



Midenga & Company Advocates v Mutua (Commercial Miscellaneous Application E436 of 2023) [2024] KEHC 8947 (KLR) (Commercial and Tax) (19 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E436 OF 2023**

MN MWANGI, J

JULY 19, 2024

BETWEEN

MIDENGA & COMPANY ADVOCATES ADVOCATE

AND

PAMELA NDUKU MUTUA CLIENT

RULING

1. The client/applicant filed a Chamber Summons application dated 8th December, 2023 pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Rule 11(2) of the *Advocates (Remuneration) Order* and all other enabling provisions of the law, seeking leave to file a Reference out of time to challenge the Taxing Officer's ruling dated 30th October, 2023. The application is supported by affidavits sworn by Pamela Nduku Mutua, the applicant herein on 8th December 2023 and 14th February 2024.
2. The applicant's case is that the Taxing Officer delivered a ruling on 30th October 2023 on the Advocate's bill of costs dated 22nd June, 2023, awarding the Advocate/respondent Kshs.2,408,632.50. Dissatisfied by the said decision, the applicant instructed her Advocates on record to object to the taxation on grounds of excessive fees. That despite efforts to obtain a copy of the said ruling, including payments and follow-ups on 10th & 21st November 2023, her Advocates only received the ruling on 8th December, 2023. She stated that on perusal of the said ruling, they noted that the Taxing Officer had erroneously awarded the Advocate Kshs.316,666.66 as Getting-Up fees, despite the fact that the primary case did not progress beyond dismissal of the client's application for interim orders.
3. The client averred that the main suit never reached pre-trial directions neither was a hearing date ever set, thus the Taxing Officer's ruling on taxation of the Advocate's bill of costs dated 22nd June, 2023 ought to be set aside in its entirety and the bill of costs remitted for fresh taxation before a different



- Taxing Officer. She asserted that the delay in filing the said Reference was not inordinate, and was attributed to difficulties in procuring the ruling of 30th October, 2023.
4. The application was opposed vide a replying affidavit sworn on 16th January, 2024 by Charles Midenga, an Advocate of the High Court of Kenya and learned Counsel for the respondent. The respondent also filed a Notice of Preliminary Objection dated 19th January, 2024, raising the following grounds of objection –
 - i. That the respondent has to date not filed a Notice of Objection as a prerequisite to filing the instant application, hence the application offends the mandatory provisions of Paragraph 11(1) of the Advocates Remuneration Order;
 - ii. That the respondent has to date not filed an application seeking to extend time for filing a Notice of Objection, hence the application offends the mandatory provisions of Paragraph 11(4) of the *Advocates Remuneration Order*;
 - iii. That in the absence of a Notice of Objection or an application seeking to extend time to file the Notice of Objection out of time, the Honourable court lacks jurisdiction to hear and determine the application;
 - iv. That as such, the application is ex-facie incompetent, fatally defective and inadmissible; and
 - v. That on the whole the Chamber Summons application dated 8th December, 2023 is a gross abuse of the court process.
 5. The respondent contended that following delivery of the ruling of 30th October, 2023, its Counsel and the applicant's Counsel engaged in multiple conversations from 10th November to 8th December, 2023, where it was clear that the applicant was willing to pay the taxed sum being Kshs.2,233,632.50, and parties even agreed that the respondent should provide its bank details for the applicant to effect payment. The respondent averred that by an email sent on 16th November, 2023, it provided the respondent's Advocates with its bank details, but the said email elicited no response. The respondent deposed that after following up with the applicant's Counsel, it was informed that the applicant had been informed on the need to make payment.
 6. It was stated by the respondent that the applicant has to date not filed a Notice of Objection or requested for reasons for the Taxing Officer's ruling, as the only letter on record from the applicant is dated 1st November, 2023 and it was requesting for a copy of the Taxing Officer's ruling. The respondent asserted that the client had not provided sufficient reasons for filing the Reference late. Further, that the ruling delivered on 30th October, 2023 was clear, it was delivered in the presence of all the parties, and was available in the Court file.
 7. The present application and the Notice of Preliminary Objection were canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Kisilu Wandati & Company Advocates on 16th February, 2024 and 9th April, 2024, whereas the respondent's submissions were filed on 19th February, 2024 by the law firm of Midenga & Company Advocates.
 8. Mr. Kisilu, learned Counsel for the applicant relied on the provisions of Paragraph 11 of the *Advocates Remuneration Order* and the case of the *County Executive of Kisumu v County Government of Kisumu and 8 others* [2017] eKLR and urged this Court to grant the orders sought in the application. He cited the case of *Ahmed Nassir v National Bank of Kenya Ltd* [2006] E.A, and submitted that the competence of a Reference is not pegged on the Notice of Objection. He submitted that the purpose of a Notice of Objection is not to initiate the Court's jurisdiction, but to obtain reasons for the taxation. As to whether the respondent's application seeking entry of judgment is merited, Counsel submitted



that no directions have been issued to date in regard to the said application, hence it is only fair and just for the instant application to be heard first.

9. Mr. Midenga, learned Counsel for the respondent relied on the case of *Multiline Motors (Kenya) Ltd v Migori County Government* [2021] eKLR and submitted that since there is no Notice of Objection on record, this Court has no jurisdiction to hear the client's application and the envisaged Reference. He also relied on the case of *David Anunda v John Karu (Sued in his Own Capacity and as the Chairman of Kileleshwa Githunguri Road Residents Association) & 2 others* [2021] eKLR and argued that in the absence of a Notice of Objection, the intended Reference would have no leg to stand on as there is no indication of the items objected to in the ruling, hence this Court would be proceeding on conjectures and surmises.
10. He cited the Court of Appeal case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and stated that the procedure for filing a Reference is well settled, but the applicant has not availed any cogent reason why she did not follow the said procedure.

Analysis And Determination.

11. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit and the Notice of Preliminary Objection by the Advocate as well as the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the Advocate's Notice of Preliminary Objection is merited; and
 - ii. Whether the client's application for extension of time is merited.

Whether the Advocate's Notice of Preliminary Objection is merited.

12. In *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 Law JA as he then 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. “

13. At page 701 paragraphs B-C Sir Charles Newbold, P., added the following-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

14. It is now well settled that a Preliminary Objection should raise a pure point of law. It should be argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The respondent contended that the applicant did not comply with the provisions of Rule 11(1) of the *Advocates Remuneration Order*, thus this Court has no jurisdiction to hear and determine the instant application.



The procedure for objecting to a Taxing Officer's decision is provided for under Rule 11(1) & (2) of the [Advocates Remuneration Order](#) which states that –

- “(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.”

15. It is not disputed that the Taxing Officer delivered a ruling on the respondent's bill of costs dated 2nd June, 2023 on 30th October, 2023 at Kshs.2,233,632.50. Thereafter, vide a letter dated 1st November, 2023, the applicant wrote to the Taxing Officer requesting for a copy of the ruling delivered on 30th October, 2023, which was within the fourteen (14) days provided for under Rule 11(1) of the Advocates Remuneration Order. The respondent contends that the applicant has never complied with the provisions of Rule 11(1) of the Advocates Remuneration Order which requires her to issue the Taxing Officer with a Notice of Objection, since the letter dated 1st November, 2023 only requested for a copy of the ruling, but did not state the items which the applicant was objecting to.
16. This Court has perused the applicant's letter dated 1st November, 2023 addressed to the Taxing Officer and I note that it is referenced 'request for Ruling'. The contents therein do not indicate, mention and/or refer to the client's intention to challenge the Taxing Officer's ruling of 30th October, 2023. In the case of [Matiri Mburu & Chepkemboi Advocates v Occidental Insurance Company Limited](#) [2017] eKLR, the Court in striking out a reference held that -

“the provisions of Paragraph 11 of the Remuneration Order serve several purposes. Firstly, the requirement that a party seeking reasons gives a notice of items objected to, serves to narrow down the issues, and secondly, give notice to the adverse party and the taxing master of his objection. Thus, the taxing master, adverse party and ultimately the reference court in their respective roles can focus on the specific matter objected to rather than entire bills of costs, which often run into several pages. The objective is obvious: the expeditious disposal of taxation disputes. Thus, compliances with the requirements of paragraph 11 of the Remuneration Order is not a mere technicality that can be pushed aside peremptorily as the Applicant appears to suggest.”

17. In this instance, and having considered its own circumstances, it is my finding that the applicant's letter dated 1st November, 2023 addressed to the Taxing Officer does not suffice as a Notice of Objection contemplated under Rule 11(1) of the [Advocates Remuneration Order](#), since it neither notifies the Court and the respondent of the applicant's intention to challenge the Taxing Officer's Ruling of 30th October, 2023, nor does it specify the item(s) objected to by the applicant. It is worthy of note that the applicant in her application is not seeking leave and/or extension of time to comply with the provisions of Rule 11(1) of the [Advocates Remuneration Order](#). In the premise, this Court finds that the applicant did not comply with the provisions of Rule 11(1) of the Advocates Remuneration Order
18. This Court's jurisdiction to deal with a Reference is invoked upon compliance with the provisions of Rule 11(1) of the Advocates (Remuneration) Order. Further, a Notice of Objection serves the same purpose as a Memorandum of Appeal, therefore, failure to file and serve a Notice of Objection is not a



technical issue that can be wished away by the provisions of Article 159(2)(d) of *Constitution* of Kenya, 2010 for the sake of substantive justice, instead, it is fatal since it goes to the roots of the High Court's jurisdiction to deal with a Reference. In the case of *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR, the Supreme Court of Kenya considered the importance of adherence to the laid down procedures in approaching a Court of law, and stated as hereunder -

“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of *Constitution*, which proclaims that, “...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”

19. This court finds that its jurisdiction to hear and determine this application was not properly invoked. Consequently, this Court has no jurisdiction to hear and determine the application herein.
20. In the circumstances, this court upholds the respondent's Notice of Preliminary Objection, and finds that the application dated 8th December, 2023 is fatally defective. It is hereby dismissed with costs to the Advocate/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 19TH DAY OF JULY 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Nyakoa h/b for Mr. Wandati for the client/applicant

Mr. Midenga for the Advocate/respondent

Ms B. Wokabi – Court Assistant.

