



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT MISC. APPLICATION NO. 1156 OF 2005**

**AND**

**IN THE MATTER OF PARTY AND PARTY BILL OF COSTS**

**BETWEEN**

**NYAMOGO & NYAMOGO ADVOCATES....ADVOCATE/RESPONDENT**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED.....CLIENT/APPLICANT**

**RULING**

The Applicant moved this Court by way of Chamber Summons dated 11<sup>th</sup> September, 2017 under the provisions of paragraph 11 (2) of the Advocates Remuneration Order and sought orders;

- (a) THAT the decision of the taxing officer delivered on 8<sup>th</sup> December, 2016 as far as the same relates to taxation of items 1, 2 and 3 of the Respondent's Party and Party Bill of costs dated 25<sup>th</sup> April, 2016 be and is hereby set aside.
- (b) THAT this Honourable Court be pleased to re-tax items 1,2 and 3 of the said Bill of costs.
- (c) THAT in the alternative to prayer (b) above, the Honourable Court be pleased to remit the Bill of Costs for re-taxation of items 1,2 and 3 before a different taxing officer with appropriate directions.
- (d) THAT the costs of this Application be borne by the Respondent.

The Application is supported by the grounds on the face of the application and the Supporting Affidavit of **GLORIA KHAFABA**. It is deponed that on 13<sup>th</sup> May, 2003, the Applicant instructed the Respondent to watch brief in Criminal case No. 693 of 2003 however, midway, their relationship broke down upon which the Applicant withdrew instructions from the Respondent and as a result, the Respondent filed an Advocate-Client Bill of costs under misc. application No. 1156 of 2005. Before the taxation could proceed, the Applicant filed an application dated 17<sup>th</sup> October, 2005 seeking stay of the proceedings pending, the hearing and determination of a suit (HCCC No. 1242 of 2005) in which the Applicant sought to impeach an Agreement the basis of which the Respondent filed the Advocate-Client Bill of costs. That application dated 17<sup>th</sup> October, 2005 was dismissed.

The Applicant depones that the bill of costs for watching brief was taxed at Kshs. 15,604,233.60. The Applicant being dissatisfied filed a reference which was dismissed and they ended up paying the Respondent the sum of Kshs. 44,007,508.75 which comprised the assessed costs of Kshs. 15,604,233 and the sum of Kshs. 28,399,705 being the interest thereon from 15/08/2003 to 31/07/2015 and Kshs. 3,570 being further costs. That the Respondent was also paid Kshs. 1,513,777 being costs for defending itself in HCCC. No. 1242 of 2005.

The Applicant further depones that from the bill of costs filed on 29<sup>th</sup> April 2016, which is the subject of this application, the applications dated 29/7/2005 (item 1), 17/10/2005 (item 2), 24/8/2011 (item 36) and 25 /10/2011 (item 38) all emanated under one cause Misc App No. 1156 of 2005. The Applicant therefore deponed that the DR took into account an irrelevant factor in basing the value of the subject matter on the sum of Kshs. 15,604,233.60 when all the applications had emanated from a misc. application. It was further deponed that no basis was laid for treating the Application dated 17<sup>th</sup> October, 2005 as independent suit. The applicant therefore urged the Court to allow the application in the interest of justice.

The application was opposed by the Respondent who filed a Replying Affidavit dated 2<sup>nd</sup> November, 2017 sworn by **NYAMONDI OCHIENG NYAMOGO** who deponed that the application is incurably defective since it did not comply with the provisions of Rule (11) 1

& 2 of the Advocates (Remuneration) Order in that the Applicant did not seek reasons from the taxing officer before filing the Application. It was further deponed that the application deals with matters concluded years back. In absence of compliance with Rule, 11, the Respondent deponed that the Application cannot be a competent reference and the Respondent prays that the application be dismissed with costs.

The Application was canvassed orally in court on 20<sup>th</sup> November, 2017. Mr. Terer appearing for the Applicant submitted that the reasons for the Deputy Registrar on the taxation were contained in the ruling and that if any were requested for, they wouldn't be different from what was in the ruling. He relied on the case of **Crescent Construction company Limited v Kenya Ports Authority & another [2014] eKLR** where it was held that where it is possible to discern reasons, it is not necessary to wait for the reasons. The Counsel also referred the court to annexure NON 3 to the application dated 28/03/2017 in which the Deputy Registrar stated that the reasons for the subject ruling dated 25<sup>th</sup> April, 2016 are in the same ruling.

On his part, Mr. Nyamogo submitted that the Applicant did not write a letter to the Deputy Registrar requesting for reasons for the decision neither did the Deputy Registrar communicate any to the Applicant. He further submitted that from the application, the Applicant has not told the court what the taxing officer did not do right. It was further submitted that the Application was filed 10 months after the decision was delivered.

I have considered the Application together with the Affidavits, the submissions made and the authorities cited. In determining this Application, I will seek to establish whether the Applicant complied with the provision of Rule 11 of the Advocates (Remuneration) Order.

The provisions of Rule 11 of the Advocates (Remuneration) Order provides that -

*“(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.”*

That being the law, the next question will be; what is the rationale behind seeking reasons for the decision from the taxing master? In the case of **National Oil Corporation Limited v Real Energy Limited & another [2016] eKLR** the judge had this to say;

*“In my view there is no magic in requiring the Taxing Officer to furnish reasons before making a reference. Where reasons are contained in the decision a party ought not to seek the same simply because it is fashionable to do so. Accordingly, nothing turns on the issue that the applicant did not seek the reasons for the decision before filing the reference.”*

Similarly, in the case of **EVANS THIGA GATURU, ADVOCATE v KENYA COMMERCIAL BANK LIMITED [2012] eKLR**, when confronted with a similar issue on the provision of Rule 11 of the Advocate (Remuneration) Order, **Justice Odunga** held that –

*“From the foregoing it is clear that the reasons for the decision are to be sought for by way of a notice within 14 days of the decision and the reference is to be lodged within 14 days of the receipt of the reasons.*

*That brings us to the question of what happens, as the client alleges in this case, where no reasons are given. First, and foremost, the above provisions presuppose that in delivering their decisions on taxation, the taxing officers only pronounce the results of the taxation without the reasons behind them. In most cases, the court is aware that, taxing officers, in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons, thereafter. In such circumstances it would be foolhardy to expect the taxing officer to redraft another “ruling” containing the reasons. In my view, this is another provision that requires to be looked into afresh. I do not see the reason why the taxing officer cannot at the time of making his decision do so together with the reasons therefore.”*

While quoting with approval the holding by the Court of Appeal in **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board Nairobi Civil Appeal No. 220 of 2004** J.B Havelock, in the case of **Crescent Construction company Limited v Kenya Ports Authority & another [2014] eKLR** held that;

*“In view of the differing interpretation put on **Rule 11 (2)** by the various High Court Judges including **Mwera J. in Behan & Odero v National Bank of Kenya Ltd (2008 eKLR, Ochieng J. in Ahmednassir Abdikadir (supra) and Okwengu J. in the Kiplagat & Associates** case all cited to the Court by the Plaintiff/Respondent, I must necessarily turn to the decisions of the Court of Appeal on this point. The opinions of my learned brothers and sisters in the High Court are persuasive but not binding upon me. However, the finding of the Court of Appeal in the **Kipkorir, Titoo & Kiara** case (supra) is binding upon this Court. The learned Judges of Appeal held in that matter:*

*“It is true that the taxing officer did not record the reasons for the decision on the items objected to after receipt of the respondent's notice. It seems that the taxing officer decided to rely on the reasons in the ruling on taxation dated 23rd February, 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with **Rule 11 (2) of the Order**, we are nevertheless, satisfied that there was substantial compliance.”*

*The **Kipkorir, Titoo & Kiara** appeal was decided before the coming into effect of the new Constitution, 2010. In my view, since that decision in 2006, Courts are required to give an even more liberal interpretation of procedural rules. In this regard, I am encouraged by the finding of my learned brother **Odunga J. in the Evans Gaturu** case (supra) when with reference to **Rule 11 (2) of the Order**, he detailed at pages 14 and 15 of his Ruling as follows:...*

From the above authorities, it appears to me that the act of requesting for reasons of a taxing master is not, and should not be an academic exercise but rather should serve a purpose, which is to obtain reasons where the same are not discernable from the ruling. The subject of this application is the decision delivered on 8<sup>th</sup> December, 2016 and the same is titled "*Ruling and Reasons for Taxation*". This is to say that the decision contained the ruling on the taxation as well as reasons for the same. There is no magic in the act of requesting for reasons and it would not serve a different purpose to ask for reasons when the same are contained in the ruling. Therefore, the finding of this court is that the reference was properly filed and it is not defective for the fact that the same was filed in absence of a request for reasons.

That said, I now move on to the second limb of rule 11 of the Advocates (Remuneration) Order providing that a reference should be filed within 14 days from the date of receipt of reasons from the taxing officer. The Respondent submitted that the Application should be dismissed as the same is defective having been filed more than 10 months from the date of the ruling. It is true that the decision was delivered on 8<sup>th</sup> December, 2016 whereas this Application was filed 10 months down the line. The only reason given for the late filing by the Applicants is that there were other activities in the file. Rule 11 is particular that a reference should be filed 14 days from the date of receipt of reasons. In this case, the Applicant did not request for reasons from the registrar but the same can be discerned from the decision delivered on 8<sup>th</sup> December, 2016. That being the case, it is only logical to assume that the Applicant received the reasons for the decision on 8<sup>th</sup> December, 2016 when time started to run.

I find that a delay of 10 months was too long and the Applicant did not offer a sufficient explanation for the same. That notwithstanding, the Applicant did not seek leave of this court to file the application out of time in accordance with rule 11 (4) of the Advocates (Remuneration) Order. The rule provides that, "(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.*"

In **Evans Gaturu** case (supra), even though the Court found reasons for the decision of a taxing master can be ascertained from the ruling, the learned judge dismissed the application since it was filed out of time when he held that;

*"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 Rule 11(4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure by the Taxing Master to furnish him with the reasons which, according to the decision in **Kipkorir, Titoo & Kiara Advocates (ibid)**, is a ground for allowing a reference. However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given if even by the time of making the same reference, the said reasons have not been furnished."*

The finding of this court is, therefore, that the application was filed out of time and without the leave of the court. In the premises, the Chamber Summons dated 11<sup>th</sup> September, 2017 is struck out with costs.

**Dated, Signed and Delivered at Nairobi this 19<sup>th</sup> Day of March, 2018.**

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... *For the Applicant*

..... *For the Respondent*