REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC APP 61 OF 2015

OTIENO & RAGOT COMPANY ADVOCATES.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

R U L I N G

1. This ruling is in respect of the Advocate/Applicants preliminary objection dated 14th December 2015 and a further preliminary objection dated 15th December 2015 against the Client/Respondent's chamber summons dated 14th December 2015 brought under Rule 11(2) of the Advocates Remuneration Order and Order 22 Rule 22 of the Civil procedure Rules.

2. The matter began with a bill of costs filed by the advocate herein against the client for seeking recovery of costs for services rendered and not paid for. The taxing officer heard both parties and delivered her ruling on 19th November 2015 wherein she taxed the bill at Kshs. 6,476,089.20/- On 1st December, 2015 the client through its advocate M/s Otieno, Yogo, Ojuro& Co. Advocates wrote to the taxing officer requesting for reasons as to how the bill was taxed. The Notice read as follows:

> **"Kindly provide is with good reference and reasons as to how the bill of costs in the above matter was assessed.**
>
> **May the same be able to guide us item by item for our consideration"**

3. The taxing officer replied to the notice on 8th December 2015 and indicated that the reasons for her decisions were as per her ruling delivered on 19th November, 2015. Subsequently, the client brought its chamber summons application on 14th December, 2015.

4. The preliminary objections filed by the advocate raise two issue namely that:

a. **The reference is incompetent having been filed out of time**
b. **The notice given to the taxing officer does not suffice for purposes of Rule 11 of the Advocates Remuneration Order.**

5. Both parties filed written submissions. It was argued for the advocate that the notice issued to the taxing officer by the Client's advocate does cannot found a reference under Rule 11. It is argued that the letter does not express objection to the taxing officer's decision and neither does it give a hint that the client intends to file a reference to the Judge. That the letter merely seeks reasons to enable the client to consider its next course of action. Counsel argued that without an objection as envisaged by rule 11, there can be no competent reference made to the Court.

6, On the issue of time, the advocate argued that in her ruling the taxing officer considered the issues raised fully and delivered a detailed ruling which gave eloquent reasons for her decision. That despite the detailed ruling the Client still went ahead to request for reasons which had already been given thereby leading to a delay of 25 days from the date of the tax officer's decision. Counsel was of the view that rule 11(2) was only intended to be applicable where reasons for the decision were not given. That since the reasons for the decision were given in this case, the Client should not have waited to receive any other reasons from the taxing officers.

7. The Client opposed the Advocate's preliminary objection. It was his argument that the reference was filed well within time it having been filed only 6 days from the date of the taxing officer's letter dated 8th December, 2015.

On the 2nd issue that the notice did not suffice for purpose of Rule 11, it was submitted for the client that the Court should take judicial notice of the fact that 11(2) deals with appeals from the decision of the taxing officer to the High Court and 11(3) deals with appeals to the Court of Appeal.

8. I have considered the rival submissions and the authorities filed therewith. On the issue of time, the advocate was of the view that once reasons were given in the ruling, the client did not have to wait for further reasons after issuing a notice before filing a reference. That Rule 11(2) is only applicable where the reasons are not given in the decision.

9. But the Client is of the view that it followed the law to the letter and the reference was well within time.

10. The procedure for the challenge of a taxing officer's decision is provided under Rule 11 of the Advocates Remuneration Order which provides:

> **"(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 the 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."**

11, 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 of the taxing officer and the reference is to be filed within 14 days of receipt of the reasons.

12, That brings us to a situation whereby reasons for the decision are enumerated in the taxing officer's ruling. Should a party issue a notice to the taxing officer?

13. To this end, the Court in the case of **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2) (2006) 1 EA 5** held as follows:

> **"Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons. Where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling."**

14. **Odunga J.** put it this way in his finding in the case of **Evans Thiga Gaturu, Advocate vs.- Kenya Commercial Bank Limited[2012] eKLR**:

> **"However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference.....**

The judge concluded thus:

> **In the present case, the ruling on taxation was made on 6th July 2011. 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 paragraph 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.**

15. From the foregoing, it is my understanding that if the taxing officer has given reasons for her decision, it would be an act of futility to request for the same. But if a party deems it fit to request for such reasons and the taxing officer does not provide them, then a party cannot rely on such failure to file a reference out of time.

16, In the present case, the ruling was delivered on 19/11/2015 with reasons for the decision. The Client requested for reasons on 1st December, 2015 and the taxing officer replied on 8th December, 2015. It is therefore clear that time started running from 8th December, 2015 when the taxing officer replied to the notice for reasons. The reference was filed on 14th December, 2015, 6 days after the taxing officer reply and thus was well within time.

17. On the issue that the notice does not suffice, I will disagree with the Advocate's argument that the notice could not found a reference because it failed to mention that the Client intended to file a reference. I say so because, a look at Rule 11(1) reveals that one is required to issue notice on the items he/she intends to object and it therefore follows that the only way to object is through a reference.

18. The client submitted the court should take judicial notice that Rule 11(2) deals with appeals from the decision of the taxing master. It is my opinion that terms such as "appeal" and "reference" provided by statute and can therefore not be used loosely. I seek guidance in the case of **Machira & Co, Advocates v Arthur K. Magugu (2012) eKLR** where the court of Appeal held that:

> **"The appellate jurisdiction of any court is a creature of statue and has to be exercised in accordance with the provisions of the statute creating it. With regard to advocates' bills of costs we agree with the decision of Ringera J (as he then was) in Machira vs Magugu [1] that the Advocates Remuneration Order is a complete code which does not provide for appeals from taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decision through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the Civil**

> **Procedure Act of discovery of new and important matters, errors on the face of the cord and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on advocates' bill of costs through references under rule 11 to a judge in Chambers",.**

19. The upshot is that the issues raised in the notices of preliminary objection dated 14th December, 2015 and 15th December, 2015 have no merit. The same is dismissed with costs.

Dated, signed and delivered this 27th day of April 2016.

H. K. CHEMITEI

J U D G E