



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

**CIVIL APPEAL NO. 186 OF 2016**

**EDWARD MWANGI MACHARIA.....APPELLANT**

**-VERSUS-**

**MAINA & MAINA ADVOCATES.....RESPONDENT**

**RULING ON A PRLIMINARY OBJECTION.**

1) Edward Maina Macharia, the appellant herein being dissatisfied by the rulings delivered by Hon. Makungu the deputy registrar, on the 18<sup>th</sup> day of June 2015 and the other on the 19<sup>th</sup> day of November 2015, filed an appeal seeking orders to vacate and set aside the aforementioned rulings.

2) The ruling of 18/5/2015 arose from a notice of motion dated 10/July/2014 where the appellant sought the Bill of Costs lodged by the Respondent herein be struck out. The aforesaid application was dismissed.

3) The ruling of 19/Nov/2015 arose from the hearing of an advocate- client bill of costs dated 4<sup>th</sup> July 2013, pursuant to leave granted by the court on 3<sup>rd</sup>/July/2013, where the respondent (now appellant) did not put in any objections. The bill was thus taxed in the sum of Kshs.232,690/-

4) Maina & Maina Advocates the respondent herein has filed a notice of preliminary objection dated 25<sup>th</sup> November 2016, putting forward following grounds:-

***1. THAT the appeal as filed contravenes the express steps set out at Paragraph 11 of the Advocates (Remuneration) order***

***2. THAT pursuant to paragraph 11 of the Advocates (Remuneration) order, no appeal can lie in the High Court against the decision of a taxing officer.***

***3. By reasons of the aforesaid, the appeal is therefore incompetent and incurably defective.***

5) The respondent prays that the entire appeal be dismissed with costs to the Respondent.

6) The appellant filed a replying affidavit he swore on 15<sup>th</sup> March,2017 in which he averred that the respondent's preliminary objection is time barred having been filed 10 months from when he was served with the memorandum of appeal and thus should be rejected. The appellant avers that the appeal is based on a ruling and not purely based on taxation alone. That the legitimacy of the taxation is yet to be decided by the court since both parties have filed submissions at the High Court vide H.C. Misc. Application No.20 of 2013 and a ruling is yet to be delivered. The appellant states that it is just that the respondent's preliminary objection be dismissed.

7) I have considered the grounds set out on the face of the preliminary objection and the appellant's replying affidavit in response to the preliminary objection as well as the respondents submissions on record.

8) It is the respondents submission that the appeal from a taxing master ought to be brought within the provisions of the Advocates Remuneration Order and therefore any attempts to circumvent the application of the order amounts to gross abuse of the court process.

9) The definition of a preliminary objection was restated in the case of: **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors (1969) EA 696**, where it was stated *inter alia*:

**“..... a preliminary objection consists of a point of law which has been pleaded., or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.....”** It was further stated in this cast that:

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

10) Paragraph 11 of the Advocates Remuneration Order provides that:

*1.should any party object to the decision of the taxing officer, he may within 14 days after 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 14 days from the receipt of the reasons apply to a judge by chamber summons , which shall be served on all 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 sub-paragraph (2) may , with leave of the judge but not otherwise appeal to the Court of appeal.*

11) The appellants appeal arises from the decision of a taxing officer. The appellant has come within provisions of the Advocates Remuneration order. Therefore the appeal is incompetent.

12) For the above reasons, I find merit in the respondent's preliminary objection. The preliminary objection is upheld. Consequently, the appeal is hereby ordered struck out with costs being awarded to the respondent.

**Dated, Signed and Delivered in open court this 8<sup>th</sup> day of December, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent