



REPUBLIC OF KENYA



**Abib Associates Advocates v Carling Wood Investments Co Ltd & another (Miscellaneous Cause E049 of 2020) [2023] KEHC 21921 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21921 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CAUSE E049 OF 2020  
DO CHEPKWONY, J  
JULY 21, 2023**

**BETWEEN**

**ABIB ASSOCIATES ADVOCATES ..... ADVOCATE**

**AND**

**CARLING WOOD INVESTMENTS CO LTD ..... 1<sup>ST</sup> CLIENT**

**RIVERPOINT DEVELOPMENT LIMITED ..... 2<sup>ND</sup> CLIENT**

**RULING**

1. This Ruling is in respect to two References being the Chambers Summons Application dated 17<sup>th</sup> May, 2022 “The Client’s Reference” and the Chamber Summons Application dated 25<sup>th</sup> May, 2022 “The Advocate’s Reference”. The two References are in respect to the Ruling of the Taxing Officer delivered on 4<sup>th</sup> May, 2022 “The Ruling” which was in respect of the Bill of Costs dated 5<sup>th</sup> February, 2020.

**The Client’s Reference**

2. The Client’s Reference seeks the following orders:-
  - a. The Taxing Officer’s Ruling and reasons for taxation dated and delivered on 4<sup>th</sup> May 2022 in respect of taxation of Items 7.1 to 7.30 inclusive in the Advocate’s Bill of Costs be reviewed and set aside.
  - b. Upon setting aside the decisions of the Taxing Officer in respect to items 7.1 to 7.30 this Honourable Court be pleased to tax off in their entirety the amounts charged and or claimed by the Advocate in respect to the said items, save for Items 7.15, 7.16 and 7.19 which ought to be taxed at Kshs. 50,000/= each.



- c. Alternatively, upon setting aside the decisions of the Taxing Officer in respect to Items 7.1 to 7.30 this Honourable Court be pleased to remit the said Items 7.1 to 7.30 for re-taxation before another Taxing Officer with appropriate directions.
  - d. The costs of this application be awarded to the client.
3. The Client's Reference is supported by the grounds on the face of the application and the Supporting Affidavit of Adel Elsayed Hassan Ali sworn on 18<sup>th</sup> May, 2022.
4. The Client argues that the Taxing Officer taxed off the Bill of Costs at Kshs 7,323,240/= which was an error in principle and the same ought to be set aside or in the alternative remitted to another Taxing Officer for re-taxation.
5. The Advocate opposed the Client's Reference through Replying Affidavit of Zamzam Abib Abdi sworn on 11<sup>th</sup> November, 2022 and holds that the Client's basis of objection has not been substantiated since they have not given any lawful grounds in disputing the ruling hence the same should be dismissed.

### **The Advocates' Reference**

6. The Advocate seeks the following orders:-
  - a. Spent.
  - b. That this Honourable Court be pleased to extend the time to file this reference and that this reference be deemed to have been properly filed.
  - c. That this Honourable Court be pleased to allow the Notice of Objection by the Advocate/Applicant and to deem it to have been properly filed.
  - d. The Ruling by Hon. E. M. Nyakundi Deputy Registrar of this Honourable Court delivered on the 4<sup>th</sup> May, 2022 on the taxation of the Bill of Costs dated 5<sup>th</sup> February, 2020 be set aside and remitted back for fresh taxation as it contains to Items numbers 1, 2, 3, 4, 7.2, 7.3, 7.4, 7.10, 7.11, 7.17, 7.18, 7.21, 7.22, 7.23, 7.24, 7.27, 7.28, 7.29, 7.30, 7.31, 7.32, 7.33, 7.34, 7.35, 7.36, 7.37, 7.38, 7.39, 7.40, 7.41 and 8.
  - e. That costs of this application be provided for.
7. The Advocate's Reference is supported by the grounds on the face of the application and the Supporting Affidavit of Zamzam Abib Abdi sworn on 25<sup>th</sup> May, 2022.
8. The Advocates contend that the instructions arose from a conveyance transaction for the preparation of a Joint Venture Agreement and from it they prepared the Bill of Costs. It is the Advocates' argument that the Ruling was based on wrong principles of law and wrong scale without proper reasons being advanced as to how the disputed items were taxed. The Advocates also contend that the Taxing Officer applied the wrong scale since she referred to the conveyance instrument dated 2<sup>nd</sup> September, 2016 as a normal sale agreement which was not the case. The Advocates hold that despite stating the property was valued at Kshs 165,000,000/= pursuant to the valuation report dated 15<sup>th</sup> May, 2015, the Taxing Officer did not tax the Item No. 1 using the value but relied on her discretion at Kshs. 300,000/= which was erroneous.
9. The Advocates hold that for Items 2 and 3 they had billed it at Kshs. 30,500,000/= due to the nature of the transaction which was valued at Kshs. 2,000,000,000/= and therefore the correct scale for use was



the first scale of Schedule 1 of the *Advocates (Remuneration) Order* [ARO] and therefore the Taxing Officer erred in exercise discretion.

10. The Advocates further contend that they were unable to attend court on the day of the Ruling and only obtained a copy of the said Ruling on 19<sup>th</sup> May, 2022. And on 20<sup>th</sup> May, 2022, they filed their Notice of Objection and the Reference wherein they seek indulgence of the court in entertaining the application, and for the mistake of the Counsel not to be visited on the client.
11. The Client opposed the Advocate's Reference through Replying Affidavit of Stephen Owino, advocate sworn on 17<sup>th</sup> June, 2022. The client argues that the Advocate failed to follow up on the court ruling as he had never requested for a copy of the ruling but instead only filed the application when Client served them with its Reference. The Client argues that the ruling has offended the provisions of Rule 11 (1) of the *Advocates (Remuneration) Order* [ARO] since the Advocate did not file the necessary objection as required by the law within 14 days of the Ruling as required under Rule 11(1) of the *Advocates (Remuneration) Order* [ARO] and therefore the Advocate's reference be dismissed with costs.
12. on the directions of the court, the parties then filed their submissions in respect of their respective positions. The Applicant's submission are dated 15<sup>th</sup> March, 2021 while the Clients are dated 23<sup>rd</sup> November, 2020. The issues raised by either party will be factored in the court's determination.

### **Analysis and Determination.**

13. Having read through the parties respective references and submissions, the court finds the issue for consideration being whether the two References have merit to warrant its interference of the decision of the Taxing Officer.
14. It is trite law that the High Court does not interfere with the decision of the Taxing Officer unless such decision is based on wrong principles. This was the decision of the Court of Appeal in the case of *Peter Mutboka & Anor v Ochieng & 3 Others* (2019) eKLR, where it was stated as follows;

“It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so that High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, then the decision though discretionary may properly be interfered with”

15. It is also trite that the High Court has jurisdiction to deal with a taxation related matter as is provided for under paragraph 11 (1) (2) (3) of the *Advocates (Remuneration) order* as follows:-

“Paragraph 11 (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 this 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."
16. In this case, the Advocate has admitted that they failed to file the Notice of Objection within the requisite 14 days period. The law in this regard is that where there is a clear procedure prescribed, then that procedure must be followed. The Court of Appeal in the decision in *Speaker of the National Assembly v James Njenga Karume*, Court of Appeal at Nairobi Civil Application No. 92 of 1992 (1992) eKLR, held that: -
- “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.”
17. The wording of Rule 11 of the *Advocates (Remuneration) Order* [ARO] on the timeline of 14 days is in discretionary terms which then gives the court the discretion to enlarge the time. This was the position in the case of *Republic v. Kenyatta University & Another Ex parte Wellington Kibato Wamburu* (2018) eKLR where the court ruled that;
- “23...This Court has a discretion to grant an extension of time for filing a reference, provided there are: - (a) good and substantial reasons for the failure to file the reference within the prescribed period, and (b) there are grounds in the application which, prima facie, show good cause why the applicant should be heard.”
18. Looking at the record, in the instant case, it is evident that when the matter was coming up for Ruling on 4<sup>th</sup> May, 2022, the Client issued the Advocates with a Ruling Notice which has been duly stamped by the said firm and therefore the Advocates cannot state that it was not aware of when the Ruling was delivered. The Ruling was delivered on 4<sup>th</sup> May 2022 and the Notice of Objection is dated 20<sup>th</sup> May, 2022 and the Reference itself dated 25<sup>th</sup> May, 2022, which was out of the statutory timeline of fourteen (14) days.
19. The court is alive to the position taken by the courts that mistakes occasioned by Counsel do happen but the said mistakes should not befall their clients. The court in the case of *Lucy Bosire v. Kehancha Dv. Land Dispute Tribunal & 2 others* (2013) eKLR held that: -
- “It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognised that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits.”
20. However, before an extension of time is granted, a party is required to give a satisfactory explanation for the delay as was held in the case of *George Kagima Kariuki & 2 Others v George M. Gichimu & 2 Others* [2014] eKLR that: -
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”



21. In the instant case, this court has read through the affidavit in support of the Advocates reference and finds that the reason why they were unable to attend court during the delivery of the Ruling or even why they took so long to obtain a copy of the said Ruling has not been advanced. Therefore, there being no valid reasons as to why the Advocates failed to lodge their Notice of Objection and Reference within the stipulated period/time this court finds that the Advocate's Reference dated 25<sup>th</sup> May, 2022 is without merit.
22. As for the Client's Reference, this court has also considered the affidavit sworn by Adel Elsayed Hassan Ali and submissions and agrees with the advocate that the Client has not given any reason or substantiated why it is disputing the Ruling of the Taxing Officer. All it states is that it has errors in principle, which is not enough. The court in the case of *First American Bank Ltd v Shab & another* [2002] 1 EA 64, held that:-
- “ This court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors...
23. The burden is thus upon the Client to show why it disputes the contents of the ruling but not to generally dispute it. As is the case herein. Equally, this court finds that the Client's Reference dated 17<sup>th</sup> May, 2022 lacks merit.
24. In the upshot, this court having found the two applications lacking in merit, the following orders issue:-
- a. The Chamber Summons Application dated 17<sup>th</sup> May, 2022 is hereby dismissed with no orders as to costs.
  - b. The Chambers Summons Application dated 25<sup>th</sup> May, 2022 is hereby dismissed with no orders as to costs.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF JULY, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

**Mr. Osodo counsel for the Client/Respondent**

**M/S Lichana holding brief for Mr. Wangila for Applicant**

**Court Assistant - Martin**

