In GEORGE ARUNGA SINO T/A JONE BROOKS CONSULTANTS LTD. Vs PATRICK J.O. & GEOFFREY D.O. YOGO & CO. ADVOCATES, CIVIL APPEAL NO. 35 OF 2007, the Court of Appeal dealt with a situation wherein there was an argument the matter of taxation, which was before the Deputy Registrar had not been originated by suit.

24. The learned Judges of Appeal noted that pursuant to **Section 2** of the **Civil Procedure Act**;

*“Suit means all Civil Proceedings  
commenced in any manner prescribed.”*

25. They then proceeded thus;

*“As to taxation, Schedule VI (1) (a)  
of the Advocates (Remuneration)  
(Amendment) Order, 1997, which  
was in place at the relevant time  
provides for ‘costs of proceedings  
in the High Court’ and states:-*

*‘(a) To sue in any proceedings  
whether commenced by  
plaint, petition, originating  
summons or notice of motion  
in which .....’*

*.....*

*These provisions, both the definition  
of suit in Section 2 (supra) and parts  
of the remuneration order we have  
reproduced above, do persuade us  
and we are persuaded that matters  
commenced by way of a notice of  
motion, as the matter before us was,  
is a law suit. We thus cannot accept*

*Mr. Mwamu’s contention that what was*

*before the taxing master of the High*

*Court was not a suit.”*

26. The learned Judges of Appeal were emphatic that;

*“The matter before the court fitted*

*the definition of a suit and cannot*

*be relegated into any matter under*

*Schedule VI (1) (l).”*

27. The Advocate/Applicant has told this Court that in **Misc. Application No. 154 of 2017**, the Bill of Costs filed by **BRUCE ODENY ADVOCATE** was claiming Kshs 91,085.00. He further said that the said Bill was taxed in the sum of Kshs 210,000/=.

28. I have perused the Bill of Costs, but I found no reference to either Kshs 417,683.84 as the sum claimed, or the sum of Kshs 210,000/= as the costs awarded.

29. In my considered opinion, it would not be right to condemn the taxing officer for arriving at an erroneous assessment, yet the Advocate/Applicant did not place before her, either of the 2 figures which he is now citing herein.

30. A reference from taxation is akin to an appeal. It is determined by assessing the impugned decision in the light of the material which was made available to the taxing officer.

31. As the Advocate/Applicant did not place before the taxing officer either the sum of Kshs 417,683.84 or Kshs 210,000/=, I find that there is no legal basis upon which this Court can hold that the learned taxing officer erred.

32. If I were to re-assess the Instruction Fees on the basis of the information which has now been provided to this Court, that would not be a decision on a reference: It would be a decision which was informed by entirely new material.

33. I therefore reject the reference, with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF MARCH 2022**

**FRED A. OCHIENG**

**JUDGE**