Ms Advocates LLP (Formerly Triple A Law LLP/ Triple A Advocates) v China Wu Yi (Kenya) Company Limited (Environment and Land Miscellaneous Application E070 of 2020) [2023] KEELC 18075 (KLR) (6 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18075 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E070 OF 2020

JA MOGENI, J

JUNE 6, 2023

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

BETWEEN

MS ADVOCATES LLP .... ADVOCATE

FORMERLY TRIPLE A LAW LLP/ TRIPLE A ADVOCATES

AND

CHINA WU YI (KENYA) COMPANY LIMITED .... CLIENT

RULING

1. Before me for determination is a chamber summons application dated October 20, 2022 filed by MS Law Advocates LLP on behalf of the advocate/applicant, brought under rule 11 and schedule 5 of the *Advocates Remuneration Order*, the *Advocates Act* cap 16, section 3A of the *Civil Procedure Act*, cap 21 and all other enabling provisions of the law. The advocate/applicant is seeking the following orders:

    1. This honourable court be pleased to set aside the ruling and purported taxation of the respondent's party and party bill of costs dated November 2, 2021, which was delivered by the Deputy Registrar, Hon I. N Barasa on September 22, 2022 and the resultant premature certificate of costs dated the October 12, 2022.

    2. The said party and party bill of costs filed over and above the advocates advocate client bill of costs dated the November 2, 2021 be dismissed and or struck out ex-debitio justitiae.

3. The costs of and further incidentals to this application be provided for.

2. The application is premised on the grounds stated in paragraphs (a) to (i) on the face of the application and the annexed affidavit sworn on October 20, 2022 by Neddie Eve Akello; counsel from the firm representing the advocate/applicant.

3. The application is opposed. The client/respondent responded to the chamber summons application through the replying affidavit by Emmanuel Eredi, counsel on record for the client/respondent herein, sworn on March 10, 2023.

4. By consent of the parties, it was agreed that the chamber summons application be dispensed with by way of written submissions. The client/respondent filed its written submissions on March 14, 2023 while there was no submissions on record by the advocate/applicant.

5. First and foremost, counsel for the client/respondent in his replying affidavit contended that the reference has been lodged out of time, without first seeking leave of court and as such the same is bad in law and must be dismissed with costs.

6. Before filing the reference, the advocate/applicant gave notice of objection to the taxing officer's decision on October 7, 2022 objecting to the ruling given on September 22, 2022 and alerting the taxing officer of his intention to file a reference. This was eleven (11) days after the taxing officer delivered her ruling. The advocate/applicant thereafter filed a reference on October 24, 2022. This was 22 days after the taxing officer delivered her ruling and ten (10) days after filing the notice of objection.

7. 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."

8. 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.

9. The advocate/applicant did not explain the notice of objection. She only deponed that she read and comprehended the ruling delivered on September 22, 2022 by the Deputy Registrar and being aggrieved by the same ruling, she filed the reference before this court. She then went on to explain how the taxing officer erred in fact and in law in various ways.

10. 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

imprudent 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 therefor. 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.

11. In *Muriu Mungai & Co Advocates v 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”.

12. Mwilu, J’s view is supported by Mohammed Ibrahim, J, (as he then was) in *Paul Gicheru T/A Gicheru & Co Advocates v 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:
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> 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
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> 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".

13. The Court of Appeal, however, took a different view in *Kipkorir, Titoo & Kiara Advocates v 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".

14. In *Nyamogo & Nyamogo v 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".

15. In *Ahmednasir Abdikadir & Co Advocates v 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".

16. 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.

17. 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 v 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 same would render the reference incompetent.

18. In the present case, the ruling on taxation was made on September 22, 2022. If the advocate/applicant considered the said decision to contain the reasons, she could have filed the reference within 14 days from the date thereof. If, on the other hand, she was of the view that there were no reasons contained in the decision, she could request for the same in writing, in which case, she would be bound to wait for the same. If, however, at a later stage she 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 she 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.

19. It is clear that the advocate/applicant was of the view that there were no reasons contained in the ruling of the taxing master delivered on September 22, 2022 and so she requested for the same in writing on October 7, 2022, in which case, she was bound to wait for the taxing master's decision before she could file a reference, as per the law.

20. In light of the foregoing, I find that as the advocate/applicant filed the notice of objection on October 7, 2022 and later a reference 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 October 20, 2022 but make no order as to costs since the problem has been partly caused by inaction on the part of the court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF JUNE 2023.

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MOGENI J

JUDGE

In the virtual presence of:-

Ms Akello for Applicant

Mr Mbae holding brief for Mr Eredi for Client/Respondent

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

RULING IN ELC MISC E070 OF 2020	0