



No.294/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 252 OF 2012

**IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT IN
MACHAKOS HIGH COURT CONSTITUTIONAL PETITION NO. 153 OF 2011**

BETWEEN

JOAKIM KALUNDA MAUNDU & 6 OTHERS.....PETITIONERS

AND

MAKINDU WATER AND SEWARAGE

COMPANY LTD & 7 OTHERSRESPONDENT

MICHAEL GOA T/A GOA & CO. ADVOCATESAPPLICANT/RESPONDENT

VERSUS

WATER RESOURCES MANAGEMENT

AUTHORITY LTDRESPONDENT/ APPLICANT

RULING

1. The application dated **18th November, 2013** is brought pursuant to the provisions of **Rule 11(2)** of the **Advocates (Remuneration) Order** Part 1 of the **Advocates Act (Cap 16 Law of Kenya)**.
2. In the application, the applicant (respondent) seeks orders that, the Taxing Officer erred in fact and law;
 - v. By dismissing the applicant’s Preliminary Objection dated **30th October 2012** despite having found that the Advocate Client Bill of Costs dated **15th October 2012** as filed is incompetent having not complied with **Rule 69** of the **Advocates(Remuneration) Order**;
 - v. By proceeding on wrong legal principles by allowing the Bill of Costs filed to proceed to taxation without requesting the respondents to amend the same.
 - v. By relying on wrong principles in holding that **Article 159 (2) (d)** of the Constitution renders useless all legal and/or procedural requirements as established by the **Civil Procedure** and other laws.
3. Consequently there is an error of principle in the ruling and reasons thereof, hence the prayer for

setting aside the decision dated **24th September 2013** and issuance of a directive for filing a competent Client Bill of Costs.

4. The application is supported by an affidavit deposed by **Prof. Albert Mumma** who is in conduct of the matter who avers *inter-alia* that the applicant being aggrieved by the decision of the Taxing Officer filed a Notice of Objection. Basically he reiterated what is stated in the grounds relied upon in the application.
5. In his submissions, counsel for the applicant did raise the issue of jurisdiction in respect of this court. He questioned the procedure laid for challenging a decision like the one made by the Taxing Officer. He alluded to **Rule 11(1) and (2) of the Advocate's (Remuneration) Order** which serves as guidance when an objection to the decision in respect of taxation is made. The rule provides thus:-

“i) 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. (Emphasis mine).

ii) Taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objectors 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”.

6. According to the rule, the power to tax the Bill of Costs is vested in a Taxing Officer. Any party aggrieved by the decision of the Taxing Officer has a remedy in the High Court. The decision of a Taxing Officer could be a preliminary one like the one that prompted the applicant to move to this court, or final as the one envisaged by **Rule 11 of the Advocates (Remuneration) Order (Rule 11)**. The notice to be given pursuant to the rule is in respect of **“items of taxation”**. In the circumstances the decision would refer to a final judgment, ruling or order. In the instant matter the ruling reached constituted a decision from which the aggrieved party would appeal.
7. The Court of Appeal in the case of **Machira & Co. Advocates versus Arthur K. Magugu & Another (2012) eKLR** stated thus;-

“The appellate Jurisdiction of any court is a creature of statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to Advocates Bill of Costs, we agree with the decision of Ringera ,J (as he then was) in Machira versus Magugu, Nairobi Civil appeal No. 199 of 2002 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 difference 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 a kin to those in Section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the record 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 for a Judge in chambers”

8. In the Tanzanian case of **Gautam Jayram Chavda versus Covell Mathews Partnership, Taxation reference No. 21 of 2004** the court held thus:-

“Any person who is dissatisfied with a decision of the Registrar in his capacity as a Taxing Officer may require any matter of law or principle to be referred to a judge for his decision and the Judge shall determine the matter as the justice of the case may require”.

9. From the foregoing it is apparent that this court has jurisdiction to preside over the matter. The matter is therefore rightly before the court.
10. This therefore brings us to the issue whether the Bill of Costs was defective as ruled by the Taxing

Officer, and if so what remedy is available. A Preliminary Objection was raised by the applicant. He averred that the Bill of Costs as drafted by the respondent contravened **Rule 69** of the **Advocates (Remuneration) Order**.

11. **Rule 69** provides the format to be adhered to while drafting the Bill of Costs. It provides that the Bill of Costs shall have **five (5) columns**. It is a requirement that the first column contains the dates, the second- the items, the third – services charged, the fourth-charges and the fifth column- Taxing Officers deductions. The respondent in drafting the bill interchanged the first and second columns. The ‘date’ was put in place of the ‘items’; while the ‘items’ was put in place of the ‘date’. This was contrary to the requirement of **Rule 69**.
12. The issue to be addressed is whether the error is detrimental to the applicant? In her ruling the learned Taxing Officer stated thus;-

“We ought to keep in mind the overriding objective principle of the courts and or the ‘double 0’ – principle which demands of courts to lean more towards sustaining suits rather than striking them out on technicalities... our superior courts have held, over and over again that justice must be served without due regard to technicalities... our constitution buttresses this point in Article 159(2) (d).”

13. The Taxing Officer in an endeavor to reach a just decision referred to the **Interpretation and General Provisions Act, Cap 2, Law of Kenya. Section 72** which provides;-

“Save as is otherwise expressly provided...”

14. Further **Article 159(2)** of the **Constitution of Kenya, 2010** states;-

“In exercising judicial Authority, the courts and tribunals shall be guided by the following principles.

- a. *Justice shall be administered without undue regard to procedural technicalities”.*

The Taxing Officers in the circumstances did not rely on wrong principles of the law.

15. Although it is a requirement that **Section 69** of the **Rules** must be complied with, interchanging columns does not touch on the substance of the Bill of Costs. It is a procedural aspect. The Bill of Costs cannot fail due to technicalities. Failure to adhere to rule **69** by virtue of columns having been interchanged is not prejudicial to the applicant.
16. Consequently, I dismiss the application. The error having been caused by the respondent’s counsel each party shall bear their own costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of MAY, 2014.

L.N. MUTENDE

JUDGE