



**China Young Tai Engineering Company Limited v Lubulellah &  
Associates Advocates (Miscellaneous Civil Application E823 of 2022)  
[2024] KEHC 11041 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11041 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E823 OF 2022  
JWW MONG'ARE, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**CHINA YOUNG TAI ENGINEERING COMPANY LIMITED ..... APPLICANT**

**AND**

**LUBULELLAH & ASSOCIATES ADVOCATES ..... RESPONDENT**

**RULING**

1. The Client, China Young Tai Engineering Company Limited, is seeking to challenge the jurisdiction of the taxing officer and has approached this court by way of Chamber summons dated 17<sup>th</sup> November, 2022 brought under Rule 11(1) & (2) of the *Advocates Remuneration Order*. The application substantially seeks to set aside the taxing officer ruling of 14<sup>th</sup> November, 2022 and stay the execution of the certificate of taxation. In addition, the Applicant aims to have the Advocates Bill of costs taxed afresh.
2. The said application is premised on the grounds of the on its face and is supported by the affidavit of Qian Guo Jun, the director of the Applicant.
3. In challenging the Taxing Officer's decision, the Client contends the taxing officer lacked jurisdiction to consider the Bill of Costs as costs had been determined by the arbitrator. It stated that the arbitrator condemned Ravasam Development Company Limited to pay the costs, and therefore, the Taxing officer erred in principle in proceeding to tax the Advocates Bill. The Applicant contended that the taxing master acted as an appeal court to the Arbitrator, which amounted to an error of principle.
4. In response to the application the Advocate filed a together with a Notice of Preliminary Objection and replying affidavit sworn on 21<sup>st</sup> December, 2022. The Advocate contends the court lacks the jurisdiction to entertain the reference as filed for being filed in a fresh suit. The Advocate argued that



the purported letter dated 4<sup>th</sup> November 2022 to the Deputy Registrar was not a proper Notice of Objection as envisioned by the law, that it was incompetent, fatally defective and offended the provision of Rule 11 of the Advocates Remuneration Order.

5. By the directions of this court parties filed their respective submissions and thereafter had a chance to highlight them orally before the court.
6. The Applicant, in its submission dated 3<sup>rd</sup> March, 2023 submitted that the filing of the reference in a separate file was not prejudicial as the court could exercise its jurisdiction under Article 165(6) & (7) of the Constitution and call for the subordinate court file and have the same consolidated.
7. The Applicant further contended that the filing of the reference in a fresh matter was a fact that could be cured by dint of Article 159 of the Constitution of Kenya and urged the court to invoke the said Article 159 of the Constitution and proceed to determine the matter with undue regard to technicality.
8. The Advocate, in opposing the said application, argued the two authorities upon which the Applicant sought to base its argument were decisions from the High Court were not binding but only persuasive. It states the Case of Muriu Mungai & Company Advocates v China Civil Engineering Construction Corporate (K) Limited (2018) eKLR held that “there is no legal dictate on how to file a reference in a separate file.”
9. According to the Applicant, Rule 11 of the Advocate Remuneration order does not specify how a Notice of Objection should be, it argues that the Notice of Objection can take the form of a letter. It submits that the letter dated 4<sup>th</sup> November, 2022 requesting a copy of the ruling indicated it was for appealing and acted as a Notice of Objection to the taxing officer.
10. The Respondent, in his submissions, objects to the Applicant filing the reference in a fresh matter, he argues the court lacks the benefit of looking at the voluminous bill of costs filed, and the Taxing Officer ruling and urged the court to strike out the reference. In doing so, the Respondent urged the court to be guided by the decision in the case of Independent Electoral and Boundaries Commission v John Omollo Nyakongo t/a H.R. Ganijee & Sons (2020) eKLR.
11. Counsel further argued that the purported letter by the Applicant contradicts the provisions of Rule 11 of the Advocate Remuneration Order. He argues a letter does not take the form of an objection. The letter is vague, incompetent and failed to specify the items objected to and seek reasons for their taxation.
12. Counsel argued that compliance with the mandatory provisions of Rule 11 of the Advocates Remuneration Order was not a mere procedural technicality that can be cured by Article 159 of the Constitution of Kenya. Counsel argues that the failure to comply with the provisions of Rule 11 ousts the court's jurisdiction to entertain the reference. He urged the court to be guided by the decision in Ufundi Co-operative Savings and Credit Society v Njeri Onyango & Company Advocates (2015) eKLR and Kenya Airports Authority v Queens Insurance Agency Nairobi Hcc No. 1430 of 2000.

### **Analysis and Determination**

13. I have considered carefully the pleadings, affidavits, written and oral submissions by the respective parties in support of their various arguments. I note that the issues for determination are:
  - i. Whether the reference offends Paragraph 11 of the Advocates Remuneration Order and therefore is unmerited.
  - ii. Whether the Taxing officer erred in principle while taxing the Bill of Costs.



14. It is not disputed the Respondent acted for the Applicant in an arbitration dispute. By a letter dated 16<sup>th</sup> January, 2013 instructed the Respondent to represent it in an arbitration dispute between the Applicant and Ravasam Development Company Ltd.
15. The dispute arose out of a joint building council (JBC) agreement and conditions of contract for buildings work dated 28<sup>th</sup> April 2009 for the construction of a five-storey office building (Elysee Plaza) on L.R. No. 2/186 off Elgeyo Marakwet Road, Kilimani Nairobi for the sum of Kshs 535,000,000. The matter was resolved through arbitration and thereafter the Respondent proceeded to file its Bill of Costs dated 4<sup>th</sup> November, 2021 through Nairobi HCC no. 818 of 2022. A Ruling to the bill of Costs was delivered on 14<sup>th</sup> November, 2022.
16. The Respondent contends the Client should have filed an objection as per the provisions of Rule 11 (1) & (2) of the Advocates Remuneration Orders which provides any aggrieved party by a taxing Officer's decision to file a Notice of Objection within 14 days stating the disputed items. The provision states:-
  1. Should any Party object to the decision of a Taxing Officer, he may within 14 days after the decision in writing to the Taxing Officer of items of taxation to which he objects”.
  2. The Taxing Officer shall forthwith record and forward to the Objector reasons for the decision on those items and the Objector may within 14 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 grounds of his.
17. The Respondent argues the reference cannot stand for failure to file the Notice of Objection. The Respondent argues the letter dated 4<sup>th</sup> November, 2022 does not take the form of a notice of objection.
18. I have had a chance to access the CT system and perused the pleadings in Nairobi misc. App No. E818 of 2021 and I note that there are two letters dated 4<sup>th</sup> November 2022 by the Applicant counsel Kibatia & Company Advocates both filed on 8<sup>th</sup> November 2022. The first one reads in part:

“we refer to the above matter and the decision of Hon Stephany Githongori on the Bill of cost dated 4<sup>th</sup> November 2021.

The Respondent objects to the whole bill as taxed and wishes to file a reference. Kindly furnish us with reasons to enable the Respondent to file a reference.”

yours faithfully.

for Kibatia & Company Advocates LLP

The second one reads:

“We refer to the above matter.

Kindly furnish us with a copy of the ruling and order delivered by Hon. Stephany Githongori on 4<sup>th</sup> November, 2022 in this matter for purposes of Appeal.

We undertake to pay your charges.”

Yours faithfully

For Kibatia & Company Advocates LLP

19. I note the said letters are both dated 4<sup>th</sup> November 2022 while the ruling was delivered on 14<sup>th</sup> November, this could not have been possible and I am satisfied the same amounts to an error on the



- date. From the record, the letter expressly states the Applicant objects to the whole bill as taxed and wishes to file a reference. I am persuaded that the letter served as a proper Notice of Objection.
20. In addition, while I agree with the Applicant that the provisions of paragraph 11(1) of the Advocate Remuneration Order require an aggrieved party to issue a Notice of Objection within 14 days I note that the said paragraph does not specify the notice format. The court in the case of *Lubullela & Associates, Advocates – v- Kenyatta National Hospital* [2012] eKLR stated as follows”...I have carefully considered Rule 11(1) of the *Advocates (Remuneration) order*. Whilst it requires a party objecting to the decision of the taxing master to issue a notice within 14 days, the sub-rule does not specify the format of such notice. In my view, the letter of 6<sup>th</sup> January 2010 was compliant with the sub-rule”
21. The import of the provisions of paragraph 11 of the *Advocates Remuneration order* is once a Notice of Objection has been filed it allows the taxing master to issue a ruling giving reasons for the decision, where the ruling stated reasons for the decision the aggrieved party will not need to await afresh ruling to be issued by the Taxing master but will proceed to file a reference.
22. I agree with the learned judge in the case of *National Oil Corporation Limited v Real Energy Limited & another* [2016] eKLR- where it was held that:
- “In my view, there is no magic in requiring the Taxing Master to furnish reasons before making a reference. Where reasons are contained in the decision, a party ought not seek the same simply because it is fashionable to do so. Accordingly, nothing turns the issue that the Applicant did not seek the reasons for the decision before filing the reference.”
23. The current application was filed on 17<sup>th</sup> November 2022 which is within 14 days as envisaged under paragraph 11 of the Advocate’s Remuneration order. In the circumstances, this court finds the Applicant complied with the provision of Paragraph 11 of the Advocate’s Remuneration order.
24. The second issue for consideration is whether the Taxing officer erred in principle while taxing the Bill of Costs. The principles of setting aside the decisions of Taxing Master were well established in the cases of *Premchand Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] E.A 162, *First American Bank of Kenya v Shah and Others* (2002) EA 64 and *Joreth Ltd v Kigano and Associates* (2002) 1 EA 92. The principles are set out here below as follows:
- a. That there was an error of principle
  - b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
  - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
  - d. That so far as practicable there should be consistency in the award.
25. For the court to set aside a ruling of the taxing master it has to satisfy itself that any of the above set principles exist. The court will therefore have to peruse the ruling of the taxing master. I have perused the instant application, together with the annexures filed, the Applicant objects to all the items in the Bill of Costs as filed. I have noticed that the Applicant has not attached a copy of the taxing master’s decision to enable the court to re-evaluate it to satisfy itself on whether the taxing master applied the relevant provisions of the law. I could also not find a copy of the ruling on the CT system. I therefore have not had the benefit of evaluating the ruling to enable this court to decide as to whether the taxing master erred in principle or in law in exercising her discretion. In my view omitting to file the decision of the taxing master is in the circumstances fatal to the Applicant’s case.



26. The upshot of the above finding is that the Applicant has not demonstrated that this Application meets the principles set out in the Advocates Remuneration Order to warrant the setting aside the decision of the Taxing Master. The result is that the reference application dated 17<sup>th</sup> November, 2022 lacks merits and the same is dismissed with costs to the Respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 19<sup>th</sup> DAY of SEPTEMBER, 2024.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

1. Ms. Lanoi holding brief for Mr. Karunga for the Applicant/Client.
2. Mr. Lubulellah for the Advocate/Respondent.
3. Amos - Court Assistant

