



**Ultimate Engineering Limited v British Engineering Services
(Europe) Ltd & another (Miscellaneous Application E485 of 2019)
[2024] KEHC 8737 (KLR) (Commercial and Tax) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E485 OF 2019
FG MUGAMBI, J
JULY 19, 2024**

BETWEEN

ULTIMATE ENGINEERING LIMITED APPLICANT

AND

BRITISH ENGINEERING SERVICES (EUROPE) LTD 1ST RESPONDENT

SIDIAN BANK LIMITED 2ND RESPONDENT

RULING

Background

1. This ruling determines two applications, both filed by Ultimate Engineering Limited.

The application dated 6th August 2021:

2. The application is brought under Rule 11(2) of the *Advocates Remuneration Order* (ARO). The applicant challenges the taxing officer's decision issued on 18/6/2021 pertaining to the Bill of Costs dated 22/3/21. The applicant contends that the full typed ruling containing the reasons for taxation was not availed to the applicant's counsel on record until the 26/7/2021 after numerous follows ups with registry.
3. The application is supported by the affidavit sworn on 6/8/2021 by Eunice Lumallas, Counsel having conduct of this matter on behalf of the applicant. It is opposed by way of Grounds of Opposition filed on 13/10/2021 by the 1st respondent. Both parties filed written submissions to the application.



Analysis and determination:

4. I have carefully considered the pleadings, submissions, evidence and authorities presented before me by the parties. Before I delve into the substance of the application, I note that this reference application was filed on 6/8/2021, relating to a taxation decision issued on 18/6/2021, and therefore almost 2 months after. Rule 11 of the *Advocates (Remuneration) Order* 1962 provides for the procedure of objection of the Taxing Officer's decision in the following terms:

“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. 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. 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.

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 expired.”

5. A cursory look at the decision of the taxing master confirms that it was delivered on 18/6/2021 and that both parties were present when the same was delivered. The applicant contends that the ruling was availed to Counsel on 26/7/2021. There is no proof of this. The applicant further contends that this was after numerous follow ups with the registry. No such proof has been provided to the court. In any case, the applicant has not moved this court for leave to file the reference out of time. It would appear therefore that the reference application was filed as an afterthought.

Disposition:

6. Accordingly, the application dated 6/8/2021 is dismissed with costs having been filed out of time without leave of the court.

The application dated 19/7/2021:

7. The application by way of an Amended Chamber Summons is brought under Rule 11(2) of the *Advocates Remuneration Order* (ARO). The applicant seeks leave to file a Taxation Reference challenging the taxing officer's decision of 25/4/2023 on the respondents' bill of costs dated 2/7/2021.
8. The application is premised on the grounds on the face of it and the supporting affidavit sworn on 19/7/2023 by Eunice Lumallas, Counsel having conduct of this matter on behalf of the applicant. It is further buttressed by the submissions and supplementary submissions dated 27/5/2023 and 19/7/2023 respectively.
9. The applicant's case is premised on the fact that while the ruling of the taxing officer was delivered on 25/4/2023, it was not until 7/5/2023 when the full typed ruling containing the reasons for taxation was uploaded on the e-filing portal. The applicant contends that this is the reason that the reference has been filed on time and seeks leave to file the same out of time, if the Court were to find that the application is time barred.



10. The applicant takes issue with the taxing officer's award of Kshs. 500,000/=, as instruction fees, arguing that the award failed to consider that the matter was a simple and short one. In particular that the matter had been filed on 22/10/2019 and finalized on 15/7/2020. The applicant further takes issue with the award of Kshs. 716,677/= inclusive as getting up fees for being manifestly disproportionate to the matter, unreasonable and so inordinately high as to amount to substantial oppression and injustice to the applicant.
11. The respondents opposed the application by way of grounds of opposition dated 13/10/2021 and 23/9/2023 respectively. They contend that there was no error in principles during taxation and the amount awarded was fair and reasonable commensurate to the work done.
12. The 1st respondent contends that the applicants failed to adhere to the procedure in paragraph 11 of the [Advocate Remuneration Order](#) (ARO), by failing to file an objection to prompt the Deputy Registrar to issue her detailed reasoning. It contends the reference was filed 49 days later and is thus time-barred. According to the respondent, no evidence has been adduced to demonstrate that the decision was availed on 26/7/2021 as alleged by the applicant. The 1st respondent argues the ruling was in fact delivered in the presence of the applicant and the 1st respondent.
13. The respondents further contend that the Taxing officer did not err in principle and law as the law provides that instruction fees shall not be less than one-third of the instruction fees. That the Deputy Registrar considered the scope and complexity of the work in taxation, and therefore that the Bill of Costs as taxed should not be interfered with.

Analysis and determination:

14. I have considered the application, the grounds of opposition and the rival submissions filed. The following issues arise for determination:
 - i. Whether the court should grant an extension of time to file the reference out of time
 - ii. Whether the reference application should be allowed.
15. Rule 11 of the [Advocates \(Remuneration\) Order](#) 1962 provides for the procedure of objection of the Taxing Officer's decision in the following terms:

“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. 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. 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.

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 expired.”

16. Rule 11(4) of the [Advocates Remuneration order](#) allows the court to enlarge the time within which an aggrieved party may file an objection, notwithstanding the expiry of the 14-day period required to



do so. The factors to be considered in granting such an application were summarized in *Republic v Kenyatta University & another ex-parte Wellington Kihato Wamburu*, (2018) eKLR. The Court held that;

“... This Court has discretion to grant an extension of time for filing a reference, provided there are:

- (a) good and substantial reasons for the failure to file the reference within the prescribed period, and
- (b) there are grounds in the application which, *prima facie*, show good cause why the applicant should be heard.”

17. Further, the Supreme Court in *County Executive of Kisumu v County Government of Kisumu & 8 Others*, [2017] eKLR held as follows:

“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as the under-lying principles that a Court should consider in exercise of such discretion:

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

18. I have carefully considered the pleadings, evidence and rival submissions filed in Court. There are two issues that arise for determination and that is whether the reference herein was filed out of time, and if it was, whether the application has made a case for leave to file the reference out of time. Secondly, whether there is a case for this Court to interfere with the award of the taxing officer.

Whether the reference was filed out of time:

19. The applicant has referred to a decision of this Court, in *Abmed Nassir v National Bank of Kenya Ltd*, [2006] E.A. The Court in interpreting rule 11(2) of the *ARO* held that a reference ought to be filed within 14 days from the date of receipt of the reasons of the taxing officer’s ruling.



20. The evidence on record confirms the submission by the applicant that the impugned ruling was delivered on 25/4/2023 and uploaded on the e-filing portal on 7/5/2023 at 14:38hrs as evidenced on the face of the said ruling. Assuming that the ruling and reasons thereof were issued to the parties on 7/5/2023, the reference ought to have been filed within 14 days of this date and therefore before 22/5/2023. The application was filed on 12/5/2023 for the first time. It was only later amended having already been filed within the required timelines, on 19/7/2023.
21. In any case, even if my interpretation of rule 11(2) were mistaken, I am also alive to the measure of discretion donated to this Court to enlarge the time for filing a reference. It provides that:
- “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.”
22. The applicant states that the delay (if at all), was not inordinate, has been well explained and was beyond the control of the applicant following delay occasioned in issuing the applicant with the typed ruling. Applying the parameters set out in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. Nai 255 of 1997 (unreported), I am satisfied that the delay between 25/4/2023 and 12/5/2023 is not excessive and is not prejudicial to the respondent. I would therefore be inclined, to allow the prayer for leave to file the reference out of time.

Whether this Court should interfere with the ruling of the taxing officer:

23. The principles upon which this court can vary or set aside the decision of a taxing officer are well crystallized. This court emphasized in *First American Bank of Kenya v Shab and Others* (2002) EA 64 and *Joreth Ltd v Kigano and Associates* (2002) 1 EA 92, that the taxing officer’s judicial discretion can only be interfered with on account of an error of principle, resulting to a manifestly excessive award and where such discretion is exercised capriciously.
24. I shall proceed to weigh the grounds upon which the applicant seeks to set aside the decision of the taxing officer within these parameters.

On instruction fees:

25. There are sufficient authorities including the Court of Appeal decision in *Joreth Limited v Kigano & Associates* [2002] eKLR and *Peter Mutboka & another v Ochieng & 3 Others* [2019] eKLR, both of which cement the fact that instruction fees are based on the subject matter value. The value of the subject matter should in turn be ascertained from the pleadings, judgment or any settlement, depending on the stage at which the fees are being taxed.
26. The Learned taxing officer at paragraph 5 of her ruling notes that the subject matter before the court was an application for interim measure of protection pending referral of the matter to arbitration. In other words, the application was not a monetary claim. On this basis the taxing officer disagreed with the calculation of instruction fees based on the value of the subject matter, and held that the applicable provision is paragraph 1(k) of the Order.
27. She then proceeded to apply her discretion and increased the instruction fees as provided for under that provision. The taxing officer explained her reason for taxing instruction fees at Kshs. 500,000/=. The fact that one court would have been inclined to award a lower figure based on the same facts is not



ground enough to interfere with judicial discretion, so long as it is evident that the taxing officer had applied her mind to the correct principles of law. I do so find and therefore have no reason to interfere with the discretion exercised by the taxing officer on this ground.

28. I would reiterate the position taken by the Court of Appeal in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR. It was stated that:

“On a 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.”

On getting up fees:

29. Likewise, I concur with the taxing officer that the getting up fee is calculated based on the instruction fee and as such, find no reason to vary the amount as taxed by the taxing officer.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 19TH DAY OF JULY 2024.

F. MUGAMBI

JUDGE

