Lubulellah & Associates v Gilbi Construction Company Limited (Environment and Land Miscellaneous Application E158, E159, E160, E161, E162, E163, E164 & E165 of 2023 (Consolidated)) [2024] KEELC 5234 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5234 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E158, E159, E160, E161, E162, E163, E164 & E165 OF 2023 (CONSOLIDATED)

JA MOGENI, J

JULY 10, 2024

BETWEEN

LUBULELLAH & ASSOCIATES ..... APPLICANT

AND

GILBI CONSTRUCTION COMPANY LIMITED ..... RESPONDENT

RULING

1. There is a Chamber Summons Application dated 23/02/2024 before me for determination in respect of six (6) other matters all related to the instant application, ELC Misc. No. E158 of 2023, ELC Misc. No. E159 of 2023, ELC Misc. No. E160 of 2023, ELC Misc. No. E161 of 2023, ELC Misc. No. E162 of 2023, ELC Misc. No. E163 of 2023, ELC Misc. No. E164 of 2023 and ELC Misc. E165 of 2023.

2. The Chamber Summons Application dated 23/02/2024 is filed by Ms. Lubulellah & Associates Advocates under rule 11 (1) – 11 (4) of the Advocates Remuneration Order and all enabling provisions of the law. The Advocate/Applicant seeks the following prayers:

    a. Thatthis Court be pleased to set aside the decision of the Taxing Officer made vide Ruling delivered herein on 7/02/2024 and remit the Advocate & Client Bill of Costs herein dated 6/06/2023 for the taxation before a different Taxing Officer other than Hon. Tessy Marienga, or in the interest of saving judicial time proceed to itself determine the costs payable to the Applicant/Advocate.

    b. Thatthe costs of this Application be provided for.

3. The Application is premised on the grounds stated in paragraphs (1) – (3) on the face of the Application and the annexed Affidavit sworn on 23/02/2024 by Eugene Lubale Lubulellah, counsel

from the Advocate/Applicant herein and a Further Affidavit sworn on 15/05/2024 by Anthony Milimu Lubulellah, the Managing Partner of the Advocate/Applicant herein.

4. The Advocate/Applicant contends that the Taxing Officer's ruling on 7/02/2024 was flawed, erroneously determining that a fee/retainer agreement existed within a sale agreement involving a third party, leading to the dismissal of the Advocate's Bill of Costs. The Applicant maintains that an Advocate-Client relationship with the Respondent is undisputed, with the only issue being who should pay for the services rendered. The Applicant denies any fee agreement with the Purchaser and refutes claims of agreed legal fees of Kshs. 170,000/= exclusive of VAT, emphasizing there was no evidence of VAT payment by the Respondent. The firm of Advocates was not a party to the Sale Agreement, except for witnessing its execution, which does not bind the Advocate to the Agreement. Clause 12 of the Agreement states each party shall pay its own Advocate's fees, contradicting the Respondent's claims. The Respondent has not clarified if it paid any Advocate's fees, and payments were made directly to the Vendor by the Purchaser. The Respondent's introduction of new evidence without leave is improper, and Mr. Harish Gopal Vekaria lacks authority to testify on Advocate practices. The Advocate-Client relationship existed before the Sale Agreement, and the Applicant's claimed fees comply with the Advocates Remuneration Order. The Advocate cannot enforce the Sale Agreement, and there was no agreement for the Respondent to receive free legal services without tax obligations.

5. The Client/Respondent in response to the application filed a Replying Affidavit by Harish Gopal Vekaria sworn on 19/03/2024. The Client/Respondent's case argues that they instructed the Applicant to represent them in various conveyancing matters, including a sale between the Respondent and East African Contractors Limited. Before proceeding, the costs and responsibility for those costs were agreed upon by all parties involved, including the Applicant, who agreed that their fees would be Kshs. 170,000.00 exclusive of VAT, to be paid by the purchaser. This agreement was documented in the Sale Agreement prepared by the Applicant on 18/09/2017, which specified in clause 12 and the Schedule of Costs that the purchaser would cover the Applicant's fees. The successful completion of the transaction, contingent upon the purchaser paying these fees, implies that the Applicant was fully compensated as agreed. The Respondent contends that the Applicant's current claim for fees is an attempt to unjustly enrich themselves, given that the terms of payment were clearly stated and agreed upon in the Sale Agreement. The Respondent asserts that the Taxing Officer was correct in dismissing the Applicant's Bill of Costs, as there was a valid fee agreement binding the Applicant to seek any further compensation from the purchaser, not the Respondent. The Respondent urges the court to dismiss the Applicant's case as unmerited and uphold the Taxing Officer's decision.

6. When the matter came up for directions, by consent, the parties agreed to dispose of the same through written submissions. The Client/Respondent duly submitted which I have considered already and in writing this ruling I have paid due attention to their submissions. There were no submissions on record by the Advocate/Applicant.

Analysis and Determination

7. Having considered the pleadings and the decisions relied on and I find that the following are issues for determination:

    i. Whether the Reference is properly before the Court.

    ii. Whether the Reference/application dated 23/02/2024 is merited.

    iii. Who bears the costs of the application?

Whether the Reference is properly before the Court.

8. The first issue for consideration is whether the reference is properly before me. Before filing the Reference, the Advocate/Applicant gave a notice of objection to taxation dated 8/02/2024 objecting to the Taxing Officer's Ruling delivered on 7/02/2024 and alerting the Taxing Officer of their intention to file a reference. The Notice of objection was filed on 9/02/2024. This was two (2) days after the Taxing Officer delivered her ruling. The fourteen (14) days were to lapse on 29/02/2024.

9. The Advocate/Applicant thereafter filed a reference on 23/02/2024. This was eleven (11) days after the Taxing Officer delivered her ruling and nine days after filing the Notice of Objection.

10. After the taxation of the bill of costs, the Advocates Remuneration Order provides for the procedure to be followed when a party opposes the taxation of the bill of costs. The procedure for the challenge of the results therefrom is provided under Paragraph 11 of the said Order which states as follows:

> "(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."

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 and the reference is to be lodged within 14 days of the receipt of the reasons.

12. The Advocate/Applicant provided an explanation in the notice of objection. The said notice stated that the Applicant/Advocate requests for the Taxing Officer's written reasons for taxation on her Ruling on various items. It also states that the reasons are to be supplied within 14 days of receipt of this notice as per Rule 11 of the Advocates Remuneration Order. It further stated that as the reasons may already be indicated in the ruling dated 7/02/2024, the Applicant/Advocate required the Taxing Officer to indicate whether there any additional reasons on the referenced items or the entire reasoning is captured within the said ruling.

13. This brings us to the question of what happens where no reasons are given. The above provisions presuppose that in delivering their decisions on taxation, the taxation 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. I do not see the reason why the taxing officer cannot be at the time of making his decision to do so together with the reasons therefore. The result of these vague provisions is that certain courts have held that preferring a reference before the reasons are furnished renders the reference incompetent. See Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited [2012] eKLR.

14. In Muriu Mungai & Co. Advocates vs. New Kenya Co-Operative Creameries Ltd Nairobi (Milimani) HCMC No. 692 of 2007, Mwilu, J was of the view that:

> " It is mandatory for an applicant who objects to a taxation to annex the ruling, giving reasons by the taxing master supporting the taxation...Nowhere is it provided that if there be a delay in the taxing master giving reasons for taxation then a party may file a reference. Instead, rule 11 (4) gives the court power to enlarge time if the same lapses before a step needed to be done is done or taken...Under the rules the taxing officer is required forthwith, upon receipt of the notice of objection to give reasons for the decision and where they fail to do so, the thing to do is not to file a reference to the High Court...In the court's view, the applicant moved the court too soon. More reminders should have been sent to the taxing officer for reasons or any other legal action that would have resulted in the taxing officer giving reasons to be taken to have the reasons given. Nobody else can give those reasons but the taxing officer and it has not been shown that the taxing officer is not available. And more importantly the court cannot determine the matter in the absence of the taxing officer's reasons for her decision in taxing the bill of costs as she did".

15. Mwilu, J's view is supported by Mohammed Ibrahim, J, (as he then was) in *Paul Gicheru T/A Gicheru & Co. Advocates vs. Kargua (K) Construction Co. Ltd Eldoret HCMCA No. 124 of 2007*, where the learned judge was of the view that:

> " Under rule 11(2) of the Advocates Remuneration Order, the taxing officer was required to record and forward to the objector the reasons for his/her decision on items 1 and 2. This is a mandatory requirement as the word used is "shall". It is only after receipt of these reasons that an objector may within another fourteen (14) days of receipt of the reasons that he can file the application raising his objections before a judge...While the taxing master did not give specific reasons even by reiteration and referred to the entire body of his ruling, he complied with the requirement at least by way of procedure if nothing else. In such a case, if the ruling is detailed and answers the inquiry, it is arguable that it would be superfluous for the taxing master to give any other reasons or repeat himself...But it is not correct to say that if the ruling of the taxing master is actually a ruling, then there is no need to request for such reasons. If this was correct interpretation, then there would be no need for the Rules Committee to set out an elaborate and long procedure as set out in the Rules. All an aggrieved person would have required to do is to give notice of objection within 14 days of the decision being made and thereafter file the application/reference within another 14 days. The words in Rule 11(2) are certain and clear that the taxing master must give the reasons for the decision within 14 days of the Notice of Objection being filed. He could thereafter do either of the following:
>
> a. If he is satisfied that the Ruling is so elaborate, detailed and sufficient to express clearly all the reasons for the decision on each item, then he could state that the reasons are in the ruling; or
>
> b. He could summarize specific reasons for decision on each item; or
>
> c. If the ruling/decision given earlier is not detailed enough to enable the objector lodge an effective and proper reference, then the taxing master would be obliged to give reasons for the decisions on each of the items complained.

It would appear that the requirement for the reasons to be given was to ensure that an objector fully knows the basis for the decision. Such a requirement appears reasonable since it is quite common and usual that the rulings or assessment of taxation are brief, precise and to the point. It is only where there is serious contentions and arguments that the taxing master would go into in-depth reasoning. In any event, the Court must apply the law as it is, as there is no room for any other interpretation or need to use any other method of interpretation than the "Golden Rule" to meet the ends of justice...In the instant case, after the notice, the taxing master was required to record and forward the reasons for the decision on items 1 and 2. No time is given for this and it is presumed that it must be done within a reasonable time. However, no sooner, the notice was filed than the applicant the next day filed the reference. This did not give any time to the taxing master to discharge her duty under Rule 11 (2). The applicant acted prematurely and pre-empted the giving of the reasons by the Deputy Registrar as taxing officer/master...There are no reasons on record after the Notice of Objection. The application/reference herein is null and void ab initio. It is a nullity. This omission is incurable as the requirement for recording and forwarding of reasons is a mandatory one and the effect of this is that this Court truly in the circumstances has no jurisdiction to entertain the application and jurisdiction being everything, without it a Court has no power to make one more step".

16. The Court of Appeal, however, took a different view in Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board Civil Appeal No. 220 of 2004 [2005] 1 KLR 528 where the Court held:

> "On reference to a Judge from a 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...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 or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit...If the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI (1), that would be an error in principle...If a Judge on a reference finds that the taxing officer has omitted an error of principle the general practice is to remit the question of quantum for the decision of taxing officer... The judge has however a discretion to deal with the matter himself if the justice of the case so requires...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".

17. In Nyamogo & Nyamogo vs. Kenya Bus Services Nairobi Milimani HCMA No. 587 of 2004, Ochieng', J stated that:

> "Pursuant to the provisions of rule 11(1) of the advocates (remuneration) order, if any party should object to the decision of the taxing officer he should within 14 days after the decision give notice of the items of the taxation to which he objects and upon receipt of the notice, rule 11 (2) obligates the taxing officer to forthwith record and forward to the objector the reasons for his decision...by promising to give his reasons for taxation in due course the taxing officer must be deemed to have been aware that the reasons were not in the ruling and by subsequently declining to provide the reasons the taxing officer must be deemed to have failed to discharge the obligation bestowed upon him by rule 11 (2) of the Advocates (Remuneration) Order...Where the sum awarded is four times the minimum sum prescribed, the taxing officer would have been expected in his reasons for taxation to justify

his finding that such an award was appropriate...Such reasons are essential when the Judge is giving consideration to a reference, as it enables the Court determine whether or not the taxing officer may have taken into account irrelevant consideration; or if he had failed to take into account relevant factors, or if the taxing officer had erred in principle".

18. In Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 1 EA 5 Ochieng, J, similarly, 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...Therefore the reference having been filed way out of the period prescribed should have been dismissed but having been given due consideration in substance, the same dismissed".

19. It is therefore clear that the interpretations by the Court especially the High Court on this issue is far and varied. Where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.

20. 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. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of *Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005*, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I opine that to file the reference more than 14 days after the delivery of the ruling would render the reference incompetent.

21. In the present case, the ruling on taxation was made on 7/02/2024. If the Advocate/Applicant considered the said decision to contain the reasons, he could have filed the reference within 14 days from the date thereof. Which he did. He filed a reference eleven (11) days after the delivery of the Ruling. However, it is evident that the Advocate/Applicant was of the view that there were no sufficient reasons contained in the decision as he required the Taxing Officer to state whether there are any additional reasons or the entire reasoning is captured within her ruling. He requested for the same in writing, in which case, he would therefore be bound to wait for the same.

22. 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. 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.

23. It is clear that the Advocate/Applicant was of the view that there were no sufficient reasons contained in the Ruling of the Taxing Master delivered on 7/02/2024 and so he requested for the same in writing on 8/02/2024, in which case, he was bound to wait for the Taxing master's decision before he could file a reference, as per the law.

24. In light of the forgoing, I find that as the Advocate/Applicant filed the notice of objection on 9/02/2024 and later a reference on 23/02/2024 before being furnished with the reasons for the Taxing master's ruling, the reference is incompetent for being prematurely instituted. I accordingly strike out the Chamber Summons dated 23/02/2024 but make no order as to costs since the problem has been partly caused by inaction on the part of the Court.

25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JULY 2024.

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MOGENI J

JUDGE

In the presence of:

Mr. Lubullelah for Advocate/Applicant

Caroline Sagina - Court Assistant

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MOGENI J

JUDGE