



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
Misc. Civ. Cause 364 of of 2007**

**MURIU MUNGAI & CO. ADVOCATES.....ADVOCATE/RESPONDENT**

**- VERSUS -**

**NEW KENYA CO-OPERATIVE CREAMERIES LTD..... CLIENT/APPLICANT**

**R U L I N G**

This is a reference filed by the client under the provisions of **Paragraph 11 (1) and (2)** of the **Advocates Remuneration Order**. The client was dissatisfied by the decision of the taxing officer of this court when he taxed the advocate's bill of costs at KShs.2,317,564/=. The client was aggrieved by the said decision and duly put in motion the process of challenging the said decision of the taxing officer. The ruling was delivered on 4<sup>th</sup> September, 2007 and on 12<sup>th</sup> September 2007, the client wrote to the taxing officer requesting for reasons that influenced the court in taxing the said advocate's bill of costs. On 20<sup>th</sup> September 2007, the deputy registrar of this court wrote to the advocate of the client and informed him that his request was being attended to and that he would be notified when the reasons would be ready for collection. On 23<sup>rd</sup> January 2008, the deputy registrar of this court wrote to the said advocate and informing him to pay KShs.120/= for certified copies of the ruling of the taxing officer. Upon collecting the certified copy of the ruling, the client realized that the taxing officer of the court had not given reasons as provided under **Paragraph 11(2)** of the **Advocates Remuneration Order** but had instead given the same ruling which he had delivered on 4<sup>th</sup> September, 2007. I will revert to this aspect of the proceedings before the taxing officer later in this ruling due to the fact that it formed the core objection to the reference by the client.

On 3<sup>rd</sup> March 2008, the client filed chamber summons pursuant to the provisions of **Paragraph 11(2)** of the **Advocates Remuneration Order** seeking to have **items No. 1,2,3,4,5,11 and 15** of the Advocate-client's bill of costs which was taxed in favour of the advocate to be set aside or varied. The client further requested the court to exercise its inherent jurisdiction and allow such fees on the above items as it shall deem fit or make such other or further orders as regard the bill of costs in issue. It was contended by the client that the taxing officer had misdirected himself both on the law and on the facts and thereby awarded the advocate a sum that was manifestly excessive and based on erroneous legal principles. The client took issue with the taxing officer's failure to give reasons in support of the said taxation made in favour of the advocate. The client maintained that the taxing officer had allowed fees for services that were clearly not rendered by the advocate. The reference is supported by the annexed affidavit of Milcah Mugo, the company secretary of the client.

The application is opposed. The advocate filed grounds in opposition to the application. The advocate stated that the application was without foundation or merit since the applicant had not annexed the reasons of the taxing officer to demonstrate the basis of the alleged errors of principle and objection to the taxation. It was contended on behalf of the advocate that the application was misconceived and

incompetent having been filed before reasons were furnished by the taxing officer in accordance with the provisions of **Paragraph 11(2)** of the **Advocates Remuneration Order**. The advocate stated that the client was seeking to challenge the taxation of the bill of costs on the basis of quantum which cannot be properly be addressed without presentation of reasons for the same for analysis by the court on reference. The advocate asserted that there was no evidence that the client had made follow-up efforts to obtain reasons from the taxing officer before giving up and thereafter filing reference to this court.

At the hearing of the reference, I heard arguments made by Mr. Nyaga on behalf the applicant and by Mr. Werimo on behalf of the respondent. Apart from citing several decided cases, the said counsel basically reiterated the contents of the pleadings filed by their clients in support of their respective positions. The issues for determination by this court are twofold; firstly, whether the reference filed by the client is competent, and secondly, if the court makes a finding of competence in favour of the applicant, whether the applicant established the taxing officer erred in principle in taxing the respondent's bill of costs in the manner that he did. On the first issue, the respondent objected to the reference on the grounds that the applicant had failed to secure reasons from the taxing officer of the court before filing reference to this court. Mr. Werimo for the respondent relied on a decision by Ochieng J in **Ahmed Nassir, Abdikadir & Co. Advocates vs. National Bank of Kenya Ltd Nairobi HC Misc. Appli.No.750 of 2004 (unreported)** where the learned judge held that it was mandatory for a party making reference in respect of a taxation to annex a ruling outlining reasons of the taxing master's decision. Ochieng J in the said ruling, quoted with approval the dicta of Visram J in **Shah & Parekh vs. Apollo Insurance Co. Ltd Nairobi HC Misc. Application No. 263 of 2003 (unreported)**.

Similarly, in **Kerandi Manduku & Co. vs. Gathecha Holdings Ltd Nairobi HC Misc. Application No. 202 of 2005 (unreported)** where the same learned judge held that a party who does not annex reasons of the taxing officer in support of his reference must establish that he undertook due diligence before reaching a determination the taxing officer was unable to supply reasons to enable him file reference to this court. Such due diligence, it was suggested by the learned judge, included such a party sending reminders to the taxing officer to supply the required reasons before such an aggrieved party files reference to the court. I agree with the exposition of the law by Ochieng J. The learned judge, in my view, properly interpreted the provisions of **Paragraph 11 (2) of the Advocates Remuneration Order** which states that:

*“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.”*

Mr. Nyaga for the applicant explained that the applicant had indeed complied with the requirements of **Paragraph 11(2)** of the **Advocates Remuneration Order** when it requested to be supplied with reasons within fourteen (14) days of the taxation by the taxing officer. Indeed, the applicant established that the court acknowledged receipt of the letter of the applicant requesting for reasons from the taxing officer of the court. The applicant was surprised, when four months later, it was informed by the deputy registrar of the court that the reasons by the taxing officer were ready for collection only to find that what was described as “reasons” was in actual fact the ruling which had earlier been delivered by the taxing officer. It was upon receipt of the said ruling that the applicant filed reference to this court.

The issue for determination by this court therefore is whether the applicant performed due diligence in requesting for reasons from the taxing officer pursuant to **Paragraph 11(2)** of the **Advocates Remuneration Order**. It is my view that the applicant complied with the provisions of the said **Paragraph 11(2)** of the **Advocates Remuneration Order**. The applicant requested for reasons from the taxing officer within the stipulated period. The deputy registrar of the court acknowledged receipt of the request for reasons and informed the applicant that the reasons would be supplied in due course. Unfortunately, when the “reasons” were supplied, the applicant discovered that the taxing officer of the court had not in fact given any reasons but had supplied the applicant with the ruling in respect of the taxation. What was the applicant supposed to do in the circumstances? The applicant cannot compel a taxing officer of this court to give reasons. It can only do what is required of it by the law.

It was clear from the circumstances described above that the taxing officer failed to give reasons for his decision. Failure by the taxing officer to give reasons is sufficient ground for an aggrieved party to seek redress by filing reference to this court. The Court of Appeal found itself in a similar situation when dealing with a matter where reasons had not been by a taxing officer. The Court of Appeal held in **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board [2005] 1KLR 528** at page 535 that:

*“Although there was no strict compliance with **Rule 11(2)** of the **Order**, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.”*

I therefore hold that the applicant substantially established due diligence in complying with the requirements of **Paragraph 11(2)** of the **Advocates Remuneration Order**. I decline to uphold the respondent’s objection that the reference filed by the applicant was incompetent on the basis that the taxing officer of the court had not supplied reasons before the reference was filed.

As regard the second issue whether the applicant established error in fact and in law on the part of the taxing officer when taxing the advocate’s bill of costs, the Court of Appeal in the above referred case of **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board (supra)** set out the principles to be considered by the court when determining whether a reference from taxation by a taxing officer should be allowed. At page 533, the Court of Appeal held that:

*“On a reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In **Arthur vs. Nyeri Electricity Undertaking [1961] EA 497**, the predecessor of this Court said at page 492 paragraph I:*

*‘where there has been an error in principle the Court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the Court will interfere only in exceptional cases’.*

*An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see **Arthur vs. Nyeri Electricity Undertaking** (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see **Devshi Dhanji vs. Kanji Naran Patel (No.2) [1978] KLR 243**.”*

In the present reference, the applicant complained that the taxing officer had considered an incorrect valuation of the property that the advocate was instructed by the client to have transferred to it. The land in question was **LR No. 9895 (Grant IR No.18914)**. According to the advocate, the value of the land, including all the developments on the land was KShs.338,912,935/50. The taxing officer held that the value of the property was KShs.127,094,800/=. It was on the basis of this value that the taxing officer taxed the advocate-client’s bill of cost. On its part, the client insisted that the correct value which should have been given to the property was the value of the land that was to be transferred and not the developments on the land. The applicant submitted that the value which should have been adopted by the taxing officer was KShs.35,900,000/=. In support of his submission, the applicant relied on a valuation by Tysons Limited which was annexed in support of the advocate’s bill of costs. The applicant took issue with the other aspects of the said taxation which it considered to be manifestly excessive.

I have carefully considered the arguments made on this point by the parties to this reference. It was evident that the advocate was given instructions to prepare a conveyance and charge in respect of the client’s property at Sotik, among other properties, contained in the vesting order which had been issued by the court on 15<sup>th</sup> November, 2005. The total value of all the properties in the said vesting order was KShs.547,000,000/=. That was the sum which was quoted in the instrument of transfer prepared by the advocate. It was therefore inconceivable that the value of the client’s property at Sotik would be

equivalent to 1/5<sup>th</sup> of the 22 properties which were listed in the vesting order. I agree with the applicant that the value of the Sotik property which the taxing officer should have applied in taxing the advocate-client's bill of costs is KShs.35,900,000/=. I therefore hold that the taxing officer erred in principle by applying a higher value in taxing the advocate's bill of costs. The said application of a higher value resulted in the taxing officer assessing the advocate's bill of costs at a sum that was manifestly excessive to the extent that would attract interference by this court.

In the premises therefore, I hold that the applicant's reference to this court must succeed. It is hereby allowed. The taxation of the taxing officer of the court dated 4<sup>th</sup> September, 2007 is hereby set aside. The advocate-client's bill of costs herein is remitted to a taxing officer other than D. K. Ole Keiwua, Deputy Registrar, for appropriate taxation. For avoidance of doubt, the value of the subject property that shall be applied in assessing the advocate's costs shall be KShs.35,900,000/=. The client shall have the costs of this reference.

**DATED at NAIROBI this 19<sup>th</sup> day of June 2008.**

**L. KIMARU**

**JUDGE**