



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISCELLEANOUS CASE NO. 166 OF 2018**

**DENNIS K. MAGARE & BEN MUSUNDI T/A**

**MAGARE MUSUNDI & CO. ADVOCATES.....ADVOCATES/APPLICANT**

**-VERSUS-**

**PARMINDER SINGH MANKU.....1<sup>ST</sup> CLIENT**

**BALJINDER KAUR MANKU.....2<sup>ND</sup> CLIENT**

**RULING**

**INTRODUCTION**

1. The Applicant herein took out Chamber Summons Application dated 10<sup>th</sup> March 2020 and which is expressed to be brought pursuant to the **Advocates Remuneration order, Sections 45, 48 & 49 of the Advocates Act, Chapter 16 Laws of Kenya** and in respect of which Advocates/Applicants have sought for the following Reliefs;

- a. the Ruling and order of the taxing master dated the 13<sup>th</sup> February 2020, be set aside.*
- b. The Petitioners bill of costs dated the 27<sup>th</sup> September 2018, be taxed a fresh by this Honourable court.*
- c. Costs of this Application be provided for.*

2. The Subject Chamber Summons Application is premised on the grounds contained at the foot thereof and same is further supported by the Affidavit of one Ben Musundi, sworn on the 10<sup>th</sup> March 2020.

3. Besides, the Application is further supported by a Further Affidavit sworn on the 10<sup>th</sup> February 2021, to which the Deponent, namely Ben Musundi, has attached three (3) sets of annextures, including the Ruling of the taxing Mistress as well as the certificate of taxation.

4. Following the filing of the Chamber Summons herein, same was placed before the Honourable Court on 18<sup>th</sup> March 2021, on which date directions were taken on the manner and/or mode of disposal of the said application. For clarity, it was directed that the subject Application be disposed of and/or canvassed by way of written submissions.

**DEPOSITIONS BY THE PARTIES**

**The Applicants Case**

5. The Advocate/Applicants herein, who are themselves Advocates of the High Court of Kenya have averred that same were instructed and/or otherwise retained by the Respondents herein, to represent same before the National Land Commission.

6. It is further averred that following the engagement and/ or retention, the Advocates duly represented the Respondents, culminating into an award being made in favor of the Respondents in the sum of Kenya Shillings 139, 251, 703.10/= Only, being the value of the subject property, which was in Dispute.

7. It was further averred that following the rendition of the award in favor of the Respondents, the Respondents failed to pay and/or settled

the Applicants professional charges and as a result of such failure, the Applicants were constrained to and indeed filed the Advocate/ client Bill of costs.

8. Subsequently, the Applicant's bill of costs, was presented before the taxing mistress, who proceeded to and taxed same in the sum of kes.1, 744, 860.44/= only.

9. It is the Applicants' further averment that the taxation was erroneous and the ultimate amount/figure was thus Inordinately low and it is in this respect that the Reference before the court was filed.

### **The Respondents Case**

Being a Reference, the Respondents herein were not obliged and/or obligated to file a Response and/or Replying affidavit. For clarity, a Reference is akin to an appeal and therefore the parties are obliged to engage the court on the basis of issues of law and not otherwise.

### **Submissions by the parties**

#### **Applicants Submissions**

10. Pursuant to the directions of the Court issued on the 18<sup>th</sup> March 2021, the Applicants herein proceeded to and filed their Written submissions on the 17<sup>th</sup> May 2021, in respect of which the Applicants' herein have rehashed the various submissions that same ventilated before the taxing mistress, during the taxation of the Advocate/client Bill of costs.

11. On the other hand, the Applicants further contended that the taxing mistress erred in not relying on and not applying the schedule for taxation of matters before the high court and at as a result of failure to rely on the correct schedule, the taxing mistress arrived at an Erroneous conclusion and certificate of taxation.

12. Owing to the foregoing, the Applicants herein have thus requested this court to re-tax the Advocate/ client's amended bill of Costs dated the 25<sup>th</sup> January 2019, afresh.

#### **Respondents Submissions**

13. On their part, the Respondents filed their written submission on the 28<sup>th</sup> June 2021, and in respect of which same contended that the decision by the taxing mistress as well as the certificate of taxation, were arrived at following the Application of and reliance on the correct principles of the law.

14. In the premises, the Respondents have implored the honourable court to dismiss the Applicant's Application and to humbly uphold the Decision of the taxing mistress.

#### **Issue for determination**

15. Having reviewed the Chamber Summons Application dated the 10<sup>th</sup> March 2020, the supporting affidavit thereto as well as the further affidavit, the latter which was filed on the 10<sup>th</sup> February 2021, and upon considering the written submissions filed by and/or on behalf of the parties, it is my humble opinion that the following issues arise for Determination;

- i. Whether the Applicants herein filed and/or lodged the requisite Notice of objection to taxation, either in accordance with the Statutory Provisions of the Law or at all.*
- ii. Whether the Reference herein was filed within the stipulated timeline and/or whether the Reference is legally tenable.*
- iii. Whether this Honourable Court is vested with an omnibus jurisdiction to retax a bill of costs, in the manner proposed by the Applicants.*

### **ANALYSIS AND DETERMINATION**

#### **Issue Number 1**

**Whether the Applicants herein filed and/or lodged the requisite Notice of objection to taxation, either to the statutory condition or at all.**

16. The starting point as pertains to and/or concerns the subject matter is the appreciation and understanding of the provision of **rule 11 of the Advocates Remuneration Order 2009**. In this regard, it is therefore imperative to reproduce the provisions of the said Rules, which are reproduced as hereunder;

#### **"Objection to decision on taxation and appeal to Court of Appeal**

*(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) far 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."

17. From the foregoing provisions, it is common ground that a party who is aggrieved by the Decision of a taxing master/mistress, is obliged to file and/or lodge a notice of objection to taxation against the decision of the taxing master and in any event the notice of objection to taxation must be filed within 14 days from the date of such taxation.

18. In support of the foregoing findings, I take guidance from the decision in the case of **Twiga Motor Limited v Hon. Dalmas Otieno Anyango (2015) eKLR**, where the Court stated as hereunder;

**"The time limits in Rule 11 of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the said time lines would mean that the application would be rendered incompetent in the first instance."** [own emphasis]

19. On the other hand, it is important to note that the notice of objection to taxation must stipulate and/or contain the particular items, which the Applicant contends to be aggrieved and/or to be Dissatisfied with.

20. Upon the filing of the Notice of Objection, the taxing master/mistress is thereafter obliged to render and/or avail his/her reasons for arriving at the Decision in respect of the items, which are the basis of the objection.

21. My reading of the provision of **rule 11 (1) of the Advocates Remuneration Order**, drives me to the conclusion that the lodgment of the notice of objection to taxation, is peremptory, mandatory and/or imperative. In any event, the Notice of Objection, must speak to specific items which are objected to.

22. It is further my observation that where a Notice of objection to taxation is lodged, same must be specific and must not be omnibus. For clarity, an omnibus notice if any, would be incompetent and incapable of grounding a Reference before this Honourable Court.

23. In support of the foregoing observation I take guidance from the Decision in the case of **Machira & Company Advocates v Arthur K Magugu & Another (2012) eKLR**, where the Honourable Court observed as hereunder;

**"As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1<sup>st</sup> August 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out."**

24. Be that as it may, the foregoing Decision considered the legal implications and consequences where an omnibus Notice of Objection to taxation was filed and/or lodged and proceeded to observe that a Non-compliant Notice of objection, can not anchor a valid Reference.

25. However, in the instant case, No Notice of Objection to taxation was ever filed and the Applicant herein have not referred to the filing and/or lodgment of same .Besides, none has been annexed or otherwise, attached to the Affidavits filed Before the Honourable Court.

26. On the other hand, I have perused the entire file as well as the Affidavits filed by the Applicants and, I have not been able to lay my hands on any. Simply put, no such Notice of Objection to taxation was ever filed and/or lodged.

27. In my humble view, in the absence of compliant Notice of Objection to taxation, properly identifying the items objected to and filed within the statutory timeframe, the Reference before Court has been lodged and/or filed in vacuum.

28. On this ground alone, the entire Application fails. However, because there are two other issues that have been enumerated, I am therefore enjoined to address and render determination on same.

## **Issue Number Two**

**Whether the Reference herein was filed within the stipulated timeline and/or whether the Reference is legally tenable.**

29. Pursuant to and according to the provisions of **Rule 11, (2) of the Advocates Remuneration Order**, an Applicant seeking to file a Reference, is obligated to file a reference within 14 days of the Provision and/or supply of the reasons for taxation, which follows the issuance and lodgment of a Notice of objection to taxation.

30. I have pointed out whilst dealing with issue number 1, that there is no notice of objection to taxation, which was ever filed in this matter and in this regard, it is difficult to ascertain when the Reasons for taxation, which are ordinarily contained in the ruling were supplied.

31. In the absence of deposition as to when the reasons to taxation were supplied and/or availed, if at all, the presumption is that the applicants were availed and/or were supplied with a copy of the ruling upfront upon the delivery of same.

32. In my humble view, it was therefore incumbent upon the applicant to file and/or lodge a Reference, if any, within the 14 days of the ruling on taxation, that is assuming that such a Reference can be filed without a Notice of Objection to Taxation, being lodged in the first place.

33. On the basis of the Documents filed before the court, what is evident is that the ruling on taxation was rendered on the 13<sup>th</sup> February 2020, but the Reference was filed on the 11<sup>th</sup> March 2020, same being a period of more than 14 days prescribed and/or stipulated under the law.

34. I must say, that I have also perused the proceedings of the court, but I have not seen anywhere, when leave was ever sought for and/or obtained to file a Reference out of time.

35. Owing to the foregoing, it is my humble opinion that the Reference before the Court, which was filed on the 11<sup>th</sup> March 2020, *albeit* without leave, was filed out of time and was therefore a nullity *ab initio*.

36. In support of the foregoing position, I re-echo and/or restate the Decision in **Nicholas Kiptoo Arap Korir Salat v Electoral and Boundaries Commission & 7 Others (2014) eKLR**, where the Honourable Court observed as hereunder;

*“To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.”*

37. If any emphasis was further required, I would invoke and apply the reasoning in the latter Decision in the case **Mwangi Njuguna v Judicial Service Commission & another [2020] eKLR**, where the court observed as hereunder

**The Court in that case proceeded to observe and found that:**

*“By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.*

*To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as the document is unknown in-law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.”*

38. Based on the foregoing Decisions, it is my humble opinion that the entire Reference that was filed out of time, without leave having been sought for, was a nullity.

**Issue Number Three**

**Whether this Honourable Court is vested with an omnibus jurisdiction to retax a bill of costs, in the manner proposed by the Applicants.**

39. The Applicants herein, have sought for and/or invited the court to re-tax the Advocates/ client’s Bill of costs, without itemizing the Items, which the Honourable Court is called upon to look at and/or attend to.

40. Before venturing to deal with the issues as to whether the Court can proceed to re-tax the Bill of costs in the manner requested for, it is important to take cognizance of the Decision of the court in the case of **Joreth v Muturi Kigana & Company Advocates (2002) eKLR**, where the Honourable Court of Appeal observed as follows;

*“Besides it is not really in the province of a judge to retax the bill. If the judge comes to the conclusion that the taxing master has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. It was stated by the predecessor of this Court in the case of Steel **Construction & Petrol eum Engineering (E.A.) Ltd vs. Uganda Sugar Factory Ltd (1970) E.A. 141 per spry JA at page 143:***

*"Counsel for the appellant submitted, relying on D'Souza v. Ferao [1960] EA 602 and Arthur v. Nyeri Electricity Undertaking [1961] EA 492 that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re-assessed on different principles, the proper course is to remit to the same or another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion."*

41. The Applicants' herein have implored the Court to re-tax and/or put differently, tax the bill of costs afresh. For clarity, there is no request that the bill of costs be referred to a different Taxing master/mistress for purposes of re taxation or otherwise.

42. I must say that, whereas this Court is seized with jurisdiction to hear and/or adjudicate on Reference and to give necessary directions, particularly on the principles that ought to have been applied by the taxing master, it is certainly not within the province of this Honourable Court to undertake taxation, whether in the first instance or afresh.

43. In the premises, my short answer to the request by the Applicants herein, is that this Court does not have jurisdiction to undertake the fresh taxation, in the manner sought or at all.

#### **Final disposition**

44. I have addressed and/or considered the import and tenor of the provisions of **Rule 11 (1 & 2) of the Advocates Remuneration Order** and in my humble view, the said Rules were enacted for a purpose and thus deserve compliance with.

45. However, in respect of the subject matter, there was No efforts and/or attempts to comply with the law. Consequently, the Reference before me, is not only premature, but constitutes to an abuse of the Due process of the Court.

46. In the premises, the Chamber Summons dated **10<sup>th</sup> March 2020, be** and is hereby struck out.

47. The issues upon which the Chamber summons have been struck out and/or disposed of, were neither taken nor raised by the Respondents. Consequently, the Respondents herein are not entitled to costs.

48. In this regard, the orders that commends itself is that both parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2021.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE,**

**ENVIROMENT AND LAND COURT,**

**MILIMANI.**

In the Presence of;

**June Nafula Court Assistant**