



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL CASE NO. 9 OF 2016

MULTILINE MOTORS (KENYA) LTD.....PLAINTIFF/APPLICANT

-VERSUS-

MIGORI COUNTY GOVERNMENT.....DEFENDANT

RULING

This ruling is in respect to the Notice of Preliminary Objection (the “**Objection**”) dated 22/11/2021 and filed on 23/11/2021 by the firm of Omonde Kisera & Co. Advocates, Counsel for the defendant/respondent. It is an objection to the application dated 17/11/2021. The objection is premised on the following grounds:-

i. The said application is bad in law and incurably defective as it offends the mandatory provisions of Paragraph 11 of The Advocates Remuneration Order which states:-

1. “Should any party object to the decision of the taxing officer he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.”

2. that no objection has been filed in regard to the a Ruling on taxation delivered on 428/10/2021 to date.

ii. No request has been made to the taxing officer to give reasons regarding the taxed items to enable the appellants invoke the jurisdiction of this court to consider any decision on any objected item (s).

iii. The taxing officer has rendered no communication containing her reasons for the impugned taxation as by Law required to enable to reconsider the same.

iv. The application is statute barred as it is filed out of time allowed by Law without any leave of this court.

v. The application is misconceived and is otherwise an abuse of the process of the court.

vi. There can be no stay of execution on costs.

vii. The application is openly frivolous and intended to abuse the process of this court.

The objection was canvassed orally on 7/12/2021. **Learned Counsel for the defendant / respondent Mr. Kisera**, submitted that the application by the plaintiff/applicant offends the mandatory provisions of Paragraph 11 of the Advocates Remuneration Order (**the ARO**) which requires that within 14 days of the ruling, whoever is aggrieved by the decision of the taxing officer should file a notice of objection indicating which items in the ruling they are objecting to; that so far no notice under Paragraph (1) of ARO has been filed; that no request has been made to the taxing officer to give reasons for the decision made on taxation as required under Paragraph 11 (2) of the ARO; that no reference can be made to the High Court without these mandatory provisions as there will be nothing for the High Court to consider. Counsel further submitted that there is no stay of execution that can be made on a bill of costs. To further buttress this position, Counsel relied on the decision of the **Court of Appeal Civil Application No. 298 of 1996 Francis Kabaa vs Nancy Wambui & Jane Wanjiru**. Counsel concluded that the application is an abuse of the court process and should be dismissed with costs.

In rebuttal, **Learned Counsel Mr. Singei h/b for Mr. Omondi for the plaintiff / applicant** submitted that Paragraph 11 of the ARO is not couched in mandatory terms; that the applicant may file an application within 14 days if there is need for reasons. In support of its application, Counsel asked this court to consider the decisions rendered in **Misc Application No. 3 of 2017 Mulu Mbuvi a.k.a John Mulu Mbuvi vs Carolyn K. Mumbo & Co. Advocates** and **Misc. Civil Cause No. 157 of 2010 Adan Guyo T/A Mansille Medical Centre vs Gikunda Anampiu & Co. Advocates**. On the issue of stay, Counsel submitted that there are circumstances when the issue of stay comes into play that the taxing master does grant stay and urged this court to dismiss the objection.

In a brief rejoinder, Mr. Kisera submitted that it is not true that the objection does not contain the issue of stay (see paragraph 6 of the objection). Whether grounds are discernible from a ruling, it cannot amount to filing of the objection; that Notice of objection itemises which parts of the bill are objected to. It is the notice of objection that initiates the jurisdiction of the court; that it is two months since the bill was taxed and, no objection has been filed.

A preliminary objection is one which raises a pure point of law which has been pleaded or which arises by clear implications out of pleadings and which when argued, may dispose of the suit. An example is the objection to the jurisdiction of the court or a plea of limitation. See the decision in **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors (1969) E.A. 696**

I need not rehash the provisions of Paragraph 11 (1) of the ARO which clearly provide that if a party is dissatisfied with the decision of the taxing officer then he has to give Notice of objection; itemising the items objected to. The applicant has not filed such Notice within fourteen (14) days as per the law. Learned Counsel Mr. Singei submitted that the provision is not couched in mandatory terms. In its application, the applicant annexed and marked “**PO1**” being a copy of the said ruling dated 28/10/2021. The aforementioned annexure is a copy of the handwritten ruling. On the face of it, there seems to be no reasons advanced on why the specific items in the bill of costs dated 13/8/2021 were taxed as so. In considering the provisions on Paragraph 11 (1) of the ARO, **Odunga J in Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited [2012] eKLR** had this to say:-

“In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.”

Even if no reasons are indicated on the face of the application, the applicant has the duty to notify the taxing officer to give the reasons, The only person who can give reasons for their decision is the taxing officer which should indicate whether they took into account irrelevant matters or applied wrong principles of law in reaching their findings. It is upon the grounds that the court would find good ground to refer the bill of costs for re-taxation before the same officer or a different taxing officer. If the ruling is without reasons, what the applicant is expecting this court to do, is to sit as if it is taxing the bill afresh which is not the proper procedure under the law. The applicant must comply with the due process under paragraph 11 of AMO.

Further to the above, the taxing officer’s decision is dated 28/10/2021. This application was filed on 18/11/2021 which is outside the fourteen (14) days allowed for giving of notice to the taxing officer. The applicant has not sought leave of this court to file the Notice out of time in accordance with paragraph 11 (4) of ARO. The application is therefore incompetent.

Supposing the scenario would have been that the ruling had some reasoning albeit minimal, the court would not need to require the taxing officer to furnish further reasons. See the decision of Ochieng J in **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 1 EA 5**. **The applicant has not demonstrated to this court that they filed a notice to the taxing officer requiring that they be furnished with reasons of her decision as per requirements of paragraph 11. The Court of Appeal in Speaker of the National Assembly vs James Njenga Karume Court of Appeal at Nairobi Civil Application No. 92 of 1992 (1992) eKLR held that:-**

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

There is a clear procedure set out in paragraph 11 of ARO which the applicant must follow. No reason has been given why the applicant has not complied with that procedure

On the issue of stay, Learned Counsel Mr. Kisera submitted that there cannot be stay of execution of costs as was held in the case of **Francis Kabaa (supra)**. The Court of Appeal’s decision did not go into detail as to why a stay could not issue in respect of taxed costs. Taxation of costs, in my view, is part of the execution process. **Section 89 of the Civil Procedure Act** provides for the application of the Civil Procedure Rules in all cases of a civil nature such as the present application arising from taxation of costs. **Section 89 of the Act provides** as follows:-

“89. Miscellaneous proceedings

The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.”

Muriithi J held as follows in **Labh Singh Harman Singh Ltd v Attorney General & 2 others [2016] eKLR**

“It follows, in my view, that the provisions of the Civil Procedure Act with regard to stay of execution will apply to proceedings, which are of a civil nature, for the reference of an objection to the Court from the taxation of a Bill of Cost by a Taxing Officer of the Court under the Advocates’ Remuneration Order. This position accords with the interests of justice that a party against whom substantial sums of money have been adjudged in the nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates’ Remuneration Order, which is the procedure provided for such determination. Otherwise such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time.”

In granting of stay of execution under **Order 42 Rule 6 of the Civil Procedure Rules**, the courts consider among others, whether substantial loss is likely to be suffered and the provision of a suitable security for due performance of the decree which may be ultimately binding upon the applicant. The applicant contends in its application that the delay in filing the reference was due to the laxity on the part of one of its associates who has since left the firm. The applicant is specifically challenging in prayer (c) of its application, albeit in the wrong way, the award of **Kshs. 509,834.63** being the instruction fees awarded by the taxing officer. If the execution was to proceed, the whole process of

challenging the decision of the taxing officer will be rendered nugatory. I am of the view that the court can order stay of taxed costs. In this case however, a part from applying for an order of stay. The applicant should have invoked the jurisdiction of this court by complying with paragraph 11 of the ARO in a miscellaneous application. Failure to comply with the said provision renders the application incompetent.

From the foregone, I am satisfied that the application dated 17/11/2021 offends the clear provisions of Paragraph 11 (1) of the Advocates (Remuneration) Order. It is incurably defective, improper, unprocedural and an abuse of the court's process, I uphold the Preliminary Objection. The application dated 17/11/2021 is struck out with costs to the respondent.

DATED, DELIVERED AND SINGED AT MIGORI THIS 17TH DAY OF DECEMBER, 2021.

R. WENDOH

JUDGE

In presence of:-

No appearance for the Applicant

Mr. Kisera Advocate for Respondent

Nyauke - Court Assistant