



**Green Power Generation Company Limited v Kenya Power and Lighting Company Limited & another (Environment & Land Case 179 of 2013) [2023] KEELC 17182 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17182 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 179 OF 2013**

**MAO ODENY, J**

**MAY 2, 2023**

**BETWEEN**

**GREEN POWER GENERATION COMPANY LIMITED ..... PLAINTIFF**

**AND**

**KENYA POWER AND LIGHTING COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Chamber Summons dated 17<sup>th</sup> December 2021 by the 1<sup>st</sup> defendant brought under rule 11 (2) of the [Advocates Remuneration Order](#) for orders inter alia that the court review/set aside the ruling of the taxing officer to the extent of VAT awarded on the Plaintiff's party and party bill of costs; and the Plaintiff's Preliminary Objection dated 18<sup>th</sup> July 2022 that the court does not have jurisdiction on grounds that the Taxing Master has not heard an application for review.
2. The application is supported by the grounds on the face of the application and the affidavit of Ms Lelu, counsel for the 1<sup>st</sup> Defendant who deponed that on 8<sup>th</sup> December 2021, the taxing officer delivered her ruling on the plaintiff's party and party bill of costs awarding the Plaintiff the sum of Kshs. 134, 743.62 being VAT. That by a letter dated 14<sup>th</sup> December 2021, the 1<sup>st</sup> Defendant sought an objection and reasons for the said decision and according to Ms. Lelu, the taxing officer committed an error of principle by awarding VAT.
3. Counsel agreed to canvas the e Preliminary Objection and Chamber Summons by way of written submissions which were duly filed.
4. Counsel for the 1<sup>st</sup> Defendant submitted that VAT could not be levied on party and party bill of costs since there were no 'vatable' services. Counsel relied on the cases of [Paramount Bank Limited v Nagvi Syed Qamar](#) [2021] eKLR; [Shreeji Enterprises Limited v John Munga Chai](#) [2022] eKLR; [Amalo](#)



- Company Limited v BN Kotecha and Sons Limited and Another* [2022] eKLR where the court held that a Party and Party Bill of Costs does not attract an aspect of taxable supply as an Advocate Client Bill of Costs would.
5. On the preliminary objection, counsel submitted that paragraph 11 (4) of the *Advocates Remuneration Order* does not require that a Taxing Officer hears an application for review before a reference is filed.
  6. Ms Lelu relied on the case of *National Oil Corporation Limited v Real Energy Limited and another* [2016] eKLR; *Evans Thiga Gaturu Advocate v Kenya Commercial Bank Limited* [2012] eKLR; *Prabbhulal Tejpal Haria and another v Pravinsbandra Meghji Dodhia and 2 others; and Singh Gitau Advocates v City Finance Bank Limited* [2021] eKLR and urged the court to dismiss the preliminary objection and allow the application as prayed.
  7. Counsel for the Plaintiff/respondent submitted that under the law, a decision on taxation of Party and Party Bill of Costs by the taxing officer is a preliminary exercise, which results in a Certificate of Costs and any aggrieved party then has a 14 days window to:
    - i. Give notice in writing her of objection to any item of the decision of the taxing officer; and apply for written reasons.
    - ii. The taxing officer then gives his reasons in writing for the taxation on the objected to.
    - iii. Within 14 days from receipt of the taxing officer's written reasons, the objector can apply to a judge by way of chamber summons, which must be served on all the parties concerned. The chamber summons must set out the grounds of the objector's objection.
    - iv. Only after these steps are taken can the High Court (and the ELC as a court of equal status) can be properly seized of a valid objection (see Section 11 of the *Advocates (Remuneration) Order*).
  8. Counsel further submitted that the only other avenue that an objection against taxation can reach the High Court is through a reference by consent of both parties, whose procedure is similar to the procedure under Section 12 of the *Advocates (Remuneration) Order*.
  9. Counsel urged the court to allow the preliminary objection and dismiss the application with costs

### **Analysis And Determination**

10. When a preliminary objection is raised on of the jurisdiction of the court to hear a matter. The court must dispense with it first as it might have the effect of taking away the matter from the court for lack of jurisdiction.
11. Preliminary objections should be on pure points of law as was held in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. Where the court is urged to look outside the case for facts, then such does not qualify as a preliminary objection but a matter that requires further evidence to be adduced in a trial.
12. The preliminary objection by counsel for the plaintiff/respondent is that the reference, filed by the 1<sup>st</sup> Defendant, is an appeal from the decision of the Taxing Master and that the 1<sup>st</sup> Defendant ought to have filed an application for review before the Taxing Master before filing the reference herein.



13. It should be noted that the terms “appeal” and “reference” are provided by statute and can therefore not be used loosely as per 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 statute 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 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 to a judge in Chambers”.

14. The procedure for challenging a Taxing officer’s decision is provided for 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 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.”

15. 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 supposed to be filed within 14 days of receipt of the reasons.

16. Courts have however numerous held that 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. It follows that there is no requirement that a party should first file an application for review before the Taxing Officer before filing a reference to this court. I find that the Preliminary Objection dated 18<sup>th</sup> July 2022 has no merit and is therefore dismissed with costs.

17. On the issue whether VAT is chargeable in party and party costs, Section 6 (1) of the *VAT Act 2015* provides as follows-

“Tax shall be charged on any supply of goods or services made or provided in Kenya where it is a taxable supply made by a taxable person in the course of or in furtherance of any business carried on by him.”



18. In the case of *Pyramid Motors Limited v Langata Gardens Limited* [2015] eKLR the Court of Appeal held as follows-

“On the final issue of VAT, I hold the simple view that in allowing the same the Master erred under the *Value Added Tax Act*, 2013 particularly section 5 thereof. Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein. The Bills herein concerned Party and Party costs and VAT could then not apply as neither party fetched nor supplied services to the other. True, legal services were rendered but it is not the Advocate who was being compensated herein. The Master could only have awarded VAT if the Bills were Advocate-Client Bills or if there was tendered evidence before the Master that the Plaintiff had paid VAT and was consequently entitled to indemnity. But yet that again is also debatable whether the Plaintiff was a taxable person. I would vacate the award on VAT as the Master erred.”

19. Similarly, in the case of *Shreeji Enterprises Limited v John Munga Chai* [2022] eKLR Githinji J held that:

“Having stated the above and noting a proper reading of Section 6 (1) of the VAT Act, I am persuaded that a Party and Party Bill of Costs does not attract an aspect of taxable supply as an Advocate Client Bill of Costs would. The Court of Appeal in *Joreth Limited v Kigano & Associates*, Civil Appeal No. 66 of 1999 [2002] E.A, 92 [2002] eKLR held that unless the taxing officer has misdirected himself on a matter of principle, a Judge sitting on a reference against the assessment ought not to interfere with the findings. I agree with the Applicant and particularly the authority cited where J.L Onguto stated a taxing Master can only award VAT if the Bill is an Advocate- Client.”

20. It is trite that the Court will only interfere with the decision of the Taxing Master where there is a clear error of principle or the sum awarded are manifestly high or low so as to lead to an injustice as was held in the case of *Republic vs. Ministry of Agriculture & 20 Others, Ex Parte Muchiri w' Njuguna* [2006] eKLR.

21. From the authorities above on VAT, it is now settled that it is not payable on Party and Party Bill of Costs as no services can be said to have been rendered as between the parties

22. I have considered the application, the submissions by counsel and come to the conclusion that the application 17<sup>th</sup> December 2021 has merit and is therefore allowed. The Bill of Costs is hereby remitted to the Taxing Master for fresh taxation. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 2ND DAY OF MAY, 2023.**

**M.A. ODENY**

**JUDGE**

