



**Timsales Limited v Gathiri (Civil Appeal 149 of 2009)
[2022] KEHC 10199 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 149 OF 2009**

**JM NGUGI, J
JUNE 30, 2022**

BETWEEN

TIMSALES LIMITED APPELLANT

AND

JOSEPH NJOROGE GATHIRI APPLICANT

RULING

1. Upon successfully prosecuting his claim in Molo PMCC No. 130 of 2003, the Applicant was awarded costs of the suit. The Appellant then filed an appeal to this Court. The appeal was partially successful, and this Court (Wendoh J.) awarded half the costs of the appeal to the Appellant but maintained the award of costs in the Lower Court to the Applicant. The relevant part of the Judgment reads:

In view of the fact that the Appellant has been partially successful in its appeal, it is awarded half of the costs of this appeal. The Respondent will however be entitled to costs of the suit in the Lower Court. Costs and interest are payable from the date of the award by the Trial Court on 16th June, 2009

2. The Appellant subsequently filed a Party and Party Bill of Costs (hereinafter, 'the Bill of Costs'). Although the parties' documents and the Court record refer to various dates, it is apparent that the Bill of Costs referred to is the one dated December 20, 2011 and received in Court on September 25, 2012.
3. There is an undated Ruling on record which indicates that the said Bill of Costs was taxed at Kshs. 133.654. From the record, the Ruling was scheduled to be delivered on 24/03/2014, a date also alluded to by the Appellant as being the date of the Ruling.
4. The matter then went into hibernation until 2017 when the Applicant filed the application dated January 30, 2017 seeking the following prayers.



1. That this Honourable Court be pleased to set aside that Appellant's party and party bill of costs dated December 20, 2012.
2. That the costs of this application be borne by the Respondents/ Appellants
5. The Applicant's account from the Grounds on the face of the application and his affidavit in support thereof is that parties' advocates on record agreed they would discuss the amounts payable as costs without taxing the same in Court. The Applicant says that the Appellant however proceeded to file the bill of costs in Court but never served his advocates with a hearing date for the same
6. He says that his advocates informed him that they had received a letter and consents from the Appellant's advocates dated May 31, 2016 stating that the party and party bill of costs had been taxed. The letter also requested that consents be executed by his advocates to enable the release of funds deposited in Court.
7. The Applicant swears that it is only at that time that his advocates learnt that the bill of costs had been filed and taxed without their knowledge, which he says was highly prejudicial. He therefore asks that the bill of costs be set aside so that his advocates can be present when it is taxed.
8. The Application is opposed vide the affidavit of Wekesa G. Nasimiyu -Advocate dated May 22, 2017, who contends that the Application is bad in law, mischievous, misleading and an afterthought. She depones that the Applicant was unwilling and lacked commitment for any negotiation towards the amicable settlement of costs, forcing the Appellant to prefer taxation.
9. She contends further that negotiation is not mandatory and where a party feels they will get a low bargain, that party has a right to have the Court determine the same. She depones that after the bill was taxed, the Applicant has never approached the Appellant's advocates for review by consent or with any offer.
10. She says that the Applicant was served with the taxation notice dated 13/01/2014 which was received and stamped, and an affidavit of service filed, but the Applicant opted not to show up in Court, thus the taxation proceeded ex parte. She deposes that after the taxation, the Appellant wrote to the Applicant giving them a breakdown of the amount due to them, but the Appellant never responded to the same.
11. She contends that the Appellant has already been prejudiced by the delay in payment and deserves the fruits of its judgment. Conversely, she contends that the Appellant has not demonstrated any prejudice he is likely to suffer by settling the Bill of Costs and says that even if the Bill of Costs was to be set aside, the Applicant cannot force the Appellant to accept any offer. She argues that setting aside of the Bill of Costs would amount to an abuse of the Court process.
12. I directed that the Application be canvassed by written submissions. The Appellant's submissions are dated March 17, 2022. The Applicant submits on two issues, i.e., the competency of the application and whether the Applicant is entitled to the orders sought.
13. On the first issue, the Applicant contends that the Applicant has not complied with any strict strictures for challenging a decision of the taxing officer, specifically under Rule 11 of the Advocates Remuneration Order, making the application incompetent for want of form, procedure, and legal basis. The Appellant argues that upon the delivery of the Taxation Remuneration Order. The Appellant relies on the case of *Luka Wagana & 2 Others v Charles Alexander Kiai & Another* [2020] eKLR, where the Court held that the only way to challenge a decision of the taxing officer is as provided under Rule 11 of the Advocates Remuneration Order.



14. On the second issue, the Appellant reiterates that its decision to tax the Bill of Costs was informed by the Applicant's unwillingness to participate in negotiations. The Appellant contends that in any case, negotiation is not a stay of taxation proceedings and in the absence of an application for stay of proceedings, there was nothing barring the Appellant from taxing the bill of costs.
15. The Appellant also reiterates that it served the Applicant with the Bill of Costs as evidenced by the annexed affidavit of service and urges the Court to be persuaded by the holding in *Mark Bushuru Angalia v Fodak Kenya limited* [2020] eKLR.
16. The issue for determination is whether the Application dated January 30, 2017 is properly before this Court. But first I wish to point out that it is not clear when the Taxation Ruling was delivered. However, from the correspondence on record, it seems to have been delivered sometime in 2016 and not March 24, 2014. Particularly, is the letter from the Taxing Officer in this case dated February 4, 2016 forwarding the file to the Chief Magistrate for delivery of a ruling. Even though the Ruling is signed, both the Ruling and proceedings do not indicate when that Ruling was delivered. Be that as it may, the Parties did not delve into the issue, and I will therefore proceed to the main issue on its merits.
17. The Appellant began by arguing that the Application is meant to set aside the Bill of Costs and should have instead, sought to overturn the Ruling of the Taxing Officer. My understanding of "setting aside of a Bill of Costs" is that the Applicant is seeking to have the entire Bill of Costs as taxed set aside. Indeed, the Applicant at paragraphs 10 and 11 of his affidavits concedes that the Bill was taxed but claims that the taxation was done in his absence. The Applicant's only contention therefore is that the taxation was done ex-parte.
18. In my view, Rule 11 of the Advocates Remuneration Order provides the same procedure for challenging the decision of a taxing officer whether the taxation was done ex-parte or inter partes. This position was explained in *Gacau Kariuki & Co. Advocates v. Allan Mbugua Ng'ang'a* [2012] eKLR as follows:

In my view the only available recourse to a person aggrieved by a decision of the Taxing Master is to lodge a reference. Where a person discovers the fact of taxation after the time stipulated as it is alleged herein paragraph 11(4) of the Advocates Remuneration Order empowers the court to extend time'
19. It was also expressed in *Kamunyori & Company Advocates v Cannon Assurance (K) Limited* [2006] eKLR as follows:

In the light of that legal position, the client cannot have been right to argue, as it did, that paragraph 11 of the Remuneration Order only applies in cases wherein both parties had participated in the taxation.
20. The applicable procedure in this case would be the one provided under Rule 11 of the Advocates Remuneration Order. That is the avenue the law has provided to use if one is dissatisfied with the decision of a Taxing Master. That avenue is provided in Paragraph 11 of the Advocates (Remuneration) Order. It provides as follows:
 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 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.

21. Hence, the procedure for challenging the decision of a Taxing Master – whether ex parte or inter partes - is clearly enunciated in the law. It is animated by filing a reference within fourteen days with the Court given discretion to enlarge time in appropriate cases. In the present case, the Respondent has neither timeously filed a reference nor sought to enlarge time to file one.

22. I believe this was the position expressed by R. Korir, J when the matter came up before her November 1, 2017as:

The Application is challenging taxation which was done ex parte. The same should be filed before the same Court. Relief in the first instance should be sought in the same Court. The application herein is therefore stayed pending the exhaustion of that procedure.

23. Our courts have, in various pronouncements, explained that this procedure for challenging a taxed bill is mandatory and is not a mere technicality. See, for example, *Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 others* [2016]eKLR and *Alfred Ochieng Opiyo t/a Ochieng Opiyo & Co Advocates v Export Hydro Pump and Services (Africa) Limited* [2018] eKLR.

24. There is no evidence that the Applicant exhausted that procedure before approaching this Court. The Application dated January 30, 2017is therefore fatally defective and cannot stand. The same is hereby dismissed with costs to the Appellant.

25. Orders Accordingly.

DATED AND DELIVERED AT NAKURU THIS 30TH DAY OF JUNE, 2022

JOEL NGUGI

JUDGE

