



REPUBLIC OF KENYA



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Devyani Food Industries Kenya Limited v Khalwale & Company Advocates (Miscellaneous Civil Application E206 of 2021) [2025] KEHC 1576 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E206 OF 2021
HI ONG'UDI, J
FEBRUARY 20, 2025**

BETWEEN

DEVYANI FOOD INDUSTRIES KENYA LIMITED APPLICANT

AND

KHALWALE & COMPANY ADVOCATES RESPONDENT

RULING

1. This ruling is in respect of Chamber Summons dated 17th October 2023 seeking the following orders;
 - i. That the honourable Court be pleased to vacate and set aside in its entirety the Ruling of the Honourable Nancy Makau, Deputy Registrar, dated and delivered on the 6th October 2023 allowing the Advocate-Client Bill of Costs dated 24th August 2021.
 - ii. That the honourable court do find that the Taxing Master, erred in law in taxing and allowing the bill of costs dated 24th August 2021 and in failing to consider the Applicant /Client's Submissions, Replying Affidavit and Grounds of Opposition.
 - iii. That the honourable Court be pleased to dismiss the Advocate-Client Bill of Costs dated 24th August 2021.
 - iv. That in the alternative, the honourable court be pleased to refer the Advocate-Client Bill of Costs dated 24th August 2021 for a fresh taxation by a Taxing Master.
2. The application is premised on the grounds on it's face as well as the affidavit sworn by Paul Maina the legal officer of the applicant on even date. He deponed that the taxing master erred in principle while taxing the bill of costs dated 24th August 2021. That she disregarded the evidence raised in the applicant's submissions, replying affidavit and grounds of opposition all dated 11th July 2023.



3. He further deponed that the taxing master injudiciously applied her discretion by proceeding to tax Items 1-23 of the bill of costs when the respondent did not hold a valid practicing certificate. Further, that the taxing master erred in principle in awarding VAT to the respondent without a substantive claim being itemised in the bill of costs. He added that it was in the interests of justice that the ruling delivered on 6th October 2023 be set aside and the advocate-client bill of costs dated 6th October 2022 be dismissed. He urged the court in the alternative to have the bill of costs referred back to a taxing master for reconsideration and taxation.
4. In response the respondent filed a replying affidavit dated 30th August, 2024 sworn by Wilberforce L. Khalwale an advocate of the High court. He opposed the application and averred that on or about 24th August 2021, he filed an advocate /client bill of costs which was taxed and assessed by the taxing master at Kshs 643,133/=. That on 5th July 2022 the respondent filed a reference similar to this one in which in prayer 3 thereof the client sought to set aside the ruling of Hon. Margaret Kyalo, the deputy registrar on similar grounds. Pursuant to the said ruling by the learned Judge, the advocate /client bill of costs dated 24th August 2021 was taxed afresh and assessed in the sum of Kshs 384,211/=.
5. He further deponed that the application was fatally defective for failure to comply with the mandatory provisions of Rule 11 of the *Advocates Remuneration Order* which requires an aggrieved litigant to issue a Notice to the Taxing officer on the items he wishes to challenge within 14 days of the ruling. In addition, that the application by the respondent offends the principle of *res judicata* and was meant to deny him fees for the professional services rendered to the respondent.
6. The matter was canvassed by written submissions.

Applicant's submissions

7. These were filed by Eliud Maina Karanja Advocates on 29th October, 2024, whereby counsel gave brief facts of the case and identified three issues for determination.
8. The first issue is whether the application is *res judicata*, on which counsel submitted that the current reference pertained to the ruling dated 6th October 2023 and not the ruling dated 22nd March 2022. Thus, the issue of *res judicata* did not arise since the issues raised in the application are neither directly nor substantially the same as those in the application dated 5th July 2022.
9. He cited section 7 of the *Civil Procedure Act* and the decision in *E.T v Attorney General & another* [2012] eKLR where the court held that for *res judicata* to apply there must be a clear, conclusive judgment in the prior case. Since there was no such judgment, the plea of *res judicata* must fail.
10. The second issue is whether the application is defective, and counsel submitted that the word "may" in the provisions of Rule 11 (1) of the *Advocates Remuneration Order* implied the existence of discretion and denoted a permissive rather than mandatory obligation. Further, that in the ruling dated 6th October 2023, the taxing officer provided reasons for taxing the bill despite their grounds of opposition and the evidence on record. Thus, the only recourse available was the instant reference application.
11. Lastly, on the third issue on whether the decision of the taxing officer in respect of items 1-23 should be set aside, he submitted in the affirmative and cited sections 9, 31(2)(b) and 34(2) of the *Advocates Act* and several decisions among them *First American Bank Kenya v Shah and others* 2002 1 EA 64 where Ringera J. (as he then was) stated as follows;

“First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of



principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle”.

Respondent’s submissions

12. These were filed by Khalwale & company advocates on 30th August 2024, where counsel gave a brief background of the application and identified three issues for determination.
13. Regarding the bill being *res judicata*, counsel submitted that the two prayers under paragraphs 3 and 4 in the application are similar to the prayers sought in the application dated 5th July 2022. Further, that the said application was heard and this court ordered that the bill of costs be taxed afresh. He placed reliance on section 7 of the [Civil Procedure Act](#) and the decision in [Henderson v Henderson](#) 1843-60 All ER 378 observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case. and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case.”
14. On the bill being defective for want of form, counsel submitted that no notice by the client was issued to the taxing officer on the taxed bill. Further, that the notice to the taxing officer was mandatory prior to filing a reference application. Thus, the application was filed without a notice contrary to the provisions of the Rule 11(1) of the [Advocates Remuneration Order](#).
15. Lastly, on the practising certificate issue, he submitted that it was clear from the bundle of exhibits filed by both parties that at the time of instruction and throughout the proceedings, the advocate held a valid practicing certificate. It is also not in dispute that the advocate acted and represented the client.
16. In conclusion, counsel submitted that the application before the court was without basis or merit. Further, that the issues in the application were directly and substantially similar to the issues raised and decided on in a previous application, and it thus amounted to an abuse of the court process.

Analysis and determination

17. I have considered the application, the affidavits, the submissions plus the authorities cited by the parties. In my opinion, the only issue for determination is whether the applicant is entitled to the orders sought.
18. Before delving into the merits of the application, this court shall address the issue of *res judicata* raised by the respondent in its replying affidavit and submissions. It was argued that on 5th July 2022 the applicant filed a reference similar to this one in which it sought to set aside the ruling of Hon. Margaret Kyalo, the deputy registrar on similar grounds and the court ordered the bill of costs to be taxed afresh.
19. On its part, the applicant argued that the issue of *res-judicata* did not arise since the issues raised in the current application are neither directly nor substantially the same as those in the application dated 5th July 2022. Further, that the current reference pertained to the ruling dated 6th October 2023 and not the ruling dated 22nd March 2022.
20. Having perused the court records, I note that in the ruling dated 15th June 2023 by Justice Chemitei, the ruling of the deputy registrar was set aside and the bill of costs dated 24th August, 2021 was to be heard afresh. The reason behind the court’s finding is that the deputy registrar relied on false affidavits



- of service in arriving at her decision. Also, that the process server was unlicensed and therefore the purported service by him upon the applicant was illegal and improper.
21. In view of the above finding by the court, it is clear that the applicant in its application dated 5th July, 2022 challenged service of the bill of costs and taxation done by a different taxing master. Furthermore, it was not accorded an opportunity to defend the said bill of costs. In the current reference the applicant is challenging the bill of costs on the grounds that the taxing master disregarded the evidence raised its submissions, replying affidavit and grounds of opposition. The taxing master in this instance was deputy registrar Nancy Makau and not deputy registrar Margaret Kyalo who did the first taxation. From the foregoing it is my view that the reference filed herein is not *res judicata*.
 22. On the issue of the application having been filed outside the 14 days period provided for under Order 11 of the [Advocates Remuneration Order](#), and the applicant failing to issue notice to the taxing master before filing its reference, I refer to the law provided.
 23. Paragraph 11 of the [Advocates \(Remuneration\) Order](#) 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. (Emphasis mine)
 24. My understanding of the above provision of the law is that the obligation upon a party who is dissatisfied with a decision is to file the objection within fourteen (14) days of taxation seeking reasons for his/her decision on cited items. It is upon receipt of the reasons given that a party elects whether or not to file a Reference. Further, the wording on filing of a notice is not in mandatory terms as the word used there is “may”.
 25. In [Abmed Nasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd](#) [2006] eKLR the court 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 sub rule (2) of rule 11 of the [Advocates Remuneration Order](#) demands so. The said rule was not indeed to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling...” (Emphasis mine)
 26. Moving to the merits of the application which seeks to have the ruling of the deputy registrar Nancy Makau dated the 6th October 2023 vacated and set aside, it is the applicant’s case that the deputy registrar injudiciously applied her discretion by proceeding to tax items 1-23 of the bill of costs when the respondent did not hold a valid practicing certificate. Further, that the taxing master erred in principle in awarding VAT to the respondent without a substantive claim being itemised in the bill of costs.



27. On its part the respondent argued that the application was fatally defective for failure to comply with the mandatory provisions of Rule 11 of the Advocates Remuneration Order which requires an aggrieved litigant to issue a notice to the taxing officer on the items he wished to challenge within 14 days of the ruling.
28. It is trite law that this court cannot interfere with the decision of the deputy registrar unless it was based on wrong principles or that the fees was manifestly excessive or low or the deputy registrar failed to take into consideration relevant factors. This was the decision in the case of *First American Bank Ltd v Shab & another* (*supra*) also relied on by the applicants, where the court held that;
- “This court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors...”
29. I have closely examined the ruling of the deputy registrar Nancy Makau delivered on 6th October 2023. I find that the grounds raised by the applicant on the errors made by the taxing officer are not substantive to warrant the interference by this court. This is because the taxing officer noted that a practicing certificate was issued though late. She acknowledged the delay that advocates face in receiving the same despite having paid for it. No evidence was adduced by the applicant to the contrary and the documents attached in its supporting affidavit are not sufficient.
30. Further, she went ahead to analyse each and every item in the bill of costs and taxed them in accordance with the law. The applicant did not cite any specific item that the taxing master taxed contrary to what is provided for in the Advocates Remuneration Order. In addition, its argument that the taxing master disregarded the evidence in its submissions, replying affidavit and grounds of opposition is neither here nor there. I also note that there is no award of VAT in ruling dated 6th October, 2023 by the taxing master.
31. For reasons stated above, this court is not satisfied that the applicant was able to demonstrate that the taxing master used different principles in assessing the fees on the claim I am therefore not persuaded that this is a case where I should interfere with the discretion of the taxing officer as she did not err in principle and the items in the bill of costs dated 24th August, 2021 were properly computed as provided for in the Advocates (Remuneration) Order.
32. Consequently, the Chamber Summons dated 17th October, 2023 lacks merit and is dismissed with costs.
33. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 20TH DAY OF FEBRUARY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

