



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC APPLICATION NO. 243 OF 2017

WANJIKU & WANJIKU ASSOCIATES..... APPLICANT

=VERSUS=

MANU HOLDINGS LIMITED..... RESPONDENT

RULING

1. M/s Wanjiku & Wanjiku Associates (**the advocate**) brought a bill of costs against their client, M/s Manu Holdings Limited (**the client**), drawn at Kshs 1,531,510. One of the taxing officers of this court, **Hon Orago**, taxed the bill at Kshs 66,235. Dissatisfied with the taxing officer's decision, the advocate brought a reference through a chamber summons application dated 8/10/2018, challenging the decision. This court (Eboso J) heard the reference and subsequently rendered a determination on the reference on 28/5/2020. The court found that the taxing officer erred and/or misdirected herself in her assessment of **Item 1** of the bill of costs. The court upheld the decision of the taxing officer on all the other items in the bill of costs. Further, the court ordered that the bill of costs be remitted back for taxation of Item 1 by a different taxing officer of the court.

2. Subsequently, the bill was placed before a different taxing officer, **Hon Barasa**, who through a ruling rendered on 25/11/2020, taxed **Item 1** (instruction fees) at Kshs 750,000. She reckoned Value Added Tax on the said figure at Kshs 120,000. Together with the other times in the bill of costs, the total final award came to Kshs 878,235.

3. Consequently, the advocate brought a notice of motion dated 14/1/2021 (the advocate's application) seeking an order adopting the award of the taxing officer as a judgment of this court. The said application by the advocate, dated 14/1/2021, is one of the two applications falling for determination in this ruling. It was supported by an affidavit sworn on 14/1/2021 by Naomi Wanjiku Maina. She deposed that the taxing officer having rendered an award on 25/11/2020, it was fair and just that the award be adopted as a judgment of the court.

4. The client subsequently brought a reference by way of chamber summons application dated 4/3/2021, seeking the following verbatim orders:-

1) That this honourable court do grant leave for extension of time for filing of this reference.

2) That in the interest of overriding objective principle, upon grant of prayer 1 above, this Reference therefore be deemed to have been filed within time.

3) That the decision of the taxing master in this matter in the advocate/applicant's bill of costs dated 13th December 2017 between the applicant and the respondent made on 25th November 2020 be reviewed in terms of item number 1-27 of the Bill of Costs.

4) That the certificate of taxation dated 25th November 2020 be set aside.

5) That the costs of this application be provided for.

5. The said application dated 4/3/2021 by the client is the second application falling for determination in this ruling. Because the court's decision on the client's application will have a bearing on the fate of the advocate's application which seeks adoption of the award of the taxing officer, I will dispose the client's application first.

6. The client's application was supported by an affidavit sworn on 4/3/2021 by Francis Saint Njuguna. He deposed that the delay in filing the reference was occasioned by: (i) the failure of the Court Registry to give notice of the date when the impugned ruling was to be delivered; and (ii) the failure of the Court Registry to supply the client with a copy of the ruling together with the taxing officer's reasons for her decision. He contended that the bill of costs had been taxed by the same taxing officer contrary to the order of this court directing that the bill be taxed by a different taxing officer. He added that the taxing officer wrongly made a finding that the fees applicable under the applicant's bill of costs was Kshs 878,235 instead of Kshs 66,235. Further, he deposed that the taxing officer failed to take into account the

fact that the intended transaction never materialized because the deal collapsed after only one meeting of the parties. Further, he contended that the increase of instruction fees without reasons and justification should be reviewed and disallowed because no services were rendered by the advocate. The deponent added that the taxing officer misinterpreted and misapplied the law on Item 1, rendering her decision irrational, punitive and without any legal foundation. He contended that the advocate only perused an agreement which had been drawn by another law firm.

7. The application was opposed by the advocate through a replying affidavit sworn on 19/5/2021 by Naomi Wanjiku Maina. She deposed that taxation notice was duly served upon the client's advocates and the client elected not to attend the taxation. She added that whereas the first taxation was carried out by Hon Orago, the subsequent taxation of Item 1 was carried out by Hon Barasa who subsequently rendered a decision thereon on 25/11/2020. She stated that Hon Orago only undertook the subsequent administrative exercise of signing the certificate of taxation after Hon Barasa had taxed Item 1. She faulted the client for not exhibiting the ruling of 25/11/2020 and for exhibiting the earlier ruling of 13/9/2018. She added that the client had failed to comply with the legal requirements relating to issuance and service of notice of objection hence the application was incompetent. She further deposed that following the digitization of the court process at Milimani Environment and Land Court, all files had been mapped onto the e-portals and all court activities relating to the files were available to the parties. She urged the court to reject the client's application.

8. The client's application was canvassed through written submissions dated 28/8/2021, filed by the firm of *Koceyo & Company Advocates*. Counsel submitted that the same taxing officer who originally taxed the bill of costs at Kshs 66,235 had subsequently taxed it at Kshs 875,235 yet the judge had in the ruling dated 28/5/2020 directed that the second taxation be carried out by a different taxing officer. Counsel added that the taxing officer wrongly made a finding that the fees applicable was Kshs 878,235 instead of Kshs 66,235. Counsel contended that the taxing officer had failed to take into account the fact that the intended transaction never materialized because the deal collapsed after only one meeting of the parties. Counsel added that the increase of instruction fees was without reason and justification and should be reviewed / disallowed. Counsel for the client further submitted that the taxing officer misinterpreted and misapplied the law applicable to item 1 rendering her decision irrational, punitive, and without any legal foundation. Counsel emphasized that the advocate only perused an agreement already drawn by another firm, a fact which was overlooked by the taxing officer. Counsel contended that the advocate would not suffer any prejudice if the application was granted. Relying on, among other decisions: **(i) Belinda Murai & 9 others vs Amos Wainaina [1978] eKLR; (ii) John Ochanda V Telkom Kenya Limited [2014] eKLR; (iii) First American Bank of Kenya v Shah & others; Nairobi (Milimani) HC Civil Case No. 2255 of 2000 and (iv) Behan & Okero v Pan African Insurance Company; Kisumu HC Misc Case No. 229 of 2003**, counsel urged the court to grant the client's applicant.

9. The advocate opposed the client's application through consolidated written submissions dated 28/5/2021, covering the two parallel applications. Counsel identified the following as the issues falling for determination in the two applications: (i) Whether the client should be allowed to file its reference out of time; (ii) Whether the decision of the taxing officer made on 25/11/2020 should be reviewed; and (iii) Whether the advocate's notice of motion dated 14/1/2021 should be allowed as prayed.

10. On whether the client should be allowed to file a reference out of time, the advocate submitted that the client had issued a notice of objection more than three months after the taxing officer's decision in contravention of the requirements of Paragraph 11 of the Advocates (Remuneration) Order. Counsel added that the reasons outlined by the client to explain the delay to initiate a reference were not bonafide because the client's advocates had been served with notices and had elected not to attend the taxation. The advocate added that the activities of the court were readily available and accessible on the e-portal. The advocate submitted that she stood to be highly prejudiced if the client's application was allowed because the professional service culminating in the bill of costs were rendered in 2015.

11. On whether the decision of the taxing officer dated 25/11/2020 should be reviewed, the advocate submitted that the client did not file any documents to guide the court when undertaking the taxation exercise relating to Item 1. Further, the client elected not to attend the taxation exercise on 22/10/2020. Counsel contended that in the circumstances, the advocate's case in relation to the taxation exercise carried out on 22/10/2020 was unopposed. It was the position of counsel that, in the circumstances, the client had no proper basis for seeking a review of the decision of the taxing officer. Further, the advocate submitted that the client had not demonstrated that the taxing officer erred on the applicable principles of law. Lastly, counsel submitted that the plea for review was incompetent because the client had failed to annex the order in respect of which they sought a review.

12. On whether the advocate's application dated 14/1/2021 should be allowed, the advocate submitted that because retainer was not an issue at this stage, **Section 51(2) of the Advocates Act** mandated this court to enter judgment as taxed by the taxing officer.

13. I have considered the client's application dated 4/3/2021; the response thereto; and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The following issues fall for determination in the said application: (i) Whether there is a competent reference before court under paragraph 11 of the Advocates (Remuneration) Order; (ii) Whether the client has satisfied the criteria upon which our courts exercise jurisdiction to enlarge time; and (iii) If the answers to (i) and (ii) above are in the affirmative, whether the client has satisfied the criteria upon which the superior courts exercise jurisdiction to interfere with the taxing officer's exercise of discretion under the Advocates (Remuneration) Order. I will make brief sequential pronouncements on the three issues in the above order.

14. The first issue is whether there is a competent reference before this court under Paragraph 11 of the Advocates (Remuneration) Order. The mandatory procedure for initiating a reference is set out in Paragraph 11 of the Advocates (Remuneration) Order which provides as follows:-

"11. 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 reason for his decision of those items and objector

may within fourteen days from the receipt of the reason 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) 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."

15. My interpretation of the above legal framework is that a party objecting to the decision of a taxing officer is required to give a notice of objection within 14 days from the date when the decision is rendered. Secondly, where the reasons of the taxing officer are not set out in the decision, and the objector requests for the reasons, the objector is supposed to file a reference by way of chamber summons within fourteen days from the date of receipt of the taxing officer's reasons. Thirdly, where an objector runs out of the time-frame set out under subparagraphs 1 and 2 of paragraph 11, that party is required to make a formal application for enlargement of time, and upon enlargement of time, the objector is required to comply with the requirements of the respective sub paragraph.

16. The ruling leading to the present reference was rendered on 25/11/2020. The notice of objection which the client has exhibited is dated 2/3/2021. There is no evidence that an application was presented to the court for enlargement of the time within which to issue the notice of objection. There is no prayer in the present application for enlargement of the time within which to issue and serve a notice of objection under paragraph 11(1) of the Advocates (Remuneration) Order. In my view, no valid reference can be maintained in the absence of a valid notice of objection.

17. Similarly, there is no evidence of any prior formal application brought for an order enlarging the time for bringing a reference under Paragraph 11(2) of the Advocates (Remuneration) Order. What the client has done is to bring the reference and while canvassing the reference, invite the court to enlarge the time for bringing the very reference that they are canvassing. This, in my view, is an abuse of the process of the court. What the client has done is equivalent to a scenario where a party lodges an appeal in the Court of Appeal or the Supreme Court outside the statutory timeframes; the party canvasses the appeal; and while canvassing the appeal, the party invites the appellate court to enlarge time for bringing the very appeal that he is canvassing. The law does not permit that approach. If the client desired to initiate a reference outside the stipulated timelines, paragraph 11(4) granted him a mechanism of redress by providing a platform for seeking enlargement of time prior to filing the reference. The client elected not to utilize that mechanism. The result is that there is no competent reference before this court under paragraph 11 of the Advocates (Remuneration) Order. That is my finding on the first issue.

18. The second issue is whether the client has satisfied the criteria upon which our courts exercise jurisdiction to enlarge time. The Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Salat v The Independent Electoral and Boundaries commission & others; Supreme Court Application No. 16 of 2014 [2014] eKLR** outlined the following broad principles that guide the exercise of jurisdiction to enlarge time:

"1. 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;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

3. Whether the court should exercise the discretion to extend time is a consideration to be made on case to case basis.

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. whether in certain cases, like election petitions, public interest should be a consideration for extending time."

19. In the present application, the client did not obtain an order enlarging time for issuing and serving a notice of objection under paragraph 11(1) of the Advocates (Remuneration) Order. The client only sought an order enlarging time for bringing the reference which is normally brought as a chamber summons application under paragraph 11(2) of the Advocates (Remuneration) Order. The court has made a finding that no valid reference can be brought without a valid notice of objection. Therefore, in the absence of an order enlarging the time within which to issue and serve a notice of objection under paragraph 11(1) of the Advocates (Remuneration) Order this application is ill-conceived from the start.

20. Secondly, the explanation tendered by the client for failure to bring a reference within the timelines set by the law is that the Court Registry failed to give notice of the date of the impugned ruling. The client further blamed the Court Registry for failing to supply them with a copy of the typed ruling and reasons for the taxing officer's decision. I have perused the court record and the response by the advocate. It is clear from the court record that the client's advocates, M/s Koceyo & Company Advocates, were served with a taxation notice dated 5/10/2020, relating to the second taxation. The notice was received by the said firm on 6/10/2020. The notice was clear that taxation was scheduled for 22/10/2020. The client and their advocates elected not to attend the taxation. Their failure to know the date when the ruling

was delivered was a result of their default to attend court. The blame placed on the Court Registry is therefore not *bonafide*. Further, the only request exhibited in relation to the request for the taxing officer's reasons is the letter dated 2/3/2021. The said letter was done over three months after the impugned ruling had been rendered. Further, this was three days before the date of the supporting affidavit and the application under consideration. It is therefore not correct that the Court Registry failed to attend to any request from the client seeking reasons for the taxing officer's decision.

21. Thirdly, in urging the court to extend time, the client contends that they are challenging the taxing officer's decision on Items 1 to 27 of the bill of costs. The record before me shows that, in its earlier ruling dated 28/5/2020, this court upheld the taxing officer's decision on all the items in the bill of costs except item 1. What was remitted back for taxation by a different taxing officer of the court was Item 1. Indeed, the taxing officer who rendered a taxation decision on 25/11/2020 only dealt with Item 1. The client is therefore not candid in contending that a reference against the ruling of 25/11/2020 will provide them with a platform on which to challenge the earlier decision relating to the other items in the bill of costs.

22. The other ground advanced by the client while urging the court to enlarge time for bringing the reference is that the taxing officer who carried out the first taxation (**Hon Orago**) is the one who carried out the second /impugned taxation. This contention is not correct. The record shows that the impugned taxation was carried out by Hon I N Barasa, Senior Deputy Registrar. The impugned/ second taxation which related to only Item 1 was not conducted by Hon Orago. All that Hon Orago did after the decision had been rendered by Hon Barasa was to issue the certificate of taxation confirming that the bill had been taxed. This was an administrative duty. It is therefore apparent that the client is not truthful in contending that the impugned decision was rendered by Hon Orago.

23. Last on the issue of enlargement of time for bringing a reference, the client was obligated to demonstrate an arguable case demonstrating the probability of an error of principle that would, if the plea for enlargement is granted, require consideration by this court. This requirement is important because there are well-settled principles upon which a superior court interferes with the discretionary jurisdiction of the taxing officer under the Advocates (Remuneration) Order. The client elected not to attend the taxation. While urging the court to enlarge time, the client did not make any reference to the matters considered by the taxing officer in the impugned ruling. Neither did the client point out the precise error of principle which the taxing officer committed. It cannot therefore be said that the client has demonstrated an arguable case warranting consideration and therefore forming a proper basis for enlargement of time.

24. The totality of the foregoing is that the client has failed to satisfy the criteria upon which our courts exercise jurisdiction to enlarge time. That is the finding of this court on the second issue.

25. Having made the above findings on the first two issues, it follows that the third issue is moot.

26. In the ultimate, for the above reasons, the client's reference brought by way of chamber summons application dated 4/3/2021 is declined. The client shall bear costs of the reference.

27. I now turn to the advocate's notice of motion dated 14/1/2021. The advocate exhibited a certificate of taxation dated 8/12/2020, showing that Item 1 of the advocate bill of costs was taxed for the second time on 25/11/2020 and the total award came to Kshs 878,235, down from the Kshs 1,531,510. There was no opposition to the application. The reference which the client brought after being served with the advocate's application has been considered and has been declined. Consequently, it follows that the advocate is entitled to judgment in terms of the award in the certificate of taxation dated 8/12/2020.

28. In light of the foregoing, the advocate's notice of motion dated 14/1/2021 and the client's chamber summons application dated 4/3/2021 are disposed in the following terms:

a) The client's chamber summons dated 4/3/2021 is declined.

b) The advocate's notice of motion dated 14/1/2021 is allowed in terms of prayer 1.

c) The client shall bear costs of the two applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 25TH DAY OF OCTOBER 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Ajiki for the Client

Court Assistant: Lucy Muthoni

NOTE:

This application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.

B M EBOSO

JUDGE