



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH MISC.APPL.NO.122 OF 2013 & 47 OF 2012

MILLING COOPERATION OF KENYA (2009).....APPLICANT

-VERSUS-

FRANCIS MURIUKI MURAGURI T/A LUSOI STORES.....1ST RESPONDENT

AMUEL MUCHAI NUGUNA T/A WAMU STORES.....2ND RESPONDENT

RAHAB WAMBUI T/A WAMU STORES.....3RD RESPONDENT

RULING

1. This is a ruling on reference in respect to ruling on taxation delivered on 20th February 2019. The reference was brought by way of chamber summons application dated 29th March 2019. The application sought the following orders:-

- i. Spent.**
- ii. Spent.**
- iii. An order that ruling of Hon. J. M. Omido delivered on 22nd February 2019 be varied with regard to items 1, 2, 4,6,14 and 25.**
- iv. Costs of the application be provided for.**

2. Grounds on the face of the application is that the applicant opposes item 1 on instruction fees as the appeal at hand was an issue of strike out for want of jurisdiction hence the subject matter was not quantifiable at that stage.

3. That the applicant also opposes item 4 and 6 on instruction to oppose the application as the same cannot be kshs.3500 considering the year it was argued; that kshs.1500 should be taxed off and item in respect to attendance is kshs.3000 and not kshs.5,040.

4. The application is supported by affidavit sworn by **Kennedy Charles Ouma** a Credit Control Officer of the applicant's company. He averred that being dissatisfied with the taxing master's ruling, he instructed their Advocate to expeditiously file a reference. He attached a letter seeking reasons and further stated that the respondent did proceed to proclaim and that they stand to suffer prejudice businesswise should the tools of trade be attached; that no prejudice will be occasioned to the respondents should this application be allowed.

5. In response the 3rd respondent filed replying affidavit sworn on 4th April 2019. He averred that the taxation reference by the applicant is incompetent for failing to attach reasons for taxation by the taxing master nor the ruling and the court do not therefore have a basis to interrogate the taxation.

6. He further averred that both parties were allowed to file submissions in respect of the bill of costs and the taxing master struck a middle ground, which did not have to be figures recommended by the applicant. He further stated that the judge of superior court has no mandate to interfere with the quantum assessed by the taxing master unless the amounts awarded are manifestly excessive to justify an error on principles of taxation; that the learned judge cannot interfere with discretion of the taxing master so as to substitute his/her own figures of taxation which he/she may consider appropriate.

7. That the items objected to were considered by the taxing master upon perusal of bill of costs together with the filed submissions and it

cannot be said there occurred an error on principle in taxation of the said items.

8. He stated that the applicant is guilty of delay in filing the taxation reference on the basis execution proceedings had already commenced upon sufficient forewarning to the applicant.
9. He averred that the applicant's Advocate was served with certificate of costs and given 7 days to pay on 22nd February 2019 and on 11th March 2019 prior to execution, a demand for kshs.150,751.65 was served on applicant's Advocate and on 19th March 2019 auctioneers made proclamation on applicant's movables; and on 28th March 2019 auctioneers attempted to attach after lapse of 7 days proclamation notice but the applicant denied auctioneers access to its premises thus auctioneers costs escalated to kshs.43,221.
10. He averred that the outstanding bill inclusive of auctioneers cost for execution is kshs.196,422.65. He stated that the reference herein was initiated as an afterthought long after execution proceedings had commenced. He prayed for dismissal of chamber summons dated 29th March 2019.
11. The respondent further filed notice of preliminary objection that the taxation reference is fatally defective and incompetent on the basis that it does not contain taxing master's reasons for disputed taxation as required by **Rule 11 (2) of the Advocates Remuneration Order**; that the applicant has failed to attach the ruling on taxation and the High Court has no basis upon which to interrogate taxation.
12. In a rejoinder, the applicant filed a supplementary affidavit on 4th June 2019. He averred that vide application dated 29th March 2019, the applicant moved the court for stay of execution pending a reference filed herein. That stay orders were issued and served on the 3rd respondent; that in response, the respondent stated reasons for taxation had not been attached but in so far as the proceedings had been requested, they were not able to get proceedings in time. He attached the typed proceedings
13. parties were directed to proceed with the reference and the preliminary objection by way of written submission.

RESPONDENT'S SUBMISSIONS

14. The respondent's argument is that the applicant failed to comply with **paragraph 11 of the Advocates Remuneration Order**. Respondent argue that the taxation amounts assessed by the taxing master on 20th February 2019 were within reasonable limits of his discretion and the High Court has no basis upon which to interfere; further that the reference filed is a miscalculated afterthought filed after inordinate delay whereby auctioneers had already proclaimed the applicant's movable goods thus escalating costs from kshs.150,751.65 to kshs.196,422.65 due to additional costs for warrants and auctioneer's charges
15. Respondent submitted that applicant's taxation reference of 29th March 2019 is fatally defective and incompetent on the basis that it does not contain the taxing master's reasons for disputed taxation as required by **Rule 11 (2) of the Advocates Remuneration Order**, the applicant has failed to attach ruling on taxation, and it should be dismissed with costs. Respondent submitted that ruling was delivered on 20th February 2019 and the applicant filed a letter dated 25th February 2019 raising objection on 5th March 2019 and the said letter did not enumerate specific items of taxation which the applicant was objecting. Respondent submitted that the letter made blanket objection to all taxed items contrary to requirements of **paragraph 11 (1) of Advocates Remuneration Order**.
16. Further that the applicant filed reference without reason contrary to provision that it should be filed within 14 days from the date of receipt of reasons. Respondent submitted that attaching the ruling to supplementary affidavit does not cure the defect in the application. He should have sought extension of time and filing of reference without reasons is premature.
17. Respondent cited the case of **Paul Gicheru T/A Gicheru & Co. Advocates Vs Kargua (k) Construction Co. Ltd [2008]e KLR page 2-5** where the court held as follows:-

“

The notice of objection is not sufficient basis to file a reference. It is mandatory that the Deputy Registrar must formally inform the objector the reasons for taxation. The words of Rule 11 (2) are very clear. The taxing master must give reasons for the decision within 14 days of the notice of objection being filed. If the ruling/decision is not detailed enough to enable the objector lodge an effective and proper reference, then the taxing master would be obliged to give reasonably explanatory reasons for the decision on each on each of the items complained of.

...I am not quite sure of the intention of the draftsman and the rules committee, but it would appear that the requirement for the reasons to be given was to ensure that an objector fully knows the basis for the decision. Such a requirement appears reasonable since it is quite common and unusual that the rulings or assessment of taxation are brief, precise and to the point. It is only where there us serious contentions that the taxing master would go into in-depth reasoning.”

18. Respondent submitted that the reference was filed prematurely without reasons by taxing master and no leave was sought or granted within which to secure and file taxing reasons out of time; that the reference is fatally defective and should be struck out.
19. On merits of the reference, the respondent submitted that items 4,14 and 25 were not objected to and reference on them is misconceived; further item 14 does not relate to attendance and objection on the item is misguided; that item 1 on instruction fee had been drawn at kshs.63,000 but was eventually assessed at kshs.50,000 and that the taxing master exercised discretion fairly; that it is trite law that a taxation

reference should not substitute his/her own figures for taxation which he/she may consider appropriate unless the amount is manifestly excessive so as to justify an error on principles of taxation. Respondent submitted that the applicant has not demonstrated that the taxing master applied wrong schedule of remuneration order; that the applicant's objection of taxation are vague and/or speculative consideration that the reference was filed without reasons for taxation.

ANALYSIS AND DETERMINATION

20. I note from the application dated 29th March 2019 that the applicant sought stay of execution pending reference filed and in prayer 3 the applicant sought to set aside and or vary the ruling of taxing master in respect to items 1, 2 ,6, 14 and 25. Grounds for the objection on taxation are stated on the face of the application. From the application it is clear that the applicant approached the court to grant stay under civil procedure rules and in the same application, objected to taxation in respect to the five items captured above. It is not disputed that the taxing master's ruling was not attached to the application. Reason given by the applicant for not attaching the ruling was delay in tying proceedings. The applicant however later filed supplementary affidavit attaching the said ruling.

21. It is evident that the application was intended to serve as a reference but at the same time, the applicant sought stay; I do agree with counsel for the respondent be brought under paragraph 11 of Advocates Remuneration Order, which should have also served as a stay. It is evident that what informed prayers for both stay and reference in the application is action taken by the respondent of commencing execution process by proclaiming and attempting to attach the applicant's movable property despite being served with the letter asking for reasons.

22. Stay of execution having been granted, I now wish to consider prayer in respect to reference. I first wish to consider whether reasons for the assessment have been availed by the taxing master. I note from the ruling that the taxing master indicated that the appeal arose from stay order which is not quantifiable. He taxed item 1 at kshs.50,000 and item 2 at one third of item 1.

23. In respect to Items 4 and 6 on instruction to oppose the appeal, the applicant's argument is that considering the time it was argued it should have been kshs.1500 and Item 14 on attendance should have been kshs.3000 not kshs.5040.

24. Reason for opposing item 25 has not been stated. I also note from the ruling that item 4, 14 and 25 was not objected to before the taxing master. Items not objected to, were taxed as drawn. The items cannot therefore be subject to reference if they were not objected to in the first place.

25. On perusal of the ruling delivered by Deputy Registrar, I find that it is not detailed enough to contain reasons for the assessment. Its only item 1 which has brief explanation that the application was seeking orders for stay and therefore not quantifiable and he went ahead to assess it at kshs.50,000 no explanation was given for arriving at kshs.50,000. It is therefore difficult for me to interrogate and establish whether wrong principles of taxation was applied. If reasons were given as requested, this court would have had a basis within which to make a determination. Assessment on item 1 determine the assessment on item 2.

26. For the other two items I note that amount charged in the bill of costs is kshs.3500 amount taxed off was kshs.1500 meaning it was assessed at kshs 2000. Even though no explanation is given in the ruling, the applicant is proposing a smaller figure than what the taxing assessed the item.

27. This leaves the court with item 1 on instruction fee. I note from the bill of costs that the respondent had asked for kshs.106,340.00. The taxing master assessed it at kshs.50,000 taxing off leaving kshs.66,340. The taxing master briefly explained that the subject matter was ruling on preliminary objection, which is quantifiable. In my view, the assessment was reasonable; he also explained why he could not assess based on the respondent's claim, which was kshs.2,956,000.

28. In respect to item one, which remained, I find the reason in the ruling was sufficient and the assessment was reasonable. I therefore reject objection in respect to that item. Explanation on item 4 and 6 are also given at page 2 of the ruling, the taxing master indicated that he taxed the two items at kshs.1500 as per 2012 Remuneration Order. It is not therefore true that the said amount was not provided for by the remuneration order at that time.

29. From the foregoing I find that the reference was filed in time and reasons for taxation were provided in the ruling attached to the supplementary affidavit. I therefore dismiss the preliminary objection.

30. In respect to objected items, as observed above, I find that the taxing master did not apply the wrong principles as submitted by the applicant.

31. FINAL ORDERS

- 1. Preliminary objection dated 4th April 2019 is hereby dismissed with no orders as to costs.**
- 2. This reference is therefore dismissed.**
- 3. Costs of the reference to the respondent.**

Ruling dated, signed and delivered via email at Nakuru

This 30th day of April 2020.

.....

RACHEL NGETICH

JUDGE

TO:

J. A. Simiyu Advocates – Counsel for Applicant

Kanyi Ngure Advocates – Counsel for Respondent