



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS APPLICATION NOS. 13 OF 2017

MUMIAS SUGAR COMPANY LIMITED.....APPLICANT

AND

PROFESSOR TOM OJIENDA & ASSOCIATES.....RESPONDENT

(Being a Reference from ruling and order herein, by Hon. RN Akee, of 22nd December 2020)

RULING

1. What is for determination is a reference by the applicant herein brought by way of a Chamber Summons, dated 26th January 2021. It principally, seeks the setting aside of the ruling of the taxing officer of 22nd December 2020, a fresh taxation of the bill of costs dated 17th March 2017, and an order directing the respondent to account for all the moneys paid to him when he was acting as Advocate for the applicant.

2. The grounds upon which the application is premised, and which are aligned to the facts deposed in the supporting affidavit, sworn on 26th January 2021, are that the total taxed costs for work done by the Advocates was an error in principle on the quantum of all the taxed items, the ruling was imprinted with errors of principle to justify interference by the court, no reasons were assigned for the high figure awarded for basic instruction fees, the court did not identify the applicable schedule of the Advocates Remuneration Order upon which the basic instruction fees were premised, charging Value Added Tax (VAT) to the entire amount without regard to fact that some items were not vatiable VAT having been charged on them already, failing to interrogate each of the items based on the objections of the applicant, allowing disbursements that were not supported by receipts, and failing to factor the moneys already paid to the Advocate.

3. The respondent, in response, by way of an affidavit sworn on 18th February 2021, argues that the reference has been filed out of time, as it was filed outside the fourteen days allowed by the law, and the same ought to be struck out. He also avers that the applicant had filed a notice of objection to the ruling of the taxing officer, which it then abandoned before reasons could be given. On the basic instruction fees, he avers that what is for consideration is the nature of the suit, the interests of the parties, the pleadings, and as such the taxing officer was justified to arrive at the figure that she determined. He argues that the matter was complex, being a Judicial Review matter the value of the subject-matter was not determinable from the pleadings. He further avers that the instruction fees are awarded at the discretion of the taxing officer. On VAT, he avers that the taxing officer only included the same with respect to the services rendered, and not disbursements.

4. On whether the reference was filed on time, the starting point should be with Rule 11 of the Advocates Remuneration Order, which states 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."

5. Although the issue of the reference not being filed in accordance with the laid procedure was raised in the replying affidavit and the written submissions of the respondent, the applicant has not addressed it. It did not file a further affidavit to explain itself with regard to it, and it has not dealt with it in the written submissions. It is a preliminary issue, for whether the court should consider the rest of the issues raised should first depend on whether the reference is properly before it.

6. Order 11 is specific. The journey to the filing of a reference begins with the applicant writing to the taxing officer, within fourteen days of the decision, giving the taxing officer notice of the items in the bill whose taxation he objects to. The taxing officer, upon receipt of the objection, then writes to the applicant, giving reasons for having taxed the matters in the manner that she did. If the reasons given do not satisfy the applicant, there is fourteen days to then apply to the Judge in chambers. It is this process that the respondent is pointing out and saying it was not followed. The applicant is said to have had initiated it, by writing to the taxing officer, and then abandoned it, before receiving the response from the taxing officer, and rushing to file the chamber summons without the reasons.

7. I was referred to the decision in *Twiga Motors Limited vs. Dalmas Otieno Onyango* [2015] eKLR (J. Kamau J), where a similar situation obtained, and the court pointed out that Order 11 of the Advocates Remuneration Order gave timelines for a reason, and that failure to adhere to them rendered the reference incompetent, before it dismissed the chamber summons. What I would add is that the reasons that the taxing officer is expected to give to the objection raised, would go some way into answering some of the questions that the applicant is asking in its summons, and thereby obviating the need to file a summons. The chamber summons is not founded on the ruling of the taxing officer on the bill, but on the reasons by taxing officer in answer to the objection by the applicant.

8. I agree entirely with the position taken in *Twiga Motors Limited vs. Dalmas Otieno Onyango* [2015] eKLR (J. Kamau J), the applicant herein chose not to follow Rule 11, and embarked on a course of its own creation. That rendered its application incompetent at the first instance. That being the case, there is no basis for me to consider the merit of the other issues raised in the reference. The chamber summons, dated 26th January 2021, is accordingly, hereby, dismissed for being fatally defective and incompetent. The respondent shall have the costs.

9. I have perused through the references in Kakamega HC Miscellaneous Applications Nos. 15 of 2017 and 17 of 2017, both dated 26th January 2021, and established that they are of the same background, where Rule 11 of the Advocate Remuneration Order has not been complied with, for the applicant rushed to file the references before it had received the answers to its objections from the taxing officer. Consequently, the orders made herein apply with equal measure to the applications in Kakamega HC Miscellaneous Applications Nos. 15 of 2017 and 17 of 2017. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER 2021

W MUSYOKA

JUDGE