



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. 124 OF 2019

(CONSOLIDATED WITH 125 TO 156 EXCEPT 125 & 146 OF 2019)

FRIENDS CHURCH (QUAKERS) NAIROBI YEARLY MEETING.....APPLICANT/CLIENT

-VERSUS-

ONSONGO & CO. ADVOCATES.....RESPONDENT/ADVOCATE

RULING ON REFERENCE

The learned Taxing Officer taxed the Advocate/Client Bill of Costs on 27th August 2020.

1. The Client felt aggrieved by the decision rendered by the Taxing Officer and preferred a Reference to this Court. It was the Client's contention that the taxing officer erred by taxing the Bill in the sum of Kshs 48,459/=.
2. In answer to the reference, the Advocate/Respondent raised 2 issues; first, that the reference was incompetent because it was filed late, and second that the reference lacked merit.
3. Pursuant to **Paragraph 11 (2)** of the **Advocates (Remuneration) Order**, any party who has an objection to the decision of the taxing officer may give notice within 14 days, indicating the items of taxation that he was objecting to.
4. Upon receipt of the notice in writing;

*“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.”*

5. It is common ground that on 10th September 2020, the Client filed a Notice of Objection to the decision of the taxing officer.
6. It is further common ground that the learned taxing officer wrote a letter dated 4th November 2020, informing the Objector that the reasons for her decision were contained in the Ruling.
7. The Advocate submits that the reference ought to have been filed by 19th November 2020. Therefore, because the reference was filed on

20th November 2020, the Advocate submits that it had been filed out of time.

8. In the case of **CHARLES ONYINGE ABUSO Vs KENYA PORTS AUTHORITY & ANOTHER, CIVIL APPLICATION NO. 33 OF 2016**, the Court of Appeal dealt with a case which required an interpretation of **Rule 55** of the **Court of Appeal Rules**. The said rule stipulates that a person who was dissatisfied with the decision of a single Judge may apply to the court if he was seeking a variation, discharge or reversal of the said decision.

9. The said person was permitted to either apply informally to the Judge at the time when the decision is given or by writing to the Registrar within 7 days thereafter.

10. In that case, the Applicant did not seek reference to the full court within 7 days of the decision made by the single Judge.

11. In the face of that infraction, the full court declined to go into the merits of the second application which the Applicant lodged. The said application was held to be irredeemably incompetent.

12. The Advocate invited this court to find that the reference herein was irredeemably incompetent.

13. The Client's answer to that submission was that the reference herein was filed within the prescribed period of 14 days.

14. In the case of **EVANS TWIGA GATURU ADVOCATE Vs KENYA COMMERCIAL BANK LIMITED [2012] eKLR** Odunga J. held as follows;

“If the client considered the said decision to contain the reasons, he could file the reference within 14 days from the date thereof. If, on the other hand, he was of the view that there were no reasons contained in the decision, he 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 he decided to prefer the reference notwithstanding the failure by the Taxing Master, after the lapse of the 14 day period, it is my view that he would be bound to apply for extension of time under paragraph 11 (4) of the Remuneration Order, ……….”

15. Unless the reference from taxation is filed within 14 days from the date when the taxing officer delivers his decision, or within 14 days from the date when the taxing officer delivers his reasons for the decision (if the reasons were not contained in the decision), the reference would be incompetent.

16. Therefore, the first issue to be determined herein is about the competency of the reference.

17. On their part the Client counted the 14 days period from Monday 9th of November 2020, which is the date when they say that the taxing officer supplied the reasons for her decision.

18. But that date is different from what **SUSSIE AGOI**, the Administrative Secretary of the Applicant stated at paragraph 14 of her supporting affidavit. By her affidavit, Ms Agoi deponed that the reasons for the decision of the taxing master;

“were supplied on 4th November 2020

vide a letter that stated that the reasons

were as contained in the Ruling.”

19. As the date cited in the affidavit is the 4th of November 2020, the submissions which mention the 9th of November 2020 are not founded upon the evidence tendered by the Client.

20. Submissions cannot be the medium through which evidence is tendered to court, whilst an affidavit is a recognized and legitimate medium through which evidence is provided.

21. It therefore follows, that by the Client’s own evidence, the reasons for the decision made by the taxing officer were supplied to the Client on 4th November 2020.

22. Accordingly, the reference ought to have been filed by 19th November 2020.

23. As it was not filed within the stipulated period of 14 days, the reference is incompetent, because the Client did not obtain leave to file it late.

24. In the result, the reference is struck out, as the court lacks jurisdiction to entertain an incompetent reference.

25. However, in the event that I was called upon to determine the merits of the reference, I would begin by making a finding that there was an Agreement between the Advocate and the Client on the issue of the Instruction Fees.

26. The agreed sum was Kshs 25,200/=.

27. The Advocate asserted that the said sum of Kshs 25,200/= was an *“initial deposit.”*

28. There is no reference in the correspondence embodying the Agreement, to the words *“initial deposit”*. Indeed, the correspondence exchanged between the Advocate and the Client did not mention the word deposit.

29. I find no reason to justify the Advocate’s contention about the alleged deposit.

30. Even the taxing officer stated that

“the instructions fees was pegged at

Kshs 25,200/=.”

31. The only other sums which could be charged by the Advocate were in respect to;

“Additional amounts depending on the

number of attendances in court already

made and disbursements acceptable

to us.”

32. In my considered opinion, the taxing officer erred by enhancing the Agreed Instruction Fee of Kshs 25,200/=, to the figure of Kshs 41,775/=.

33. The Bill of Costs was an Advocate/Client Bill of Costs. Therefore, once the same was taxed, there would be no basis for adding thereto one-half thereof, to the taxed amount.

34. It is only when the Party and Party Bill of Costs was taxed, and the Advocate wanted to peg his Advocate/Client Bill of Costs upon the taxed Party and Party Costs, that the advocate could ask for one-half of the taxed costs to be added to the said taxed costs, so as to come up with the Advocate/ Client costs.

35. The increase by one-half is provided for at **“Part B” of Schedule VIII, IX, and X of the Advocates (Remuneration) Order.**

36. Therefore, if the reference had not been incompetent, I would have set aside the decision of the taxing officer, and limited the taxed costs to the Agreed Instruction Fee, plus such disbursements as were proved.

37. In the result the application by the Client is struck out, with costs thereof to the Advocate.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF APRIL 2021

FRED A. OCHIENG

JUDGE