



Mwendwa Mwinzi & Associates, Advocates v Mumo & 2 others (Civil Miscellaneous Application E016 of 2022) [2024] KEHC 2753 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2753 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL MISCELLANEOUS APPLICATION E016 OF 2022**

RK LIMO, J

MARCH 14, 2024

IN THE MATTER OF THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER, 2014

AND

IN THE MATTER OF THE ADVOCATES-CLIENT BILL OF COSTS

BETWEEN

MWENDWA MWINZI & ASSOCIATES, ADVOCATES APPLICANT

AND

PHILIP MUTINDA MUMO PETITIONER

AND

COUNTY ASSEMBLY OF KITUI 1ST RESPONDENT

THE SPEAKER COUNTY ASSEMBLY OF KITUI 2ND RESPONDENT

RULING

1. This is a reference brought by way of Chamber Summons dated 31st August 2022 in respect to a ruling by taxing master dated 19.7.2022. The applicant Mwendwa Mwinzi & Associates Advocates have invoked the provisions of Article 159 of *the Constitution*, Sections 45(1) & 51(2) of the *Advocates Act*, Sections 3 & 3A of the *Civil Procedure Act*, Order 51 of the *Civil Procedure Rules* and paragraph 11 of the Advocates (Remuneration) Order, 2014.
2. The Applicant is seeking the following orders;
 - a. That the decision of the Taxing Officer/Deputy Registrar as evidenced by the Ruling delivered with respect to Items 1,2, and 3 be set aside and taxed a fresh by this Honourable Court.



- b. That in the alternative, this Honourable Court be pleased to order that the Applicant's Advocate-Client Bill of Costs dated 15th March 2022 with respect to items 1,2 and 3 be taxed afresh by a different Taxing Officer/Deputy Officer.
 - c. That this Honourable Court do grant any further orders it may deem fit to grant.
 - d. That costs if this application be provided for.
3. The application is supported by the Affidavit of Charity Kaluki Ngilu and is based on the following grounds;
- i. That the applicant firm of advocates represented the Respondent herein in Kitui High Court Constitutional Petition No. 15 of 2019 - Philip Mutinda Mumo vs County Assembly of Kitui and Another until the same was finalized.
 - ii. After the Constitutional Petition was terminated, the 1st and 2nd Respondents filed a Party and Party Bill of Costs and vide a Ruling dated 14th July, 2021, the Deputy Registrar assessed the Party and Party Bill of Costs based on instructions fee on Kshs 525,161/-
 - iii. The Applicant filed an Advocate-Client Bill of Costs dated 15th March 2022.
 - iv. The Advocate-Client Bill of Costs was on 19th July 2022 taxed by the court and allowed in the sum of Kshs 156,600/-
 - v. The Deputy Registrar in taxing the Applicant's Advocate -Client Bill of Cost fell in error when she relied on the sum of Kshs 525,161/- as the value of the subject matter rather than the instruction fees (item 1) thus arrived at an incorrect assessment of item 1 and subsequently, the total figure assessed.
 - vi. The Applicant has suffered prejudice as a result of the unfortunate and inadvertent error by the Deputy Registrar.
 - vii. The learned Deputy Registrar by failing to accord due regard to the determination of Party and Party Costs by the Previous Deputy Registrar erred in appearing to sit on appeal on the Party and Party Bill of Costs.
 - viii. Being so aggrieved, the Applicant wrote to the Deputy Registrar requesting for reasons for the assessment which reasons were supplied on 22nd August 2022, hence this reference.
 - ix. It is apparent that the Learned Deputy Registrar misapprehended the Principles in schedule 6 of the Advocates' (Remuneration) Order, 2014 and thus fell into error.
 - x. It is in the interest of justice that the orders sought be granted.
 - xi. This Honourable Court has powers to grant the orders sought.
4. This reference is supported by the affidavit of Teddy Mwalili Mbiti sworn on 31st August 2022 where the learned counsel has largely reiterated the above grounds.
5. The respondent for the record never filed any response to this reference but that notwithstanding, this court is inclined to determine the same based on the law applicable.
6. There are two issues emerging from this reference which are;
- a. Whether the reference was filed out of time



- b. Whether the taxing master erred in taxing the items complained of.
7. (a) Whether the Reference was filed within time
- The procedure to challenge taxation of a taxing master is provided under Paragraph 11 of the Advocates Remuneration Order which provides that;
- i. “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.
 - ii. 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.
 - iii. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - iv. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - v. 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”.
8. The Deputy Registrar rendered her ruling on the Bill of Costs 14.7.2022 on. A certificate of taxation was thereafter issued on 20th July 2022. The applicant sought reasons for the ruling vide a letter dated 28th July 2022 but delivered in court on 2nd August 2022 which was within the stipulated 14 days. The reasons were issued by the court vide a letter dated 17th August 2022 which the applicant avers was collected on 22nd August 2022. However, there is no proof of the same. This application was filed on 1st September 2022, 2 days after expiry of the stipulated 14 days in which a reference ought to have been filed. Paragraph 11 (4) of the Advocates Remuneration Order gives a party the opportunity to seek extension of time to file a reference out of time but this was not done. The applicant has not addressed the court at all on the issue of timelines given. The applicant was well aware of the strict timelines provided for in filing of a reference but collected the reasons from the taxing master two days after the lapse of the stipulated timelines. There is no indication that the reasons from the Deputy Registrar were not ready in good time and counsel has not provided reasons why he collected the reasons past the deadline. In any event, as observed above counsel also failed to take advantage of the leeway provided under Paragraph 11 (4) for seeking leave.
- The omission by the applicant to seek leave to lodge the reference out of time renders this Reference incompetent.
9. The finding of this court is guided by the decision of Charles Onyinge Abuso vs. Kenya Ports Authority & another where the Court of Appeal while handling a reference filed outside the prescribed time under Rule 55 of the Rules of that court made the following observations;



While handling a reference filed outside the prescribed time provided under Rule 55 of the Court of Appeal rules the appellate court held as follows on the effect of non-compliance in the case of *Charles Onyinge Abuso vs. Kenya Ports Authority & Another [2018]* Eklr;

“Rule 55 is clear and needs no amplification. Even if we were to deem the route followed to get the application before us proper, the application was filed outside the 7 days prescribed under Rule 55 of the Rules. This was not a simple infraction or oversight which can be overlooked. Nor was it a simple case of non-compliance with Rules of the procedure. It flouted substantive law because as stated, the application itself was filed outside the 7 days within which the letter seeking reference should be sent to the Registrar of the Court. The procedure was improper and even if the Court was to close its eyes and assume that the procedure could be countenanced, the court would still not have jurisdiction because the application was out of time and no extension of time was sought.

That being the case we are not persuaded that we should go into the substantive merits of the application itself. Our finding is that this application is irredeemably incompetent and the only option open to the court is to dismiss it. We order that it be and is hereby dismissed with costs to the 1st respondent”.

10. Similarly, in the case of *Mario Rossi v Salama Beach Hotel Limited [2018]* eKLR, the appellate court proceeded to strike out a reference that was filed out of time without leave and while doing so observed as follows;

“The issue before us relates to the competency as opposed to the merits of the reference by the respondent. The applicant believes that the reference was filed out of time. It is common ground that time lines fixed by Statute or subsidiary legislation made thereunder are of essence since they are designed to achieve an intended purpose and outcome, that is not only do they ensure procedural order and certainty within the judicial system, but also advance a just, uniform and efficient dispensation of justice. It is for that reason that courts advocate for strict compliance with such time line”.

11. In this instance the applicant lodged this application 16 days after the Deputy Registrar had given her reasons on taxation and no leave was brought to extend time. The omission is fatal because this reference in the absence of leave is incompetent for having been filed out of time. The same is hereby struck out but I shall make no order as to costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 14TH DAY OF MARCH, 2024

HON. JUSTICE R. K. LIMO

JUDGE

