



Morara Omoke t/a Morara Omoke Advocates v Edmond Louis Chesneau & Luxury Leather Kenya Limited; Shelmatin Limited (Objector) (Miscellaneous Application E813 of 2023) [2025] KEHC 72 (KLR) (Commercial and Tax) (9 January 2025) (Ruling)

Neutral citation: [2025] KEHC 72 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E813 OF 2023**

**A MABEYA, J
JANUARY 9, 2025**

BETWEEN

MORARA OMOKE T/A MORARA OMOKE ADVOCATES ADVOCATE

AND

EDMOND LOUIS CHESNEAU & LUXURY LEATHER KENYA LIMITED CLIENT

AND

SHELMATIN LIMITED OBJECTOR

RULING

1. On 19/4/2024, the Deputy Registrar taxed and certified the Advocate’s Bill of Costs at Kshs. 1,601,500/-. The Advocate then commenced execution on the decree issued on the certified costs by instructing auctioneers to proclaim the Clients’ goods whereby proclamation was done on 17/5/2024.
2. In an application dated 21/5/2024, the Objector urged the court to stay the execution as the proclamation was done on its goods and properties and not those of the Clients who are the judgment debtors. The Clients also filed two applications dated 24/5/2024 and 30/5/2024, respectively seeking, inter alia, to stay the ruling of the Deputy Registrar and that they be granted leave to file an appeal out of time against that ruling and that the draft appeal be deemed filed and served upon payment of the requisite filing fees.
3. In response to those applications, the Advocate filed, inter alia, Notices of Preliminary Objection dated 29/5/2024 (“the Objections”). He contended that the Clients’ applications were misconceived and totally devoid of merit for the reason that, seeking leave to file an appeal offends Paragraph 11 of the



Advocates Remuneration Order, 2014 (“the ARO”) since an appeal is not a remedy available for a party dissatisfied by a Taxing master’s decision, but a Reference.

4. That the Clients had failed to give 14 days’ statutory Notice to the Deputy Registrar on the items of taxation to which they objected, they did not seek enlargement of time to file a reference out of time through a Chamber Summons, that they had alluded to have attached a draft Appeal, however, no such appeal had been attached to enable the court assess its chances of success.
5. That the Supporting Affidavit was fatally defective and that the Clients had no legal standing to seek stay of execution in respect of goods whose ownership/control they attributed to the Objector. That such a remedy fell within the province of objection proceedings which ought to be commenced by the Objector and thus, the Clients’ applications were frivolous, vexatious and abuse of the court process calculated to circumvent well laid taxation reference procedures and to delay the execution process. For these reasons, the Advocate urges that the Clients’ applications be struck out with costs.
6. The Advocate also objected to the Objector’s application by stating that the objector had not sworn an affidavit in support of its application as stipulated under Order 22 Rule 51 (2) of the Civil Procedure Rules, thus rendering it incurably defective. That the Person who swore the Supporting Affidavit of 21/5/2024, was Shem Mwemia, with no authority to swear any affidavit on behalf of the Objector. That he stated that was the Objector while the Objector was shown to be SHELMATIN LTD.
7. That Mwenia claimed ownership of the proclaimed goods yet he was not the Objector and that neither the Objector nor the said deponent had attached any proof of legal or equitable interest in the whole of or part of any of the attached goods which contravened Order 22, rule 51(1) of the Civil Procedure Rules. The Advocate further claimed that there was no company by the name of SHELMATIN LTD.
8. The court directed that the Objections be canvassed by way of written submissions which are on record and which I have considered.
9. I am in agreement with the Clients’ submission that a preliminary objection must be on a point of law in terms of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696 wherein it was held that: -

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.

10. Therefore, for one to succeed in a Preliminary Objection, the facts pleaded by the other party are assumed to be correct. It must be a matter of law which is capable of disposing off the matter, it must not be blurred by factual details calling for evidence and it must not call upon the Court to exercise discretion
11. From the Advocate’s submissions, he urges the court to determine the following issues; whether the Clients’ application dated 24/5/2024 offends Rule 11 of the ARO, whether the supporting affidavit in support of the Clients’ application dated 24/5/2024 is defective, whether the Clients’ have locus standi to apply for stay of execution orders, whether the applications are defective and whether the objector had disclosed any legal or equitable interest in the proclaimed goods.



12. Paragraph 11 of the ARO provides 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.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

13. From the foregoing, it is clear that an appeal in respect of a decision of a taxing officer only lies to the Court of Appeal after leave has been sought before this court. The first step in challenging the decision of a taxing master is to lodge a reference to this Court by way of a Summons. In *Machira & Co. Advocates v Arthur K. Magugu & another* [2012] KECA 245 (KLR), the Court of Appeal held: -

“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’ bills of costs through references under Rule 11 to a judge in Chambers.”

14. In the present case, the application by the client is not brought under the Order but is grounded under the *Civil Procedure Act* and the Civil Procedure Rules. As stated in *Machira & Co. Advocates v Arthur K. Magugu* (supra), there is no place for invocation of the said statutes in matters of taxation. Further, I agree with the Advocate that the Clients have not given the 14 days’ statutory Notice to the Taxing officer of the items of taxation to which they intend to object to and the same has not been attached to their application.



15. In *Machira & Co. Advocates vs Arthur K. Magugu* (supra), it was held that failure to specify the items being objected in terms of Paragraph 11(1) of ARO was fatally defective and that any subsequent reference based on the same was incompetent and deserved to be struck out. As the Clients have failed to adhere to the provisions of Paragraph 11, their application dated 24/5/2024 is for striking out.
16. As for the Objector's application, the Advocate had contended that the same was defective for not being accompanied by a supporting affidavit. However, this was not correct as he admitted that the same was supported by the affidavit of one Shem Mwemia.
17. What the Advocate appeared to contest was the deponent's capacity to swear the said affidavit. On this, I agree with the Clients that such a determination is one of evidence and not a pure point of law as the court will have to interrogate the Objector and the said deponent who will have to adduce evidence to support their position that the deponent has capacity to swear an affidavit on behalf of the Objector.
18. The same can be said of the objection that the Objector had not attached any proof of legal or equitable interest in the whole of or part of any of the attached goods and that the Objector is not a company. These are issues of proof that require evidence and cannot be determined summarily as points of law. Therefore, the Advocate's Objection in respect of the Objector's application is not merited and the same ought to fail.
19. Accordingly, the Advocate's Objection in respect of the Clients' application dated 24/5/2024 has merit and is hereby sustained but is dismissed in respect of the objector's application dated 21/5/2024. I award costs to the Advocate on the Objection against the Clients only.

It is so ordered.

SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE

