



**Mbugua t/a Munleo Hardware & Metal Fabricators v Justline Investments Limited;
Amoco Construction Group Limited (Third party) (Civil Case 36 of 2012)
[2024] KEHC 750 (KLR) (Commercial and Tax) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 36 OF 2012
MN MWANGI, J
JANUARY 19, 2024**

BETWEEN

**LEONARD MUNYUA MBUGUA T/A MUNLEO HARDWARE & METAL
FABRICATORS PLAINTIFF**

AND

JUSTLINE INVESTMENTS LIMITED DEFENDANT

AND

AMOCO CONSTRUCTION GROUP LIMITED THIRD PARTY

RULING

1. Through a Chamber Summons dated 30th November, 2021 brought under Rule 1 of the [Advocates Remuneration Order](#), the plaintiff seeks the following orders-
 1. That the Honourable Court be pleased to enlarge time for the plaintiff to object to the taxation by the Taxing Officer;
 2. That the ruling on the taxation dated 12th November, 2021 with regard to the Third Party's Bill of Costs dated 12th April, 2019 be set aside and the Court to interpret the judgment of the Honourable Court delivered by Lady Justice Olga Sewe on 4th May, 2018 on whether the two suits were consolidated or were to be heard together;
 3. That the ruling on the taxation dated 12th November, 2021 with regard to the Third Party's Bill of Costs dated 12th April, 2019 be set aside and the Honourable Court interpret (sic) Honourable Lady Justice Olga Sewe's judgment on whether or not costs of the suit were awarded to the Third Party.



4. That the ruling on the taxation dated 12th November, 2021 with regard to the Third Party's Bill of Costs dated 12th April, 2019 be set aside and the bill be remitted for re- taxation before a different Taxing Master.
5. That the costs of this application be provided for.
2. The application is supported by the grounds set out the face of it and the supporting affidavit sworn on 30th November, 2021, by Leonard Munyua Mbugua.
3. In summary, the grounds on which the application is anchored are that the Taxing Officer delivered a ruling on 12th November, 2021 in which she assessed the Third Party's bill of costs dated 12th April, 2019 at Kshs. 600,935.00, but the plaintiff learnt of the ruling on 24th November, 2021, when it was sent by the Hon. Deputy Registrar to his Advocates by way of email.
4. The plaintiff contends that the Third Party's bill of costs dated 12th April. 2019, pursuant to the judgment delivered on 4th May, 2018 by Lady Justice Olga Sewe, is null and void, as the Court did not award the Third Party any costs and that the Third Party's bill of costs was filed with respect to CMCC 2233 of 2012, yet the said suit had been consolidated with HCCC 36 of 2012. The plaintiff also contended that there was no basis for the filing of the bill of costs as judgment was entered for the plaintiff against the defendant for Kshs 27,549,520.00 with interest at 25% per annum from 6th January, 2012 and the Third Party's counterclaim was dismissed with costs.
5. For the said reasons, the plaintiff argued that the Taxing Master erred in entertaining the impugned bill of costs and taxing the same and in failing to distinguish the word "consolidation" by the two matters being heard together, yet there can be no duplicity of costs after consolidation of suits.
6. In opposing the reference, the Third Party put in grounds of opposition dated 28th March, 2023. Condensed and re-phrased, the grounds are that-
 - a. The plaintiff failed to give notice to the Taxing Officer of the items of taxation to which the plaintiff objects, in violation of Rule 11 of the *Advocates Remuneration Order*;
 - b. The plaintiff has not demonstrated that the Taxing Officer's decision was based on an error of principle;
 - c. The judgment dated 4th May, 2018 also determined the Third Party's counterclaim in CMCC 2233 of 2012;
 - d. Although the Court entered judgment for the plaintiff against the defendant as set out in HCCC 36 of 2012, it also dismissed the plaintiff's claims in CMCC 2233 of 2012, including the claim for a mandatory injunction against the Third Party with costs; and
 - e. The plaintiff did not oppose any items of the Third Party's bill of costs dated 12th April, 2019.
7. The application was canvassed by way of written submissions. The plaintiff filed written submissions dated 13th June, 2023. The Third Party filed written submissions dated 28th March, 2023.

Analysis And Determination.

8. I have considered the application, the supporting affidavit, the grounds of opposition, as well as the submissions and authorities filed by the parties' respective Counsel. The issues for determination are;-
 1. Whether the applicant has met the threshold for enlargement of time to file a Notice objecting to the taxation by the Taxing Officer; and



2. Whether the Taxing Officer erred in principle by assessing costs for the Third Party in CMCC No. 2233 of 2012 which was consolidated with HCCC No. 36 of 2012.
9. On the first issue, Rule 11 of the *Advocates Remuneration Order* stipulates 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.”
10. In my understanding of the above provisions, the party who wishes to object to a taxation decision is required to give a written Notice of Objection clearly outlining the items of taxation objected to within 14 days after the issuance of decision on taxation. Thereafter, the Taxing Officer is required to send to the Objector the reasons for the decision on the specified items. Once the Objector has received the reasons, he must file a Reference to the judge within 14 days.
11. Often times, Taxing Officers give their reasons for their decisions at the time of taxation. This however, does not preclude an Objector from seeking reasons, if he wishes to do so.

The foregoing notwithstanding, Courts have also found that where the reasons are furnished, it would be futile to expect the Taxing Officer to give further reasons and the issue of insufficiency of the reasons can be brought in the Reference. In *Peter Julius Njoroge v Fidelity Commercial Bank Limited & another* [2018] eKLR, Tuiyott J., as he then was, made the following observation-

- “13. Subparagraph (2) presupposes that a Taxing Officer may, in extempore fashion, render his/her decision on items of a Bill and so a party is entitled to bespeak the reasons for the Decision on the items sought to be objected to. But often, Taxing officers give reasons for their Decisions at the point of Taxing. This, I have said before, is a practice to be encouraged. Yet even in such cases, there may still be need for an objecting party to seek reasons under subparagraph (2) in the event that the Decision rendered by the Taxing Officer does contain all the reasons.
14. In the matter before Court the Taxing Officer struck out the entire Bill for reasons given in her Decision of 29th March 2017. The Applicant/Objector filed this Reference without first seeking reasons as contemplated by subparagraph (2). What must be decided is whether this was a fatal oversight.



15. The Chamber Summons is explicit that the objection taken up is in respect to the striking out decision that dismissed the Applicants Bill of Costs. The Taxing officer gave the reason for the Decision as being that the Bill should not have been filed in the main suit and that “the Applicant is to file the bill in the correct way and serve the parties”. The reason for the Decision is known to both Parties and the Respondent has not told Court what prejudice or disadvantage it has suffered because of the misstep by the Applicant. This is an instance that the Court is willing to overlook a mechanical and strict adherence to the procedure.”
12. The same position was also taken in the case of *Abmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2)* (2006) 1 EA 5, cited with approval in *Odera Obar & Co. Advocates v Aquva Agencies Limited* [2021] eKLR, as follows-
- “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 intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”
13. In the instant Reference, the taxation ruling is dated 12th November, 2021. The plaintiff was required to file a Notice of Objection by 26th November, 2021. The plaintiff claims that he only learned of the ruling on 24th November, 2021 when the said ruling was sent by the Deputy Registrar to his Advocates by way of email. The plaintiff argued that a day was insufficient time for him to meet the deadline to file the Notice as he had to go through the ruling. The plaintiff relied on Rule 11(4) of the *Advocates Remuneration Order*. He also relied on the decision in *Gicharu Kimani & Associates Advocates v Samuel Kazungu Kambi* (Malindi High Court Misc Civil Application No. 2 of 2019 [2020] eKLR, where the Court exercised discretion in favour of the applicant as the proceedings before the Taxing Officer were flawed and the ruling was read in the absence of the parties.
14. The Third Party submitted that the Reference is incompetent for failure by the plaintiff to give notice to the Taxing Officer within 14 days of the ruling on taxation. It relied on *Karume Investments Limited v Kenya Shell Limited & another* [2015] eKLR, where the Court found that the applicant had not given the Notice of Objection, and that instead of seeking a waiver of Notice which is not provided for under the Advocates Remuneration Order, the applicant ought to have sought leave for extension of time. In my view, this instant matter is distinguishable from the foregoing case, in that the plaintiff has sought enlargement of time for him to object to the taxation by the Taxing Officer.
15. I have looked at the ruling on taxation dated 12th November, 2021 and noted that it includes the reasons for the decision on the taxation that was done. In this instance therefore, there is sufficient cause for this Court to overlook the strict procedure under Rule 11(2) of the *Advocates Remuneration Order*. In my considered view, there is no prejudice suffered or to be suffered by the Third Party due to the plaintiff’s failure to file the Notice of Objection as both parties already knew of the reasons for the Taxing Officer’s decision.
16. The plaintiff herein filed the present Reference on 30th November, 2021. If the plaintiff had sought reasons for taxation and the reasons had been given promptly, the Reference should have been filed by 10th December 2021. The filing of the Reference on 30th November, 2021 is therefore within the timeline given to applicants to file References after receipt of the reasons for taxation from Taxing Officers. It is my finding that there was no delay in the filing of the Reference.



17. In regard to the second issue of whether the Taxing Officer erred in principle by assessing costs for the Third Party in CMCC No. 2233 of 2012 which was consolidated with HCCC 36 of 2012, the plaintiff relied on *Kawimi Kang'ethe & Co. Advocates v Muturi Investment Limited* HC Misc Cause No. 180 of 2013 [2015] eKLR to the effect that where suits are consolidated, there should be an apportionment of costs as the parties' Advocates cannot expect to be paid twice over the same work. The plaintiff contended that the Third Party's bill of costs was null and void since it is in respect of a partial decree, which was filed without leave of the Court as required under Section 94 of the *Civil Procedure Act*. To support this proposition, the plaintiff relied on the decision in *Transmara Sugar Company v Charles O. Mbaka* Migori High Court Civil Appeal No. 123 of 2019) [2021] eKLR.
18. Counsel for the Third Party also relied on the decision in *Lubulellah & Associates Advocates v Baranyi Brokers Limited & 2 others* [2014] eKLR, and urged that there is no error in principle in the Taxing Officer's decision to warrant this Court's interference. The Third Party submitted that the Taxing Officer was correct to conclude that the Third Party was awarded costs in CMCC No. 2233 of 2012, in regard to respect to the aspects of the plaintiff's claims that were dismissed.
19. On the said issue, I agree with the plaintiff's submission that where suits are consolidated there should be an apportionment of costs as the parties' Advocates cannot expect to be paid twice over the same work. The plaintiff has however not demonstrated in what way the Third Party is likely to be paid twice in the circumstances of this case. I say so because in the impugned ruling, the Taxing Officer noted the plaintiff's contention that the bill of costs should be dismissed as the Third Party was not awarded costs. The Taxing Officer however found that the Third Party was awarded costs.
20. The Taxing Officer also noted that the two suits were consolidated and that the Judge in her judgment dated 4th May, 2018, did bear in mind the list of agreed issues in CMCC No. 2233 of 2012 at paragraph 33 of the judgment. Having done so, Hon. Judge Sewe found that there was no basis to issue a mandatory injunction and dismissed other aspects of the plaintiff's claim with costs. The Judge then awarded the Third Party costs in CMCC No. 2233 of 2012.
21. The following excerpt from paragraph 47 of the judgment dated 4th May, 2018, by Hon. Judge Sewe, is pertinent given the circumstances of the instant Reference-

“...thus in the result, judgment is hereby entered for the Plaintiff against the Defendant for the sum of Kshs. 27,549,520/-, together with interest thereon at 25% per annum from 6th January 2012 until payment in full. The other aspects of this claim are hereby dismissed with costs. Similarly, the third party's counterclaim against the Plaintiff is hereby dismissed with costs.”
22. Applying my mind to both the judgment of 4th May, 2018 by Hon. Judge Sewe and the decision on taxation by the Taxing Officer, I find that the ruling by the Taxing Officer was well reasoned and left no room for ambiguity. I therefore hold that the said Taxing Officer was correct in taxing the bill of costs as drawn at Kshs. 600,935.00.
23. Ordinarily, Courts do not interfere with decisions of Taxing Officers unless they erred in principle. The foregoing was articulated in the Court of Appeal decision in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, as follows-

“On reference to a judge from the 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.”



24. Consequently, guided by the above decision and the facts surrounding this Reference, I find that the plaintiff has not demonstrated that the Taxing Officer erred in principle.
25. In regard to the validity of the bill of costs, I am not persuaded that it was null and void. Section 94 of the *Civil Procedure Act* which was cited before the plaintiff's Counsel concerns execution of a decree of the High Court before costs have been ascertained. What is before me is a Reference. It does not concern execution but addresses taxation of costs.
26. I find no merit in the Reference dated 30th November, 2021. It is hereby dismissed with costs to the Third Party.
27. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In The Presence Of:

No appearance for the plaintiff

No appearance for the defendant

Ms Sirawa holding brief for Mr. Ondieki for the Third Party

Ms B. Wokabi - Court Assistant.

