



REPUBLIC OF KENYA



**Mbuthia & another v Commissioner of Co-operatives & another (Civil Miscellaneous Application 799 of 2019) [2022] KEHC 17181 (KLR) (Civ) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 17181 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL MISCELLANEOUS APPLICATION 799 OF 2019  
DO CHEPKWONY, J  
JULY 25, 2022**

**BETWEEN**

**JACKSON MWANGI MBUTHIA ..... 1<sup>ST</sup> APPLICANT  
SIMON NDIRANGU MWANGI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**COMMISSIONER OF CO-OPERATIVES ..... 1<sup>ST</sup> RESPONDENT  
KUKENA SACCO SOCIETY LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before the court for determination is the advocate's chamber summons application dated November 18, 2021. It seeks for two substantive prayers, being;
  - a) That the time for filing a reference be enlarged.
  - b) The taxation be varied and/or set aside.
2. The application is supported by the grounds on its face and the supporting affidavit sworn on November 18, 2021 by James Gathuri. They are:-
  - a) The advocate-client bill of costs was taxed at Kshs 98,467/- on the August 26, 2021.
  - b) The delay in filing the reference is no deliberate and has been occasioned by the fact that the taxing master did not forward the reasons for the ruling in due time.



- c) The taxing master erred in law and misdirected herself in finding that the prayers in the plaint were non-monetary and that it was not possible to ascertain the value of the subject matter;
  - d) The taxing master erred in principle while taxing the bill of costs and in particular by failing to apply the correct principles and awarding costs that are manifestly low as to occasion injustice on the applicant; and,
  - e) In the interest of justice the reference be allowed.
3. The application is opposed by the respondent on the ground that the applicants have approached the court by using the wrong format and hence should not be granted the orders they are seeking.
  4. On March 22, 2022, the counsel for the parties agreed and directions issued that the application be canvassed by way of written submissions. The applicant filed their submission on April 28, 2022 while the respondent filed theirs on May 9, 2022.

### **Determination**

5. I have read through the cited case and statute law relied on. In consideration of all these, I am of the view that only two issues for determination, which are:-
  - a) Whether the applicant is entitled to order for enlargement of time within which to file a reference; and
  - b) Whether in the meantime the court can set aside the taxation as prayed.
6. In respect of the first issue, the law under rule 11(1) of the [Advocates Remuneration Order](#) provides that;-
 

“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”
7. The applicants in this case has objected to the taxing master’s decision failed to consider the value of the subject matter by claiming that the claim was non-monetary in nature and the value of the claim could not be ascertained, hence the costs awarded as instruction fees were manifestly too low. The applicant has placed reliance on the cases of [Makbecha and Gitonga Advocates v Standard Group Plc](#) [2022]eKLR; [Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board](#) [2005]eKLR and [KANU National Elections Board & 2 others v Salah Yakub Farah](#) [2018]eKLR.
8. The respondent on the other hand, is of the view that irregardless of the grounds upon which the applicant has based their application, the law as provided for under rule 11(1) of the [Advocates Remuneration Order](#) is clear on the proper format of approaching the court. It is the respondent’s case that the applicants filed their application out of time contrary to the provision of order 11(1) of the [Advocates Remuneration Order](#), the bill having been taxed on August 26, 2021 and their application filed on November 18, 2021, a period of 3 months.
9. According to the applicants, their explanation for this delay was that the taxing master did not forward the reasons for the ruling to them in good time. It is the respondent’s submissions that it was upto the applicants to follow up on the taxing master for the said reasons within the prescribed time.



10. I have read through the applicant's application and supporting affidavit and find no evidence demonstrating how and when they sought for the reasons of the taxing master. The applicant, has not told court when the said reasons were availed to them. This then leads this court to the conclusion that after the delivery of the ruling on taxation on August 26, 2021, the applicants may have gone into a slumber until November 18, 2021 when they filed the present application.
11. It is worth-noting that a delay of even a single day can be deemed inordinate if not properly explained. Therefore, without sufficient explanation of the noted delay, this court is unable to exercise its discretion in favour of the applicant and therefore the prayer seeking extension of period to file a reference is declined.
12. For completeness, I proceed to consider the second issue for determination which seeks the setting aside of the taxation. It is trite in law that the High Court can only interfere with the discretion of a taxing master if it is shown that the taxing master proceeded on an error in principle. In this case, it is averred that the taxing master committed this error in principle by making a finding that the claim on defamation cases was non-monetary in nature hence unable to ascertain the value in the subject matter. This position was buttressed with an excerpt from the case of *Makhecha and Gitonga Advocates v Standard Group Plc* [2022]eKLR
13. I wish to state that the value of a subject matter can only be determined from the pleadings, judgment or settlement. If the same cannot be ascertained, the taxing master is entitled to use his or her discretion in assessing the instruction fee.
14. This court has observed that it was a common ground that the subject claim was a defamation case and wherein redress was sought through an award of damages. Courts have widely agreed that in defamation cases, it is impossible to ascertain the value of the subject matter and find no reason to deviate from that. I am therefore not persuaded that the learned taxing master proceeded on wrong principles in arriving at her decision.
15. In the upshot, I find the chamber summons application dated November 18, 2021 without merit and proceed to dismiss the same with costs.

It is hereby ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY, 2022.**

**D.O CHEPKWONY**

**JUDGE**

