



**Shapley Barret & Co. Advocates v Bamburi Special Products
Limited (Commercial Miscellaneous Application E181 of 2022)
[2024] KEHC 11590 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11590 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E181 OF 2022
MN MWANGI, J
SEPTEMBER 20, 2024
IN THE MATTER OF THE ADVOCATES ACT CAP 16
AND
IN THE MATTER OF TAXATION OF ADVOCATE-CLIENT BILL OF COSTS**

BETWEEN

SHAPLEY BARRET & CO. ADVOCATES APPLICANT

AND

BAMBURI SPECIAL PRODUCTS LIMITED RESPONDENT

RULING

1. The applicant filed a Chamber Summons application dated 8th May, 2023 under the provisions of Rule 11(2) of the *Advocates (Remuneration) Order*. The applicant seeks orders that the decision made by the Deputy Registrar, High Court of Kenya at Milimani Law Courts Nairobi, as Taxing Officer on 19th April, 2023, which was made without giving a Ruling Notice to the applicant and released to the applicant on 3rd May, 2023, awarding costs of Kshs.16,240,002.00 to the applicant be reversed. That thereafter, the proper costs payable under the relevant or applicable law be assessed, quantified, and awarded to the applicant. Alternatively, the applicant prays that the bill of costs be referred back to the Deputy Registrar of the High Court for fresh taxation before a different Taxing Officer.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on 28th September, 2023 by Desterio Oyatsi, an Advocate of the High Court of Kenya and a partner at the applicant law firm.



- He averred that this matter was listed before the Deputy Registrar for delivery of ruling on 31st October, 2022 when the learned Deputy Registrar indicated that the said ruling would be delivered on Notice. That the ruling was delivered on 19th April, 2023 without Notice to their law firm and/or to their client. He stated that they were only issued with a written Notice for the aforesaid ruling on 3rd May, 2023 by the Court. He contended that the learned Taxing Officer applied the principles of law applicable to the taxation of a party and party bill of costs on the taxation of an Advocate/client bill of costs, thus arriving at a wrong decision.
3. Mr. Oyatsi further contended deposed that the Taxing Officer did not properly consider inter alia the correct subject matter of the case and the value thereof, the quantified & unquantified claims pleaded and made against the respondent in the case, the financial and commercial risk to the respondent's business in Kenya arising from adverse findings on the issues raised for determination in the case, the nature or importance of the case or dispute to the respondent and its business, and the labour expended and the responsibility undertaken by the applicant in the matter. He stated that the learned Taxing Officer erred in awarding the applicant costs which in all the circumstances of the suit are manifestly and unreasonably low and unfair, and disproportionate to the suit so as to amount to the denial of justice to the applicant. He stated that it is the interest of justice for the instant application to be allowed as prayed.
 4. In opposition to the application, the respondent filed Grounds of Opposition dated 5th July, 2023 raising the following grounds -
 - i. That the application is incompetent having been filed out of time without leave of this Honourable Court in accordance with the provisions of paragraph 11(4) of the [Advocates \(Remuneration\) Order](#);
 - ii. That the application is defective for failing to comply with Paragraph 11 of the [Advocates Remuneration Order](#);
 - iii. That the application does not disclose any error of principle by the Taxing Officer that would warrant interference with the decision of the Taxing Officer by this Honourable Court;
 - iv. That the decision of the Taxing Officer was not based on any error of principle, or the fees awarded vis-à-vis the judgment sum was not manifestly low to justify interference;
 - v. That the fees as assessed by the Taxing Officer were reasonable and adequately reimbursed the applicant; and
 - vi. That in view of the foregoing, the application lacks merit, is misconceived, an abuse of the Court process and ought to be struck out with costs to the respondent.
 5. The respondent also filed a replying affidavit sworn on 28th August, 2023 by Joyce Munene, the respondent's Head of Legal Compliance and Company Secretary. She contended that the instant application is incompetent for having been filed out of time and without leave of the Court, since the Taxing Officer's ruling was delivered on 19th April, 2023, whereas the instant application was filed on 8th May, 2023, more than 14 days after the delivery of the ruling. Further, that the applicant did not comply with the provisions of Rule 11(1) of the [Advocates \(Remuneration\) Order](#) by failing to file a Notice of Objection with the Taxing Officer before filing the instant application. She deposed that the Taxing Officer's failure to issue the applicant and/or his client with a Ruling Notice does not constitute a ground to reverse the ruling as sought by the applicant.



6. It was averred by Ms. Munene that the applicant represented the respondent in HCCC No. 577 of 2011-*Showcase Properties Limited v Bamburi Special Products Limited* [2020] eKLR, wherein judgment was entered against the respondent in the sum of Kshs.4,756,120.00. She also averred that thereafter, the applicant filed an Advocate/Client bill of costs seeking costs of Kshs.300,000,000/= against the respondent. That the said bill of costs was opposed by the respondent on grounds that the applicant had previously raised fee notes amounting to Kshs.16,118,850.96, which fee notes were duly settled by the respondent. That in a ruling delivered on 19th April, 2023, the Taxing Officer awarded the applicant costs of Kshs.16,243,022.96 less the legal fees already paid of Kshs.16,118,850.96, leaving a balance of Kshs. 124,172.00.
7. Ms Munene asserted that the Taxing Officer based calculations of the instruction fees on the judgment sum, then exercised her discretion taking into account the relevant facts including the nature of the case, its importance, the volume of documents, that the Taxing Officer also considered that the main issue in contention was breach of contract and increased the instruction fees from Kshs.133,342.00 to Kshs.7,000,000.00. For that reason, Ms. Munene contended that the applicant had been overcompensated and is not entitled to any additional payments.
8. The application herein was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Shapely Barret & Company Advocates on 19th October, 2023, whereas the respondent's submissions were filed on 11th December, 2023 by the law firm of Kaplan & Stratton Advocates.
9. Mr. Oyatsi, learned Counsel for the plaintiff cited the provisions of Rule 11(4) of the *Advocates (Remuneration) Order* and submitted that the Taxing Officer had indicated that the ruling on the applicant's bill of costs would be delivered on Notice, but the applicant was not notified. He stated that instead, the applicant received the ruling from the Court on 3rd May, 2023, which he contended was deemed to be the delivery date. He further submitted that the Taxing Officer's ruling was in writing and contained all the reasons as provided for under Rule 11(2) of the *Advocates (Remuneration) Order*, thus it was not necessary to write to the Taxing Officer seeking reasons for her decision. He stated that in any event, the time for compliance with the provisions of Rule 11(2) of the *Advocates (Remuneration) Order* started running on 3rd May, 2023, given that the application was filed on 10th May, 2023, and seven (7) days after receiving the ruling, the applicant fully complied with Rule 11 of the *Advocates (Remuneration) Order*. In the alternative, Counsel urged this Court to exercise its discretion in favour of the applicant and extend time for the filing of the instant application, and thereafter deem the instant application as properly filed.
10. Counsel cited the Court of Appeal case of *Joreth Limited v Kigano & Associates* 2002 EA 92, and stated that instruction fees is dependent on the value of the subject matter, but in this case, the Taxing Officer failed to appreciate that the applicant's primary responsibility towards the respondent was to defend the latter against all the adverse legal consequences or risks posed by the suit such as the financial or pecuniary liabilities claimed by the plaintiff (in the primary suit) against the defendant (the respondent herein). Consequently, having all the claims against the respondent dismissed or reduced to the bare minimum. He stated that these consequences were to be determined from the judgment and the pleadings, but in this case the Taxing Officer erred by relying on the minimal portion on the plaintiff's claim that was successful and disregarded the real success or benefit that the respondent achieved by virtue of the successful defence put up by the applicant, which led to the dismissal of the plaintiff's claim of Kshs.1,165,383,117.00. He asserted that this sum ought to have been the base line for calculation of instruction fees by the Taxing Officer.



11. Mrs. Opiyo, learned Counsel for the respondent cited the provisions of Rule 11 of the *Advocates (Remuneration) Order* and submitted that the instant application was filed out of time and without leave of the Court. She stated that the Taxing Officer delivered her ruling on 19th April, 2023 which ruling contained reasons for the taxation, thus it would be futile for the applicant to expect the Taxing Officer to provide further reasons. To buttress these submissions, Counsel relied on the case of *Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited* [2006] EA, cited by the Court in the case of *Odera Obar & Co. Advocates v Aguva Agencies Limited* [2021] eKLR. She further submitted that the application herein ought to have been filed within fourteen (14) days from 19th April, 2023. She contended that filing the instant application on 10th May, 2023 without leave of Court makes the application herein incompetent for being filed out of time.
12. Counsel relied on the Court of Appeal decisions in *Joreth Limited v Kigano & Associates (supra)* and *Otieno Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR, and argued that the value of the subject matter in this case is readily ascertainable from the judgment in HCCC No. 577 of 2011 delivered on 29th June, 2020, which gave rise to these proceedings. She further relied on the case of *Alice Yano t/a Yano & Co. Advocates v Rebecca Nadupoi Supeyo & another* [2021] eKLR, and stated that the applicant has not demonstrated the error of principle which the Taxing Officer committed, to justify interference by this Honourable Court. She submitted that the Taxing Officer taxed the instruction fees according to scale and proceeded to enhance the instruction fees based on her judicial discretion. Counsel asserted that the Taxing Officer exercised her discretion judiciously, which discretion should not be disturbed on the sole basis that the applicant is of the opinion that the amount awarded was too low.

Analysis and Determination.

13. Upon consideration of the instant application, the grounds on the face of the Motion and the affidavit filed in support thereof, the replying affidavit and grounds of opposition by the respondent, together with the written submissions by Counsel for the parties, the issues that arise for determination are –
 - i. Whether the applicant complied with the provisions of Rule 11 of the Advocates Remuneration Order; and
 - ii. Whether the application herein is merited.

Whether the applicant complied with the provisions of Rule 11 of the Advocates (Remuneration) Order.

14. A party aggrieved by the decision of a Taxing Officer can appeal against it to the High Court by way of a Reference to a Judge in the manner provided for under Rule 11 of the *Advocates (Remuneration) Order*. This position was restated by the Court in the case of *Machira v Magugu* [2002] 2 EA 428, as follows -

“...the Advocates Remuneration Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules... any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the *Advocates Remuneration Order*...”

15. The procedure for challenging a Taxing Officer’s decision in the High Court is provided for under Rule 11(1) & (2) of the *Advocates (Remuneration) Order* 1962, which states that -



1. Should any party object to the decision of the taxing officer, he may within 14 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...”
16. Therefore, before filing a Reference as contemplated under Rule 11 of the *Advocates (Remuneration) Order*, an aggrieved party has to first give the Taxing Officer a Notice in writing, commonly referred to as a Notice of Objection within fourteen (14) days of his decision, of the items of taxation to which he objects to. Thereafter, the Taxing Officer shall forward to the objector the reason(s) of his/her decision, then the objector may within fourteen (14) days from the receipt of the said reasons make an application commonly referred to as a Reference to a Judge by way of Chamber Summons, setting out the grounds of objection.
17. It is not disputed that the Taxing Officer’s ruling was to be delivered on Notice. The said ruling was delivered on 19th April, 2023 in the absence of Counsel for the applicant. Counsel for the applicant claims that their law firm was never served with a Notice for delivery of the said ruling. Instead, the ruling was sent to them by the Court on 3rd May, 2023. From the record and the pleadings filed by the parties, there is no evidence of service of Notices for delivery of the Taxing Officer’s ruling on either of the parties herein. I am therefore persuaded that the applicant was not notified that the Taxing Officer’s ruling would be delivered on 19th April, 2023. The applicant became aware that the said ruling had been delivered upon receipt of a copy of the same on 3rd May, 2023.
18. From above state of affairs, it is my finding that the time for compliance with the provisions of Rule 11(1) of the *Advocates (Remuneration) Order* started running on 3rd May, 2023 which was on the day of receipt the said ruling and not 19th April, 2023, the ruling was actually delivered. This means that the applicant ought to have filed its Notice of Objection to the Taxing Officer’s ruling on or before 16th May, 2023. In this case, it is not disputed that the applicant did not file a Notice of Objection as contemplated under Rule 11(1) of the *Advocates (Remuneration) Order*, instead it went ahead and filed a Reference against the Taxing Officer’s ruling vide the instant application. The applicant’s position is that it needed not to file a Notice of Objection requesting for the Taxing Officer’s reasons for the taxation, since the ruling availed to it already contained the said reasons.
19. The Supreme Court in the case of *Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR, considered the importance of adherence to laid down procedures by parties approaching a Court of law and stated thus -

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 the 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.

20. Further, in the case of *Matiri Mburu & Chepkemboi Advocates vs Occidental Insurance Company Limited* [2017] eKLR, the Court when striking out a Reference held as follows -

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, compliance 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. The provisions of Article 159 (2) (d) of the *Constitution* were not intended to overthrow procedural or technical requirements, but to guard against “undue regard” to procedural technicalities in the administration of justice.

21. It is evident that the applicant did not comply with the provisions of Rule 11(1) of the *Advocates (Remuneration) Order* before filing the instant application. It is however now settled law that a Court’s jurisdiction to deal with a Reference is invoked upon compliance with the provisions of Rule 11(1) of the *Advocates (Remuneration) Order*. Courts have also held on numerous occasions that 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 under the provisions of Article 159(2)(d) of the *Constitution* of Kenya, 2010 for the sake of substantive justice. Failure to serve the said Notice goes to the root of the High Court’s jurisdiction to deal with a Reference.
22. In the end, this Court finds that its jurisdiction to hear and determine the instant application has not been properly invoked for lack of compliance with Rule 11(1) of the *Advocates (Remuneration) Order*. Consequently, there is no competent Reference before this Court for hearing and determination.
23. The upshot is that the instant application is hereby struck out with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Otieno h/b for Mr. Oyatsi for the applicant

Mr. Wasonga h/b for Mrs Opiyo for the respondent

Ms B. Wokabi - court Assistant.

