



**Titus Makhanu & Associates Advocates v Southern Shield Holdings
Limited (Miscellaneous Reference Application E141 of 2021)
[2023] KEHC 4074 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 4074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS REFERENCE APPLICATION E141 OF 2021
DO CHEPKWONY, J
MARCH 17, 2023**

BETWEEN

TITUS MAKHANU & ASSOCIATES ADVOCATES APPLICANT

AND

SOUTHERN SHIELD HOLDINGS LIMITED RESPONDENT

RULING

1. There are two applications and a Preliminary Objection before the court for determination. One is a Chamber Summons application dated 24th January, 2022 filed by the Respondent/Client and brought under Paragraph 11 of the Advocates Remuneration Order seeking the following orders: -
 - a. That this Honourable Court be pleased to set aside the decision and consequential orders of the Taxing Master, Hon. E. Tanui dated 29th November, 2021.
 - b. That the Honourable court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.
 - c. That the costs of this reference be provided for.
2. The 2nd application is by the Advocate/Applicant, and it is a Notice of Motion application dated 1st April, 2022 brought pursuant to Sections 1A,1B and 3A all of the [Civil Procedure Act](#), Section 51(2)



of the Advocates Act, Rule 7 of the Advocates Remuneration Order and Order 51 Rule 1 of the Civil Procedure Rules. The same seeks for the following orders: -

- a. That this Honourable Court be pleased to enter judgment in favour of the Applicant against the Respondent hereto for the sum of Kshs.3,801,856.50 being the costs taxed by the Taxing Master.
 - b. That the taxed costs do attract at 14% p.a from the date of filing the Bill of Costs being 22nd February, 2021 until payment in full.
 - c. That the costs of this application be provided for.
3. Directions were issued that the two applications be canvassed together by way of written submissions. The Client's Chamber Summons application will be considered first for the obvious reason that if the prayer for setting aside the award on instruction fees as sought for therein succeeds, then the Advocate's Application for adoption of the Certificate of Costs as the order of the court will fail.

Client's Chamber Summons application dated 24th January, 2022.

4. The Client's application is premised on grounds set out on its face and further supported by the affidavit of Abdulali Kurji, the Client's Director sworn on the 24th January, 2022. The Client's case is that the Taxing Master erred in finding that Advocate herein represented it throughout the mediation process whereas it was presented by M/S Makhanbu Odhiambo & Co. Advocates and the Deed of Assignment dated 3rd June, 2019 would not imply instructions. He added that the Deed of Assignment had not been paid and stamped for. That the Taxing Master erred in proceeding to tax the mediation proceedings having found that they were not separate from HCCOMM. No.249 of 2018. That the trial Magistrate erred in assessing instruction fees at Kshs.1,500,000.00 which was inordinately high and not commensurate to the work done. That the Taxing Master awarded getting up fees on claims which were undefended and lastly, that it failed to appreciate that the parties had entered into a retainer agreement upon which the Defendant was paid Kshs.1,100,000/=.

Advocate's Response

5. In opposing the Client's application, the Advocate filed a Replying Affidavit sworn by the Advocate, Mr. Titus Makhanu on 22nd June, 2022 and a Notice of Preliminary Objection dated 25th February, 2022. In the Replying Affidavit, it is averred that whereas it is true that the Client did not instruct the Firm of M/S Titus Makhanu & Associates, the Advocate herein, per se to act for it in HCCOMM. No.249 of 2018, the said firm had taken over the right and obligations of M/S Makhanu Odhiambo & Co. Advocates whom the Client herein had instructed through Deed of Assignment dated 3rd June, 2019. Consequently, the Advocate herein informed the client and continued to act for the client in the mediation proceedings. That although the Client has averred that Taxing Master held that HCCOMM. No.249 of 2018 was not separate from the Mediation cause, that did not mean the Advocate was not entitled to costs and the Taxing Master was well within her mandate and discretion to enhance the fees.
6. Lastly, the advocate has also averred that an agreement for waiver of fees has to be in writing pursuant to Section 45 of the Advocates Act just as is for retainer agreements. Thus, since no such agreements were presented, it would be misleading to urge the court to believe in such theory.
7. In the Notice of Preliminary Objection, the Advocate adduced five grounds which in summary indicate the Chamber Summons application was filed without a valid authority being issued and signed by the



Client. That the firm on record for the client proceeded without a duly executed authority and so did the deponent who swore the affidavit in support of the Chamber Summons.

8. It was further averred that the Chamber Summons application dated 24th January, 2022 was filed 22 days after the lapse of the 14 days mandatory period as required by Rule 11(2) of the [Advocates \(Remuneration\) Order](#).

Client's supplementary response

9. In response to the Notice of Preliminary Objection, the Client filed grounds of opposition dated 29th March, 2022. It is the Client's case that the reference herein is a continuation of the taxation in which the Advocate never raised the issue of authority to swear or act. The court is therefore asked to discard the Preliminary Objection as an afterthought.

Advocates Notice of Motion Application dated 1st April 2022

10. The advocate's application is premised on grounds that the Bill of Costs was taxed at Kshs.3,801,856.50 and a Certificate of Costs to that effect issued on 11th February, 2022. In the circumstances, given that the Bill of Costs has never been set aside, varied or otherwise altered by the court, the same ought to be adopted as an order of this court together with interests sought for enforcement. In the affidavit sworn in support of the application, the advocate annexed the ruling by the Taxing Master dated 18th November, 2021 and the Certificate of Taxation dated 22nd February, 2022. He also added that where a Certificate of Costs has not been set aside, the same ought to be deemed as final pursuant to Section 51 of the [Advocates Act](#). Further, the Advocate has stated that the Rule 7 of the [Advocates Remuneration Order](#) entitles advocates to charge interest at the rate of 14%.

Client's Response

11. In response to the Advocate's application, the client filed a Replying Affidavit sworn by Abdulali Kurji on 13th June, 2022. He averred that since the Client has a pending application objecting to the taxation, the advocate's application is defective, bad in law and filed prematurely.
12. Parties were thereafter directed to canvass their respective cases by filing written submissions. I have perused the record and the same reflects that the parties complied with the Advocate filing three sets of submissions dated 16th November, 2022, 4th October, 2022 and 31st October, 2022 and equally the Client filed three sets of submissions dated 4th October, 2022, 14th October, 2022 and 10th November, 2022. I have read and considered those submissions but will not reproduce the contents thereof but will consider them in the determination of the applications.

Analysis and Determination

13. Having considered the record, including pleadings filed by parties, the substantive submissions presented by the parties as well as the authorities relied on I am of the considered view that the following issues arise for determination: -
 - a. Whether the Advocate's Notice of Preliminary Objection is merited.
 - b. Whether the Client's application has met the threshold to warrant setting aside of the Taxing Master's decision
 - c. Whether the Advocate's Certificate of Costs can be adopted.



14. With regard to the Notice of Preliminary Objection, time and again, this court has reiterated that a Preliminary Objection should always be on a point of law apparent on the face of the pleadings. This implies that the facts as pleaded are correct but save for the legal barrier to the sustenance of the suit. It should not be gleaned from the pleadings. It further does not require extensive analysis of facts and circumstances and if argued at a preliminary stage, it may dispose of the suit. While I am agreeable that a Preliminary Objection can be raised at any stage in litigation, it is preferable that it be raised at the earliest opportunity lest parties be inferred to have acquiesced to the Jurisdiction and competency of the subject suit.
15. In the Notice of Preliminary Objection, the Advocate has averred that the reference herein was filed on 24th January, 2022 whereas the ruling of the Taxing Master was delivered on 29th November, 2021 which was a period of twenty-two (22) days apart. It is note-worthy that the Client did not respond to the issue of having filed the reference out of the set timelines provided under Paragraph 11 of the Advocates Remuneration Order.
16. 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: -

QUOTE

- a. 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.
- b. 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.
17. Indeed, I have considered the record which reveals that the Chamber Summons reference was actually filed on the 27th January, 2022 while the ruling of Taxing Master was delivered on the 29th November, 2021, which is roughly one month and twenty-eight therefrom. 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 was objected to within fourteen days. In this matter, the Client/Applicant filed a Notice of Objection dated 6th December, 2021 on the 14th December, 2021. From the court, I find here is no response filed by the Deputy Registrar giving the reasons for her decision. The court in the case of *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”.

18. In the case of *Ahmed Nasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd* [2006]eKLR, the court held as follows: -

“Although rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already



contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not indeed to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling --- Therefore the reference having been filed way out of the period prescribed should have been dismissed but having been given due consideration in substance the same is dismissed”.

19. In this case, I have read through the ruling of the Taxing Master dated November 29, 2021 and find it contained the reasons and therefore there was no need for the Client/Respondent to seek for the reasons for the taxation.
20. Also, worth of note is that although the notice in this present case was filed on time, the reference was filed after one month and 28th days after the delivery of the ruling and the Client/Respondent did not give any reasons for the delay. It then follows that there is no competent reference before the court, the same having been filed out of time without the leave of the court. If the Client/Respondent was dissatisfied with the ruling delivered on November 29, 2021, the reference ought to have been filed within fourteen (14) days therefrom. The reference was filed on January 27, 2022 which was clearly out of time and no application for enlargement of time was sought by the Applicant as provided under Paragraph 11 (4) of the [Advocates Remuneration Order](#).
21. Consequently, the reference by way of Chamber Summons application dated 24th January, 2022 is hereby struck out for being incompetent.
22. What remains for determination is the issue of whether Judgment should be entered as per the Certificate of Costs dated 11th February, 2022. There is no dispute that the Advocate-Client Bill of Costs was taxed and a Certificate of Costs thereto issued.
23. Section 51(2) of the [Advocates Act](#) states:-

“ the certificate of the Taxing Officer by whom any bill has
been taxed shall unless it is set aside or altered by the court, be final as to the amount of costs covered thereby and the court may make such order in relation thereto as it thinks fit, including a case where the retainer is not disputed an order that Judgment be entered for to be due with costs.”
24. Taking cue from the above provision, as long as the Certificate of Costs or the Certificate of Taxation has not been varied or set aside, the sums certified thereon are final. In the instant case, the Certificate of Costs showing the final sums was annexed and, in the circumstances, I find no reason why the Advocate should be denied Judgment as sought in the Application dated April 1, 2022.
25. As for whether or not interest is chargeable on the Bill, Rule 7 of the [Advocates Remuneration Order](#) states; -

“ An advocate may charge interest at 14% per annum on his disbursements and cost, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest it raised before the amount of the bill has been paid or tendered in full.”
26. Having found that the Advocate/Applicant is entitled to Judgment as per the Certificate of Taxation, Rule 7 of the [Advocates Remuneration Order](#) provides for payment of interest one month from the date of taxation, which in this case, is March 22, 2021.



27. I therefore proceed to enter Judgment in favour of the Advocate for Kshs.3,801,856.50 together with interest thereon at 14% per annum, calculable from March, 22, 2021. Each party shall bear its own costs for the two applications.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17TH DAY OF MARCH, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Makhanu counsel for Applicant

No appearance for and by the Respondent

Court Assistant - Sakina

