



**Midenga & Co Advocates v Gilani (Miscellaneous Application
E014 of 2022) [2023] KEHC 21794 (KLR) (Family) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21794 (KLR)

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

MISCELLANEOUS APPLICATION E014 OF 2022

PM NYAUNDI, J

JULY 21, 2023

BETWEEN

MIDENGA & CO ADVOCATES APPLICANT

AND

EL ABEID HASSANALI GILANI RESPONDENT

RULING

1. By Notice of Motion dated May 4, 2023 and presented under Section 51 (1) and (2) of the *Advocates Act*, order 51 rule 4, 10 and 13 (2) of the *Civil Procedure Rules* the Applicant, Midenga & Co Advocates seeks the following orders, that: -
 1. Judgment be entered for the Applicant against the Respondent for the sum of Kenya Shillings Three Million Five Hundred and Eighty Thousand Three Hundred and Fourty Three and Seventy Cents (Kshs 3,588,343.70) Only as appears in the Certificate of Costs dated 25th February 2023 with interest at 18 % per annum from the date of taxation until payment in full.
 2. The Respondent be condemned to pay costs of this application.
2. The Respondent filed Notice of Preliminary Objection dated 12th July 2023 in which he prays that the Notice of Motion be struck out with costs on the following grounds;
 1. That the Application is filed contrary to Section 51(2) of the *Advocates Act* as read with rule 11 (1) and (2) of the *Advocates Remuneration Order* as the retainer is disputed by virtue of filing a Notice of Objection dated 23rd February 2023.
 2. That the application is thus fatally defective and an abuse of Court process.
3. The matter proceeded by way of Oral Submissions on 17th July 2023 on the virtual platform.



4. I will proceed to determine whether the Preliminary Objection as presented is valid before delving into the merits of the Notice of Motion.

5. The principles that guide Courts in determining the merits of a preliminary objection are well articulated in the celebrated decision of *Mukisa Biscuit Manufacturing Co. Ltd vs Westend Distributors Ltd*[1969] EA 696 where at page 700 paragraphs D-F Law JA (as he then was) had this to say:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

6. And at page701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion

7. In the instant case the Respondent argues that the Notice of Motion as presented is premature as he has filed a Notice of Objection and is awaiting reasons and that therefore in the circumstances having regard to the provisions of section 51 (2) of the *Advocates Act* as read with rule 11 (1) and (2) the Court cannot enter judgment as the retainer is contested.

8. I find that the Preliminary Objection as presented meets the criteria as it raises a pure point of law.

9. It is not contested that the Respondent has filed a Notice of Objection pursuant to rule 11(1) of the Advocates Remuneration order.

10. It is the submission of the Respondent that time for filing the reference begins to run after the Deputy Registrar has provided the reasons.

11. The Applicant vehemently opposed the Preliminary Objection and contends that the taxing officer having rendered a 9-page ruling, the Objector cannot expect separate reasons.

12. Rule 11 (1) provides

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. (Emphasis Supplied)

13. It is clear that to meet the requirements of rule 11(1) the Objector is required to state in writing to the taxing officer of the items to which he objects.

14. The Notice of Objection dated 23rd February 2023 filed by the Objector reads: -

Notice of Objection

(Under Rule 11(2) of the Advocates (Remuneration) Order)

Take Noticethat the Client/ Respondent objects to the decision of the taxing officer delivered on 17TH February 2023 in so far as the same relates to taxation of the entire



Advocate/ Applicant Advocate- Client Bill of Costs dated 7th February, 2022. The Taxing officer is therefore requested to record and forward the reasons for her decision.

Dated at Nairobi this 23rd day of February 2023

Mola Kimosop & Njeru

Advocates for the Client/ Respondent

15. The Respondent contends that he has taken no further action after filing the Notice of Objection as he was awaiting the reasons to be furnished by the Taxing officer. The Respondent contends that the Applicant is guilty of delay and that he was right to move the Court.
16. I agree with the Applicant that the Decision of the taxing officer was reasoned and it would therefore be foolhardy to ask the Taxing officer to again write a ruling giving reasons especially as in the instant case where the Respondent does not provide the items to which he objects.
17. On this point I am in agreement with the Honourable Odunga J (as he then was) in *Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited* [2012] eKLR where he stated

From the foregoing it is clear that the reasons for the decision are to be sought for by way of a notice within 14 days of the decision and the reference is to be lodged within 14 days of the receipt of the reasons.

That brings us to the question of what happens, as the client alleges in this case, where no reasons are given. First, and foremost, the above provisions presuppose that in delivering their decisions on taxation, the taxing officers only pronounce the results of the taxation without the reasons behind them. In most cases, the court is aware that, taxing officers, in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons, thereafter. In such circumstances it would be foolhardy to expect the taxing officer to redraft another “ruling” containing the reasons. In my view, this is another provision that requires to be looked into afresh. I do not see the reason why the taxing officer cannot be at the time of making his decision to do so together with the reasons therefor.

However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons

18. The Judge cited with approval the decision of the Court of Appeal in *Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board* Civil Appeal No. 220 of 2002 [2005] 1KLR 528 where the Court held

‘...If a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.’

19. Having found that the Respondent ought to have proceeded to file a reference notwithstanding the failure by the Taxing Officer to file reasons, I dismiss the Preliminary Objection.



20. On the Notice of Motion dated 4th May 2023, the same is presented under Section 51 (2) of the Advocates Act which provides-

“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 the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs”.

21. In his Replying Affidavit the Respondents bone of contention is that the Notice of motion is premature as he has filed a Notice of Objection. I have already pronounced myself on the Notice of Objection and found that it did not absolve the Respondent from filing a reference.

22. In Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] Cherere J, stated,

[9.] It is trite that a challenge or objection to a decision of the Taxing Master from a Taxation under the Advocates Act to the High Court should be by way of a Reference.

[10.] The foregoing position was endorsed by the Court of Appeal in Otieno Ragot & Company Advocates vs. Kenya Airports Authority [2015] eKLR when it stated,

“Ringera, J (as he then was) in the Matter of Winding Up of Leisure Lodges Limited, Winding Up Cause No. 28 of 1996 expressed the opinion, correctly in our view, that a party aggrieved by a decision of a taxing officer “whether it be on the quantum awarded on the bill as a whole or any items thereof or on the validity of the bill as a whole or any items thereof” has recourse to the High Court by way of reference under Paragraph 11 of the Advocates (Remuneration) Order and that that Order is a complete code”.

[11.] To date, the Respondent has not filed a reference and I entirely agree with the Applicant’s counsel that the procedure of challenging the certificate of costs, at this stage, by way of a replying affidavit is unknown to law.

23. The Advocate- Client Bill of Costs was taxed at Kshs 3,588,343.70 and a certificate of taxation dated 25th February 2023 issued for the sum. Rule 7 of the Advocates Remuneration order provides-

“An advocate may charge interest at 14% per annum on his disbursements and costs, 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 is raised before the amount of the bill has been paid or tendered in full.”

24. In the absence of an indication from the Applicants on when it was that the client was served with the Bill, I will tag the date of the Notice of Preliminary Objection. Since the Respondent is entitled to a 30 day of stay the effective date for purposes of computing interest will be 23rd March 2023

25. In light of the foregoing it is ordered that-



- i. Judgment is entered for the Advocate in the sum of Kenya Shillings Three Million Five Hundred and Eighty Thousand Three Hundred and Fourty Three and Seventy Cents (Kshs 3,588,343.70) Only
- ii. Interest shall be paid at 14% from 23rd March 2023 till payment in full
- iii. The Applicant will have the costs of this Application

23. It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 21ST DAY OF JULY, 2023.

P M NYAUNDI

HIGH COURT JUDGE

