



REPUBLIC OF KENYA



**Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co. Advocates v Mburu & 2 others
(Civil Case 9 of 2014) [2023] KEHC 3850 (KLR) (Civ) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3850 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 9 OF 2014

JN MULWA, J

MAY 3, 2023

BETWEEN

**MERCY NDUTA MWANGI T/A MWANGI KENG'ARA & CO.
ADVOCATES PLAINTIFF**

AND

**JOSEPH GITAU MBURU 1ST DEFENDANT
UPWARDSCALE INVESTMENT COMPANY LIMITED 2ND DEFENDANT
LINMERX HOLDINGS LTD 3RD DEFENDANT**

RULING

1. This Ruling is in respect to a Chamber Summons application dated January 18, 2022 brought pursuant to the provisions of Paragraph 11(2) of the *Advocates Remuneration (Amendment) Order*, and Order 9 Rule 9(B) of the *Civil Procedure Rules, 2010*. The Plaintiff/Applicant seeks the following orders:-
 1. That leave be granted to the Plaintiff/Applicant to act in person in place of the firm of Gitonga Kamiti, Kairaria & Co Advocates and the Consent dated January 18, 2022 be adopted as an Order of this Honourable Court.
 2. That this Honourable Court be pleased to set aside the Ruling of the Taxing Officer dated December 21, 2021 on item no 1 (instruction fees) and item no 2 (getting up fees) and the Party and Party Bill of costs dated June 12, 2019 be remitted back for re-taxation of the said items before any other Taxing Officer with appropriate directions.
 3. That the costs of this application be awarded to the Plaintiff/Applicant.



2. The application is premised on the grounds on the supporting affidavit of Mercy Nduta Mwangi.
3. The Respondents opposed the application through Grounds of Opposition dated June 22, 2022.
4. The application was canvassed by way of written submissions which the court has given due consideration.
5. To begin with, it is noteworthy that no objection was raised regarding the Applicant opting to act in person in place of her erstwhile advocates, Gitonga Kamiti, Kairaria & Co Advocates. Indeed the Applicant has exhibited a Consent dated January 18, 2022 entered into between herself and the said advocates in that regard. This prayer arises from the fact that judgment had already been delivered in the matter herein and thus pursuant to the provisions of Order 9 Rule 9 of the Civil Procedure Act, such change cannot be effected without an order of the court. In the premises, the court finds that prayer 1 of the application is merited and is hereby granted.
6. The next issue for consideration is whether the Applicant's Reference is merited. The Applicant avers that the taxing officer misdirected herself and erred in principle and did not exercise her discretion judicially in accordance with established principles of the law. She claims the Taxing Officer failed to take into account her submissions and objections to items number 1 and 2 of the Bill of costs dated June 12, 2019. Further, that the taxing officer based her ruling on facts which had not been pleaded by either of the parties in making an unprecedented and an unjust increase of 7,936% of the prescribed instruction fees. The Respondents on their part contend inter alia that the Reference was filed out of time without leave of this Honourable Court and that it does not disclose any error of law, principle and/or fact on the part of the taxing officer.
7. Before delving into the merits of the Reference, the court finds it important to consider its competency. Paragraph 11(1) and (2) of the Advocates Remuneration Order provides as follows regarding the procedure for filing a reference:
 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.
8. In the instant case, the record reveals that the Applicant's Reference was not preceded by a Notice of Objection as required under Rule 1 above. No objection was filed by the Applicant within fourteen (14) days from December 21, 2021 when the impugned Ruling was delivered notifying the taxing officer of the specific items objected to. Rather, the Applicant simply jumped straight into filing a Reference under Rule 11(2). There are numerous decisions in which the superior courts have held that the notice of objection is not just a mere technicality but a mandatory/necessary step in challenging the decision of a taxing officer. For instance, see George Miyare t/a Miyare & Co Advocates v Evans Gor Semelangó [2019] eKLR, OJSC Power Machines Limited, Trancentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board; Kenya Electricity Generating Company Limited & another (Interested Parties) [2019] eKLR and Matiri Mburu & Chepkemboi Advocates v Occidental Insurance Company Limited [2017] eKLR. In the premises, this court finds that the Applicant's Reference is procedurally incompetent.



9. Even assuming that the Notice of Objection was not mandatory which is not the case, the Reference would still be incompetent for being filed out of time without leave of court. The Ruling was delivered on December 21, 2021 and the Reference was filed twenty-nine (29) days later on January 19, 2022. The Applicant contends that pursuant to the provisions of Order 50 Rule 4 of the [Civil Procedure Rules](#), the time for filing the Reference started to run on January 14, 2022 hence its reference was well within time. Order 50 Rule 4 provides as follows-

“Except where otherwise provided by a judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time whether under these rules or any order of the court for the amending, delivering and filing any pleading or the doing of any other Act; provided that this rule shall not apply to any application in respect of a temporary injunctions.”

10. The court disagrees with the Applicant’s arguments because taxation of costs in this court is exclusively governed by the [Advocates Act](#) and the Advocates Remuneration Order which contain explicit provisions on the procedure and timelines for challenging the decision of a taxing officer. Further, Section 3 of the [Civil Procedure Act](#) is also clear that the Rules are not meant for universal application in all matters. It stipulates thus:

“In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special form or procedure prescribed by or under any other law for the time being in force.”

11. Indeed, it suffices to reiterate that where there is a law prescribed by either a constitution or an Act of Parliament governing a procedure for the redress of any particular grievance, that procedure should be strictly followed. See [Mutanga Tea & Coffee Company Ltd Vs Shikara Limited & Another](#) [2015] eKLR. For the foregoing, the court holds that the Applicant did not properly invoke this Court’s jurisdiction to address or determine the issues raised in the Reference filed herein. The Reference is incompetent, incurably defective and a non-starter. For that reason, the court will not venture into the merits of the Reference as filed.

12. Consequently, the Applicant’s Chamber Summons dated January 19, 2022 is hereby dismissed with costs.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 3RD DAY OF MAY 2023.

JANET MULWA

JUDGE.

