



REPUBLIC OF KENYA



**KENYA LAW**  
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**Abuga t/a Mara Machineries v Spring Valley Machinery (Miscellaneous Application E146 of 2021) [2023] KEHC 718 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 718 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E146 OF 2021  
HK CHEMITEI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**SYLVIA KEMUNTO ABUGA T/A MARA MACHINERIES ..... APPLICANT**

**AND**

**SPRING VALLEY MACHINERY ..... RESPONDENT**

*(Arising from the ruling of Hon N Makua (SRM) delivered on June 29, 2021 in Nakuru CMCC No 779 of 2016.)*

**RULING**

1. The chamber summons application dated August 2, 2021 by the applicant herein prays for the following orders;
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. Spent.
  - e. The ruling of Hon N Makua (SRM) on the June 29, 2021 in Nakuru CMCC No 779 of 2016 be set aside and/or be varied.
  - f. The Honourable Court be pleased to re-assess or order for re-assessment of item numbers 6, 29, 30, 31, 32, 33, 34 and 35 on the costs of the main suit.
  - g. The Honourable Court be pleased to re-assess or order for re-assessment of item numbers 1, 2, 3, 4, 5, 6, 7, 8,9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 on the party to party costs to the applications dated September 10, 2019 and October 3, 2019.



- h. The Honourable Court be pleased to re-assess or strike out item No 10 on the bill of costs to the application dated May 9, 2019.
  - i. The honourable court be pleased to grant such orders as it considers just and proper in the circumstances.
  - j. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it as well as the affidavit of Kennedy Bosire Gichana the advocate for the applicant sworn on the even date and a supplementary affidavit sworn on May 19, 2022.
3. He deponed that on June 29, 2021, the taxing officer gave her ruling assessing the bill of costs to be Kshs 219,954. That the applicant being aggrieved filed a Notice of Objection to decision on assessment dated July 5, 2021 through her firm on record for the reasons of the said decision. He deponed further that the taxing officer had not responded to the said notice as she believed that the reasons for the taxation were within the ruling. That it was fair and just that the assessment by the taxing officer be set aside and/or varied.
4. The respondent in response to the application filed a replying affidavit sworn on September 1, 2021. She averred that on November 19, 2018, the learned magistrate, Hon N Makau (SRM) delivered a judgment in Nakuru CMC No 779 of 2016 in her favour for Kshs 270,550/= together with costs and interest thereon. That upon delivery of the said judgment, the applicant was granted a thirty (30) day stay of execution from the date of delivery of the said judgment. Upon expiry of the said thirty (30) day, the applicant, in a bid to defeat justice, filed multifarious applications which include but not limited to applications dated December 19, 2018, January 16, 2019 and May 9, 2019 respectively, which applications were all dismissed with costs to her.
5. The respondent averred further that in the event the applicant was dissatisfied with the taxed costs, she ought to have moved the court in accordance with paragraph 11 of the Advocate Remuneration Order, a legal requirement which the applicant failed to comply with. That on the strength of the trial court's directions she filed her party to party bill of costs dated May 4, 2021 and brief submissions of even date challenging the jurisdiction of the trial court to proceed and re-tax the costs, having been improperly moved by the applicant. That the said bill of costs and submissions were duly served upon the applicant through her advocate on record, email: bosiregichana@yalioo.com, on May 6, 2021.
6. However, that the applicant for reasons only within her knowledge, failed, refused and/or ignored to file her response in manner whatsoever. In view of the applicant's failure to file her submissions and/or response to her bill of costs, the same was not opposed as drawn. In any event the applicant or her advocate never served her advocate on record with his alleged submissions and she challenged her to avail any evidence to the contrary.
7. The respondent went on to aver that on the June 29, 2021, the court delivered its ruling in the presence of both counsel and her party to party bill of costs re-taxed at Kshs 676,047/=. The applicant had partially satisfied the decretal sum to the tune of Kshs 455,000/= and she was required to remit to her a total sum of Kshs 219,964.75/=. That upon delivery of the ruling, the applicant informed the trial court that she had deposited Kshs 107, 182 vide receipt No 06009. The court directed her to avail the original copy of the said receipt to enable the court make an order for the release of the money to her.
8. That on the August 10, 2021, when the matter was mentioned for the applicant to confirm whether she had availed original receipt for the deposited amount, she, through her advocates on record orally made an application for stay of execution on the ground that she had intentions of filing a reference before



this honourable court. It was then that she, through her advocate on record, orally requested for the reasons for the ruling. However, that the applicant had already served her with the instant application. That from the foregoing, it is crystal clear that the applicant herein is a very calculative and cunning litigant.

9. The respondent averred that in a bid to defeat justice by denying her the fruits of her successful litigation, the applicant had failed to demonstrate to the satisfaction of this honourable court any substantial loss and damages she would suffer should this honourable court decline to grant the orders sought. That the applicant had not approached the court of equity with clean hands and was thus undeserving of its discretion. The respondent urged the court to dismiss the applicant's application with costs in her favour and proceed to grant orders that will allow her enjoy the fruits of her successful litigation.
10. When the matter came up for directions the court directed that the same be determined by way of written submissions which both parties have complied.

### **Applicant's Submissions**

11. The applicant submitted that the taxing master erred in taxing the respondents bill of costs dated July 4, 2021 as she failed to bring her mind to bear on the question in issue and therefore arriving at the wrong position. That item 6 was awarded in the cause of the proceedings and the same was paid vide M-pesa on December 16, 2017 but the taxing officer awarded the same. Also, that for item 29 service was effected but no certificate of subsistence and actual expenses was filed to prove the same. Further that for items 30, 31, 32 and 33 no evidence was availed and therefore the taxing master should have applied the chargeable fee under schedule 7 clause 10 (ii). Additionally, that for item 34 the taxing master failed to appreciate the fact that the application for amendment was occasioned by the respondents. That the Kshs 10,000/= should have been taxed off as a whole and pursuant to the provisions of Order 8 rule 5.
12. The applicant submitted further that item 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 on party to party costs to the application dated September 10, 2019 and October 3, 2019 were not applicable yet the taxing master awarded the same. That the taxing master failed to exercise her discretion properly, computed costs on items of service using repealed law instead of applying relevant *Advocates (Remuneration) (Amendment) Order 2014*, provided for interest on a sum already paid the principal amounting to Kshs. 455,000/= as at September 2019. Further, that an interest applicable between July 31, 2018 to September 30, 2019 a period of 14 months was apparently erroneous as the computation would be have been  $270,550 \times 14/12 \times 14/100 = 44, 189.80$ . That therefore the interest of Kshs 142,038.75 was erroneous in place of a sum of Kshs 97,848.95/=.
13. In conclusion, the applicant submitted that she had satisfied the conditions upon which the taxing master decision could be set aside. She urged the court to allow the application as prayed and order for re-assessment of the respondent's costs.
14. The applicant in her further submissions submitted that the ruling delivered on June 29, 2021 was in the presence of both parties advocates. That the bill of costs dated May 4, 2021 taxed at Kshs. 219,954.75/= forced her to file a notice of objection dated July 5, 2021 to the assessment which objection was not respondent to by the taxing officer. The applicant submitted that it was not clear as of when time stated running as the tax officer did not follow the provisions of paragraph 11 of the Advocate Remuneration Order and she should therefore not be penalized.



## Respondent's Submissions

15. The respondent in her submissions raised two issues for determination namely; whether the applicant was entitled to the orders sought and who should bear the costs.
16. On the first issue, the respondent submitted that the impugned ruling was delivered on June 29, 2021 in the presence of both parties and that it was not until two months later on August 9, 2021 when the applicant without giving reasons for delay or seeking extension of time as by law required filed the instant reference. That the instant application was incompetent and must be struck out with costs. She placed reliance on the cases of *Nyakundi & Company Advocates v Kenyatta National Hospital Board* [2005] eKLR, *Twiga Motor Limited v Hon Dalmas Otieno Onyango* [2015] eKLR, *Singh Gitau Advocates v City Finance Bank Limited* [2021] eKLR and *Muri Mwaniki & Wamiti Advocates v African Banking Corporation Limited* [2020] eKLR as quoted in *Abmed Nassir v National Bank of Kenya Ltd* [2006] E.A.
17. She submitted further that on items 6,29,30, 31, 32, 33, 34 and 35 on the main suit and items 1, 2, 3, 4, 5, 6, 7, 8,9, 10, 11, 12, 13, 1, 15, 16, 17 and 18 of the application dated September 10, 2019 and October 3, 2019 the taxing officer gave sufficient reasons for the award made on the items therein. That the applicant had not in any way demonstrated her dissatisfaction with the taxing officer reasons to merit the court's interference with the discretion of the taxing officer. She placed reliance on the cases of *Mwangi Keng'ara & Co Advocates v Upward Scale Investment Company Limited & another* [2019] eKLR and *Evans Thiga Gataru Advocate v Kenya Commercial Bank Limited* [2012] eKLR.
18. Finally, the respondent submitted that the taxing officer in her ruling noted that they inadvertently omitted some items which were otherwise on record and therefore failure by them to include the said items in the bill of costs could not in any manner deter her from awarding the same. She therefore urged the court to find that the taxing officer erred in principle by failing to award the said items since she had already admitted in her ruling that the record before the court showed attendances.

## Analysis and Determination

19. I have considered the application together with the affidavits sworn in support, the replying affidavit sworn in opposition and the submissions by both parties. The respondent has taken objection to the reference arguing that the same was filed out of time without giving reasons for the delay or seeking extension of time as required by law. That consequently the same was incompetent and must therefore be struck out.
20. Paragraph 11 (1) and (2) of the *Advocates Remuneration Order* provides for the procedure to be followed when a party is dissatisfied with a decision of a taxing officer as follows: -
  - (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.
21. The ruling on the taxation was delivered on June 29, 2021 by the taxing officer. Under paragraph 11(1) of the *Advocates Remuneration Order*, the applicant ought to have given a notice in writing to the taxing officer on the items of taxation to which he objected to within fourteen days. The applicant



- in this matter filed his Notice of Objection to Taxation in the lower court on July 7, 2021 that is approximately six days after the delivery of ruling which was within the time limits under paragraph 11. The applicant thereafter filed reference in court on August 9, 2021 which is approximately one month and eleven days after the ruling was delivered.
22. From the court record there is no response filed by the Deputy Registrar giving the reasons for her decision. The court in the *Mumias Sugar Company Limited v Professor Tom Ojienda and Associates* KSM HC Misc No 279 of 2017 [2018] eKLR held that where the reasons for the taxation are contained in the ruling there was no need to seek for reasons for the decision once the ruling has been delivered. Where such reasons have been given in the ruling, it is indeed superfluous to require the taxing officer to prepare another ruling repeating the same reasons that are contained in the ruling.
  23. Further, in *Muriu Mungai & Co Advocates v New Kenya Co-Operative Creameries Ltd* Nairobi (Milimani) HCCM No 692 of 2007, Mwilu, J was of the view that:

“It is mandatory for an applicant who objects to a taxation to annex the ruling, giving reasons by the taxing master supporting the taxation...Nowhere is it provided that if there be a delay in the taxing master giving reasons for taxation then a party may file a reference. Instead, rule 11 (4) gives the court power to enlarge time if the same lapses before a step needed to be done is done or taken...Under the rules the taxing officer is required forthwith, upon receipt of the notice of objection to give reasons for the decision and where they fail to do so, the thing to do is not to file a reference to the High Court...In the court’s view, the applicant moved the court too soon. More reminders should have been sent to the taxing officer for reasons or any other legal action that would have resulted in the taxing officer giving reasons to be taken to have the reasons given. Nobody else can give those reasons but the taxing officer and it has not been shown that the taxing officer is not available. And more importantly the court cannot determine the matter in the absence of the taxing officer’s reasons for her decision in taxing the bill of costs as she did”.
  24. In the present case, the ruling on taxation was made on June 29, 2021. Therefore, in view of the above cited authorities, it is my considered view that if the applicant considered the said decision to contain the reasons, she should have filed the reference within 14 days from the date thereof. If, on the other hand, she was of the view that there were no reasons contained in the decision, she should have requested for the same in writing, in which case, she would be bound to wait for the same.
  25. If, however, at a later stage she decided to prefer the reference notwithstanding the failure by the taxing master, after the lapse of the 14 day period, she would be bound to apply for extension of time under paragraph 11(4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure by the taxing master to furnish him with the reasons which, according to the decision in the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR is a ground for allowing a reference.
  26. In addition, that a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given even if by the time of making the same reference, the said reasons have not been furnished. I therefore find that the applicant filed the reference outside the 14 days of the delivery of the decision and before being furnished with the reasons hence the reference is incompetent for being out of time and/or being prematurely instituted.
  27. In the premises, the Chamber summons dated August 2, 2021 is dismissed with costs.

**DATED SIGNED AND DELIVERED VIDE VIDEO LINK AT NAKURU THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**



**H. K. CHEMITEL.**  
**JUDGE**

