



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 165 OF 2015

MNGIWA GENERAL CONTRACTORS.....APPELLANT

VERSUS

GENERAL CARGO SERVICES.....RESPONDENT

R U L I N G

1. Before the court for determination is the reference by the Appellant filed on 20/8/2018 and challenging the decision of the taxing officer on the items of the bill of costs listed as No. 1, 2, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 & 40.
2. That reference was opposed by the respondent by the Notice of Preliminary Objection dated 13/9/2018 and filed in court on the same day.
3. While the Appellant contends that taxing officer erred in his mandate to tax costs and should be reversed by this court, the respondent supports the decision of the taxing officer and faults the reference for being in contravention of the Law Under Rule 11 of the Advocate Remuneration Order, by failure to identify the error by misapplication of the principles applicable on taxation it being contended that the court lacks jurisdiction to entertain a reference filed without the court being moved appropriately.
3. On the 31/10/2019 the court gave directions to the effect that the preliminary objection and the reference be heard together. Even with those directions, the objection, as it alludes to lack of jurisdiction, ought to be dealt with first prior to the merits of the application be delved into.
4. The objection largely based on the provisions of Rule 11, Advocates Remuneration Order says:-

“TAKE NOTICE that the 1st Respondent JEDY GENERAL

CONTRACTORS LIMITED will on or before the hearing raise a preliminary objection to the reference dated 10th August, 018 on the grounds that;

- 1. The reference is incompetent and premature by failure of the appellant to issue a notice to the taxing officer within 14 days of the items he objects to in accordance with rule 11(1) of the Advocate’s Remuneration Order.**
- 2. The appellant failed to request and obtain the taxing master’s reasons for his decision in line with rule II(2) of the Advocate’s Remuneration Order.**
- 3. The appellant failed to institute the reference by way of a chamber summons in accordance with rule II(2) of the Advocate’s Remuneration Order.**
- 4. The appellant failed and or neglected to state the principals misapplied by the taxing master in arriving at his decision.**
- 5. This honourable court lacks jurisdiction to entertain the reference as brought out and filed by the appellant by dint of rule II(1) and (2) of the Advocate’s Remuneration Order by virtue of the failure by the Appellant to move court appropriately”**

5. In essence the preliminary objection asserts that there was no compliance with the requirement of the law in that the reference is premature was instituted than otherwise provided and therefore the matter is improperly before the court and should be struck out.

6. In urging the preliminary objection, the Respondent has cited to court the decisions in **Machira vs Magugu** both in the High Court and in the Court of Appeal as well as the decision in **Ufundi Co-operative Savings and Credit Society Ltd vs Njeri Onyango & Co. Advocates [2015] eKLR** for the proposition of law that the Advocates Act is a complete code on matter of taxation and that a party making a reference must do so in accordance with the law thereby enacted.

7. For the Appellant, submissions were made to the effect that where the taxing officer has rendered a reasoned decision on taxation then no just need is served by insistence on the same officer giving the same reasons. The decisions in **Evan Gaturu vs Kenya Commercial Bank Ltd [2012]eKLR**, **Muriu Mungai & Co. Advocates vs New Kenya Cooperative Creameries Ltd [2012] Eklr**, **A.M. Kimani & Co. Advocates vs Trident Insurance Co. Ltd [2016] eKLR**, **Ahmed Nassir, Abdikadir & Co. Advocates vs National Bank Ltd [2006] 1 E.A. 5** and **Republic vs Ann Njeri Waihumba, ex-parte Joseph Ndemi Wanjiri [2018] eKLR** were all cited for the same proposition that it is the substance and not the form that matters.

8. Having taken into account the submissions offered by both sides and the authorities cited, I have taken the view that the objection asks of the court to decide what the departure by the Appellant in complying with the requirements of Rule 11 portends. Is it a mere procedural irregularity that can be ignored or does compliance with the Rules serve any meaningful purpose in administration of justice? The decision cited by the Appellant are all concerned with failure to seek reasons and I do agree with them that where the reasons are in the decision then it serves no meaningful purpose to ask of the same reasons.

9. In this matter however, the departure from the law is not only in failure to ask for reasons which I would forgive and excuse. There is the requirement under Rule 11(2), Advocate Remuneration Order that the reference be by way of Chamber Summons. Without exalting the rules of procedure to the level above their role as handmaids of justice, it is to be noted that rules play the important role of making procedures of the court, standard, predictable, facilitative in dispute resolution. Once legislated as law, it calls to be respected and complied with for failure to comply with the law portends anarchy. The Court of Appeal in the case of **Nicholus Kiptoo Korir vs IEBC [2013] eKLR** had these very strong words against the practice of ignoring rules of procedure. The court, Kiage J A, said:-

“I am not in the least persuaded that article 159 of the Constitution and the oxygen principles which both command the court to seek to do substantive justice in an efficient manner and to eschew defeatist technicalities were ever meant to aid the overthrow or destruction of the rules of procedure and to create an anarchical free-for-all in the administration of justice. This court, indeed all courts, must never provide succor and cover to parties who exhibited scant respect for rules and timelines. These rules and time lives serve to make the process of judicial adjudication and determination fair just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and shifting of good posts...”

10. That is the route I find to have been followed by Aburili J, in Ufundi Co-operative Case (supra) when the judge said:-

“It would be stretching the principle too far for the court to ignore the statutory mandatory provisions of Rule 11 of the Remuneration Order to attempt to satisfy Article 159(2), especially to try and assist an indolent party such as the Applicant who deliberately and/or Recklessly failed to comply with it even after being indulged by the court that extended the period to comply”.

11. Here the law has set a good post and the ball to be aimed there so as to score. When the Appellant opted to come up with self-designed document called “Reference To a Judge In Chamber From decision of Taxing Officer” be exhibited scant and little respect for the rules and the law and cannot escape as being bent or bending the law or just usurping the duty of the Rules Committee and Parliament which ratifies subsidiary legislation before it comes to law.

12. When such happens, to condone such sets the dangerous prospects that one day a court may be asked to determine a dispute outside the law and proceed to give a remedy unknown to law. That cannot be encouraged but must be discourage by the court saying that it being a court of law, it must apply the law as enacted without providing room for violation or its bending. Being so minded, I do find that the reference was improperly brought pursuant to a procedure unknown to law and it thus incompetent and avails itself for being struck out. I do struck it out and order that the Appellant pays the costs hereby incurred to the respondent.

13. Having so stuck it out there is nothing for the court consideration on the merits.

Dated and delivered at Mombasa this 27th day of September 2019.

P.J.O. OTIENO

JUDGE