



**John Muturi Mbiyiwe t/a Bealine Kenya Auctioneers v ABSA  
Bank Kenya PLC (Miscellaneous Application E066 of 2022)  
[2023] KEHC 17408 (KLR) (Commercial and Tax) (15 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17408 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E066 OF 2022**

**PN GICHOHI, J**

**MAY 15, 2023**

**BETWEEN**

**JOHN MUTURI MBIJIWE T/A BEALINE KENYA  
AUCTIONEERS ..... AUCTIONEER**

**AND**

**ABSA BANK KENYA PLC ..... RESPONDENT**

**RULING**

1. Before the court is the application dated October 11, 2022 and filed by the firm of Muriu , Mungai & Co Advocates for the Applicant. The Applicant seeks the following orders;
  1. This Honourable court be pleased to enlarge the time within which the applicant is to file the reference challenging the ruling delivered by the Taxing Master on August 11, 2022.
  2. The reference filed herein be deemed to have been properly filed within time.
  3. This Honourable Court be pleased to vary and/or set aside the ruling delivered by the taxing officer on August 11, 2022
  4. The costs of the reference be provided for.
2. The grounds on the face of the application are that;
  1. The applicant is dissatisfied with the decision of the Taxing Master rendered on August 11, 2022 in regards to the fact that instruction fees were not awarded to the applicant.
  2. The applicant filed the notice of objection within 14 days as required by the law.



3. The applicant duly wrote to the taxing master indicating an intention to file a reference and requested for reasons for taxation vide the letter dated August 16, 2022.
  4. Under Paragraph 11(2) of the [advocates remuneration order](#), it is a requirement that after a taxing master has received an objection from any party, he/she is mandated to respond to the objector and thereafter the objector may file a reference before a judge.
  5. To date, the taxing master is yet to furnish the applicant with the reasons for taxation to enable the applicant file its reference.
  6. The delay in filing the reference is not in bad faith and is occasioned by the lack of reasons from the taxing master.
  7. It is therefore in the interest of justice that this application be allowed.
3. The application is supported by the affidavit sworn by Samuel Njuguna a legal officer with ABSA Bank formerly known as Barclays Bank. That affidavit is dated October 11, 2022 where he depones that the Auctioneer/ Respondent filed a bill of costs dated January 24, 2022 seeking Ksh 355, 171 .84. Consequently, the Applicant instructed his advocates to oppose the bill of costs and as a result, the advocates did file a Preliminary Objection to the said bill.
  4. However, upon being served with the Preliminary Objection, the Auctioneer/Respondent sought to withdraw the bill of costs and therefore the Applicant herein sought to be awarded costs of the said withdrawal. The court then directed that the issue of costs be dispensed with through submissions.
  5. The court then delivered its ruling and awarded the Applicant Ksh 9,200/= yet instructions fees under Schedule 6 paragraph 1 (b) of the [Advocates Remuneration Order](#) based on the Ksh. 355, 171. 84 sought in the bill of costs was Ksh 75,000/= and therefore, this case calls for this Court's exercise of its unfettered discretion to set aside the said ruling.
  6. The Respondent opposed the application vide a replying affidavit sworn on January 5, 2023 by John Mbijiwe. He states that the reasons for taxation are clearly gleaned from the ruling and as a matter of practice, no further reasons could possibly be expected to be given by the taxing master. He further depones that the application is an afterthought as the Applicant had not filed the reference to the Judge within the required strict timelines as required in Paragraph 11(2) of the [Advocates Remuneration Order](#).
  7. He further states that the Applicant has failed to satisfactorily explain the inordinate delay as no correspondence between the Applicant and the taxing master have been adduced to demonstrate due diligence on the part of the Applicant towards follow ups to obtain reasons for taxation.
  8. He depones the taxing master signed a typed ruling on taxation and the reasons thereof on August 11, 2022 and vailed it to the parties. As a consequence, he states that it is sheer indolence for the Applicant to file a reference two months after the said ruling.
  9. He further depones that the sole complaint by the Applicant is that instruction fees ought to have been awarded under Schedule 6 paragraph 1 (b) of the [Advocates Remuneration Order](#) , 2014. However, the Respondent depones that the taxing master has discretion to award costs, and in this case, she could not be faulted by exercising her discretion in awarding the costs for taxation at Ksh 9,200/=all inclusive . That the Applicant has failed to demonstrate that the taxing master erred in law and/or taxation principle. That the Applicant has not claimed that the taxing master failed to exercise her discretion judiciously. He therefore urges the court to dismiss the Applicant's application.



## Submissions

10. The application was canvassed by written submissions. In submissions dated January 12, 2023, the Applicant lists two issues for determination that is;
  1. Whether the Applicant should be granted extension of time to file the reference against the ruling of the taxing taxation master.
  2. Whether the ruling of August 11, 2022 should be set aside.
11. On the first issue, the Applicant relies on the Court of Appeal decision in the case of *Aviation & Allied Workers Union (K) v KQ & 3 others* [2015]eKLR and submits that the taxing master's ruling was delivered on August 11, 2022 but the delay herein was caused by non-responsiveness by the taxing master to the Notice of Objection dated August 16, 2022 requesting for reasons for taxation. While submitting that Paragraph 11 (1) (2) of the *Advocate's Remuneration Order* does not provide for factors to be considered in such an application as was set out by the Court of Appeal, he relies on the case of *George Kagima Kariuki & 2 others v George M. Gichimo & 2 other* [2014] eKLR and submits that the reason for delay and reasons for non- compliance are factors influencing the exercise of discretion by court.
12. He further submits that the Ruling by the taxing master contains Kshs 2,500/= for perusal of documents, Ksh 7,200/= for drawing notices , submissions and preliminary objection, Kshs 100/= for filing and Kshs 3,000/= for attendance but it does not contain the reasons for the decision or on how and why the decision was arrived at . That the discretion of the taxation master should not be allowed to go unexplained and hence reasons must be given. That that was the reason the Applicant filed a notice of objection and sought reasons.
13. He submits that there was a delay of 1 month 25 days and that delay alone should deny the Applicant justice as was held in the case of *Gori, Ombongi & Co Advocates v Mary Wangechi Kamara* [2022]eKLR. The Applicant there seek that time be extended for filing the reference.
14. On the second issue, the Applicant relies on the case of *Masore Nyang'au & Co Advocates & others v Supplies & services Limited* [2018] eKLR where the Court held that "...a superior court will not interfere with the discretion of the taxing officer unless it is shown that either the decision was based on an error of principle or the fee awarded was excessively high or manifestly low so as to justify an inference that it was based on an error if principle..."
15. Arguing that the Applicant was entitled to instructions fees, the Applicant submits that when the Auctioneer filed the Bill of costs, the Applicant instructed his advocates to oppose the said bill of costs and therefore, they filed a Notice of Preliminary Objection whereupon the Auctioneer withdrew the Bill of Costs.
16. On this point, the Applicant relies on the case of *Softa Bottling Company Limited & others v Nairobi City Council* 92006) eKLR where the court held that instruction fees was earned when the respondent's advocates acted on the instructions of the Respondent by filing an objection. The Applicant therefore urges the court to find that the Reference dated 14<sup>th</sup> October has merit and allow it as prayed.
17. The Auctioneer /Respondent has emphasised the contents of the affidavit and submits that the application was filed as an afterthought after the applicant failed to file a reference to a judge within the required strict timelines in accordance to paragraph 11(2) of the *advocates Remuneration order*.
18. The Respondent cites the Supreme Court's decision in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR where the Court restated principles to be



considered on application for extension of time. It submits that the Applicant had failed to explain the delay in filing the reference within the required timelines to deserve enlargement of time.

19. Further, the Respondent submits that the Applicant misapprehended the well settled principle of taxation under Schedule 6 Paragraph 1 (b) of the Advocates Remuneration Order 2014 as the said paragraph provides for instructions fees on a suit or proceedings (whether commenced by plaint , petition , originating summons or Notice of Motion and therefore none of these were before the taxing master to warrant the Applicant herein be entitled the instructions fees but rather it was a bill of cost before the taxing master.
20. The Respondent further submits that since there is no express legal provision for costs of taxation proceedings in the Advocate Remuneration Order, the taxing master exercises its discretion in awarding the costs and in this case, that discretion was exercised judiciously in awarding costs of taxation at Ksh 9, 200/=. The Respondent therefore urges the court to dismiss the Applicant's application with costs .

### **Determination**

21. I have considered the application , the affidavits and annexures therein together with the authorities cited by parties herein. To start with, prayer 2 and 3 of the Chamber Summons are superfluous. There is no draft reference filed herein to be deemed to have been properly filed within time. Further, by asking this court to vary and/or set aside the ruling delivered by the taxing officer on August 11, 2022 , the Applicant is going to the merits of the application trying to convert the Chamber Summons into a reference which cannot be done.
22. The only issue for determination here is whether the Applicant should be granted extension of time to file the reference against the ruling of the taxing master.
23. The procedure for challenging the results of taxation is provided for under Paragraph 11 of the Advocates (Remuneration) Order which states that:
  - (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.”
24. No doubt the taxing master pronounced herself in the Ruling dated August 11, 2022 and the Respondent/ Applicant filed a Notice of Objection dated August 16, 2022 under Paragraph 11 of the Advocates (Remuneration) Order 2014. That request was in no doubt timeous.
25. The Application for extension of time is however dated October 11, 2022 which is almost two months after the decision by the taxing master. As a consequence, then, it is upon the Applicant to explain the delay and demonstrate the principles set out by the Supreme case of County Executive of Kisumu ( *supra*) where at Paragraph 23 of the Ruling thus;

“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the



Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:

“the under-lying principles that a Court should consider in exercise of such discretion:

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 a 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.”
26. The Respondent/Applicant states that there was no response from the taxing master and to date they have never been given reasons. On its part the Respondent stated that the reasons were contained in the ruling and the taxing master could not be expected to give more reasons. The respondent termed the application an afterthought and stated that the applicant had failed to satisfactorily explain the inordinate delay.
27. In *Nyakundi & Company Advocates v Kenyatta National Hospital Board* [2005] eKLR the Court held that:-
- “Under Rule 11(2) of the *Advocates (Remuneration) Order* quoted above, a definite time frame for filing a reference is given. It is fourteen (14) days from the receipt of the reasons. If an Objector is delayed in making his/her reference he/she may apply for enlargement of time to make the reference under Rule 11(1) of the same Order. “
28. Further in *National Oil Corporation Ltd vs Real Energy Ltd & Another* (2016) eKLR Justice GV Odunga observed that “where reasons are contained in a decision then a party ought not to seek the same simply it was fashionable to do so.”
29. Without going into the merit of the intended reference, the impugned ruling does not seem to reflect reasons for taxation. The request for reasons was therefore proper. The argument that there were no correspondences to show that the Applicant made necessary follow ups with the taxing master that he be supplied with reasons cannot lie at this time and age in the judicial system of Kenya.
30. A party having filed a Notice of Objection containing a request for reasons under Paragraph 11 of the *Advocates Remuneration Order*, as the Applicant did in this case, is not obliged whatsoever to walk about the corridors of the Court to check if his request has been dealt with. It is mandatory under paragraph 11 (2) of the *Advocates Remuneration Order* for the taxing master to give reasons for his/her ruling on taxation upon receipt of that request.



31. If in any event the taxing master has given reasons in the ruling on taxation, and a request is made for him/her to give reasons, the taxing master should not ignore the party. Instead, he /she should timeously respond to that request indicating that the reasons for taxation are in the ruling. This will enable the requesting party to proceed with filing of his reference within the timeframe stipulated under Paragraph 11 of the Order.
32. In conclusion, it is settled law that the extension of time to file a reference is within this Court's discretion and in this case, the court is persuaded that the delay herein is not inordinate and the said delay is reasonably explained . For those reasons:
  1. Prayer 2 and 3 of the Chamber Summons dated October 11, 2022 are struck out.
  2. The Taxing master is obligated to give reasons for the taxation in the Ruling dated August 11, 2022 and should do so within 14 days of this ruling .
  3. The Applicant to file and serve the reference within 14 days from the date of receipt of receipt of the reasons.
  4. No orders as to costs.

**DATED AND DELIVERED VIRTUALLY AT KISII THIS 15<sup>TH</sup> DAY OF MAY, 2023.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Mr. Maina for Applicant

Mr. Odudo for the Respondent

Kevin Isindu Court Assistant

