



Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited (Miscellaneous Civil Application 263 of 2013) [2023] KEHC 17452 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17452 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION 263 OF 2013
MW MUIGAI, J
MAY 11, 2023
IN THE MATTER OF THE ADVOCATES ACT
(CAP 16 OF THE LAWS OF KENYA) & THE ADVOCATES
REMUNERATION ORDER, 1997 LEGAL NOTICE NO. 550
OF 11/12/1997, LEGAL NOTICE NO. 159 OF 17/11/2006
IN THE MATTER OF TAXATION**

BETWEEN

MWANGI KENG'ARA & CO. ADVOCATES ADVOCATE

AND

INVESCO ASSURANCE COMPANY LIMITED CLIENT

RULING

Chamber Summons dated 11/01/2022

1. This Ruling relates to a Chamber Summons filed on 17th January, 2022 brought under the provisions of Rule 11(2) (4) of the Advocates (Remuneration) amendment Order.
2. The applicant seeks the following orders: -
 - a. That the time for filing a reference against the ruling delivered on 9/12/2020 by the Taxing Officer be enlarged and this Chamber summons be deemed as properly filed.
 - b. That the Ruling dated 9/12/2020 be set aside in its entirety and the Advocate Client Bill of Costs dated 11/11/2013 be remitted for re-taxation under Schedule 5 part 2 before any other Taxing Officer.
 - c. That the costs of this reference be awarded to the Advocate/Applicant.



3. The application is premised on the grounds that; the Taxing Officer erred in principle and in law in holding that the applicable schedule for the taxation was Schedule 7 in total disregard on an election by the Advocate/applicant under Rule 22 (1) to proceed with taxation under Schedule 5 part 2 of the Advocates (remuneration) (amendment) order 1962; that the Ruling dated 9/12/2020 failed to tax any of the items in the Advocate/Client Bill of Costs dated 11/11/2013 and do not reflect what was allowed or disallowed; that it is in the interest of justice that the ruling of the Taxing officer dated 9/12/2020 be set aside and the Bill of Costs dated 11/11/2013 be remitted back for taxation.
4. The application is supported by the Supporting Affidavit of Mercy Nduta Mwangi, Advocate. She deposed that the applicant filed an advocate/Client Bill of costs dated 11/11/2013 on the 12/11/2013 seeking taxation of legal fees for services rendered in Machakos SRM's Court Civil Case No. 225 of 2003 – Annastasia Mwikali Kimani –vs- Kimos Transport Company Ltd & Another.
5. The Applicant filed a Notice of an election under Section 48 of the *Advocate's Act* and Rule 22(1) of the Advocates Remuneration Amendment Order to proceed with taxation under Schedule 5 part 2 simultaneously with the bill of costs on 12/11/2013.
6. The Taxing Officer delivered a ruling on 9/12/2020 where he held that Schedule 7 was the applicable scale in total disregard of the duly filed election under Rule 22(1) of the Advocates Remuneration Amendment Order.
7. That there was no legal basis for the Taxing Officer to apply Schedule 7 given that the Clients had not raised an objection on such a ground.
8. That the Applicant herein filed an objection dated 21/12/2020 under Rule 11 of the Advocates Remuneration Order which the Taxing Officer failed to respond to.
9. That on diverse dates the Applicants sent their clerk to the Court Registry but the said clerk reported back that the file was not available.
10. Due to the Court Failure to issue a response to the Objection and the fact that the Applicant was unable to access the Court file the Applicant was unable to file reference or tabulate the time for lodging the same hence now seeks leave for enlargement of the time to file this reference.

Court Proceedings

11. The Respondent though duly served vide several Affidavits of service in the Court file did not put in any response.
12. On 10/05/2022 this Court gave each party 14 days to file and exchange written submissions.

Written Submissions

13. The Applicant complied with orders of 10/05/2022 filed their submissions dated 4th July, 2022 while the Respondent failed to do so.

Applicant's Submissions

14. The Applicant based its submissions on two (2) issues as follows;
 1. Enlargement of time for filing reference.
 2. There is an error of principle in applying schedule 7 instead of schedule 5 of the Advocate's Remuneration order to the taxation.



15. On the issue of enlargement of time for filing reference it is submitted that the Applicant filed an Advocate/Client bill of costs dated 11/11/2013 on 12/11/2013 which proceeded for taxation and a ruling delivered on 9/12/2020. After the Ruling the Advocate filed an objection to the ruling dated 21/12/2020 which was 13 days after delivery of the ruling.
16. The Applicant was not able to file a reference in time due to inability to get a copy of the Ruling from the Registry. The Applicant lodged the chamber summons on 11/1/2022.
17. Rule 11(2) requires the Taxing Officer to provide reasons for the taxation once an objection to the ruling is filed. Thereafter the law provides that the reference be filed within 14 days of being furnished with the reasons.
18. Reliance is made in the case of *Wanjala Kimungui -v- Patrick W. Khaemba* [2013] eKLR the judge held as follows;

“I therefore find that the Reference herein is competent. A request for reasons to be recorded and be supplied to the objector was made on 16/8/2011 which was within 14 days are required by the law; and the Reference was filed within 14 days upon communication by the court on 19/6/2012 of the total failure of the taxing officer to give reasons for the taxation.”
19. See also the case of *Evans Gaturu, Advocate -v- Kenya Commercial Bank Limited* [2012] eKLR and *Muriu Mungai & Company Advocates and China civil Engineering Construction Corporation (k) limited* [2019] eKLR.
20. In the instant case the foundation of the chamber summons upon the Ruling dated 9/12/2020 is proper and that running of time for filing the reference be deemed to have commenced when the Ruling was issued.
21. On the issue on whether there is an error of principle in applying Schedule 7 instead of Schedule 5 of the Advocates Remuneration order to the taxation reliance is made in the case of *Thomas James Arthur -vs- Nyeri Electricity undertaking* [1961] EA 492 the Court of Appeal held on the question of interference with the taxing office’s decision as follows;-

“The principles which were applied by the judges upon review of Taxing Officer’s certificate are known... where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters with which the Taxing officers are particularly fitted to deal and the court will only intervene in exceptional cases.”
22. In the instant matter the Taxing Master erred in principle, she misinterpreted and misapplied the law as contained in schedule V part II. The Applicant herein filed a notice under Section 48 and Rule 22 (1) dated 11/11/2013 at the same time as the Advocate/Client Bill of Costs dated 11/11/2013 where the Taxing master wrote;- take notice that we are proceeding to tax the fees herein under schedule V part II of the Advocates Remuneration (Amendment) order, 1997 and 2006” therefore the Applicant herein submits that Rule 22 (1) was fully complied with and the court was therefore bound to apply the provisions of the same in the taxation of the bill of costs dated 11/11/2013.
23. reliance is made in the case of *Anthony Thuo Kanai t/a Thuo Kanai Advocates -vs- John Ngigi Ng’ang’a* [2014] eKLR and *Mwangi Keng’ara & Co. Advocates -vs- Invesco Assurance Company limited* [2018] eKLR.



24. It is further submitted that the disregard of the election by the Taxing Officer is an error in principle which led to the adoption of the wrong scale resulting in the Applicant being deprived of necessary fees for actual service that had been rendered to the Client/Respondent.
25. The learned Taxing master erred in principle, misinterpreted and misapplied the law as contained in Schedule V part II. The applicant prays that the said decision be set aside and the chamber summons dated 11/01/2022 be allowed as prayed.

Whether or not to Enlarge Time for Filing the Reference

26. The procedure guiding the objection to the decision of a taxing officer is provided for under Paragraph 11 of the Advocates Remuneration Order. The provision provides for Objection to the decision on taxation 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.
 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.
27. The principles to be considered in exercising the discretion whether or not to enlarge time are well set out by the Supreme Court in the case of *County Executive of Kisumu vs. County Government of Kisumu and 8 Others* [2017] eKLR held:-

“(23) 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’s 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.”
28. The Applicant sought enlargement of time to file Reference on the following grounds;
- a. The advocates /Client Bill of Costs was filed on 11/11/2013.
 - b. The Bill of Costs was taxed and the Ruling was delivered on 21/12/2020.
 - c. The Applicant filed Objection was filed within 13 days of the ruling within the prescribed Rule (1) of Advocates Remuneration (Amendment)Order 1962.
 - d. The Ruling was availed on 21/12/2021 and no reasons for the taxation were given.
 - e. The Applicant could not file Reference without the Ruling hence explaining the delay.
 - f. The applicant filed the instant application within 14 days of receipt of the Ruling.

Disposition

1. Enlargement of time to file the Reference under Order 50 Rule 4 CPR 2010 is granted.
2. The Reference is deemed as duly filed.
3. The Reference shall be served to the Respondent who may/shall respond
4. Skeletal written submissions shall be exchanged and filed within 14days each
5. Further mention for Directions on 11/07/2023.

**DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 11TH MAY 2023.
(VIRTUAL/ PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

