



**Kihara Ndiba & Company Advocates v Estate of Eliud Njoroge Kuria (Deceased) (Miscellaneous Civil Application 190 of 2014) [2023] KEHC 24431 (KLR) (Family) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24431 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**FAMILY**  
**MISCELLANEOUS CIVIL APPLICATION 190 OF 2014**  
**EKO OGOLA, J**  
**SEPTEMBER 21, 2023**  
**IN THE MATTER OF THE ADVOCATES ACT CAP 16 OF THE LAWS OF KENYA**  
**IN THE MATTER OF THE ADVOCATES (REMUNERATION) ORDER 2009 (SCHEDULE 10)**  
**IN THE MATTER OF RULING OF DEPUTY REGISTRAR DATED**  
**2/7/2015 AND 8/7/2022 ADVOCATE/CLIENT BILL OF COSTS**  
**(ARISING OUT OF SUCCESSION CAUSE NO. 2423 OF 2010**  
**(MILIMANI)**  
**AND IN THE MATTER OF TAXATION OF COSTS**

**BETWEEN**  
**KIHARA NDIBA & COMPANY ADVOCATES ..... ADVOCATE**  
**AND**  
**ESTATE OF ELIUD NJOROGE KURIA (DECEASED) ..... CLIENT**

**RULING**

1. Before this court for determination is the Chamber Summons application *vide* Certificate of Urgency dated 13<sup>th</sup> July, 2022 brought by the advocate/applicant seeking for Orders: -
  1. That the court be pleased to review the Taxing Master's award of and July, 2015 and 8th July, 2022 respectively and in particular- instructions fees in item 1 of the Bill of Costs dated 19th January 2015 to the above



And or alternatively without prejudice to the above review the Rulings of Hon V. Kiptoon dated 2/7/2015 and subsequent Ruling of Hon G. Sitati dated 8th July 2022

2. That pursuant to the Ruling delivered on 2/7/2015 by Hon. V Kiptoon Deputy Registrar a certificate of Costs for unpaid balance in the sum of Kshs. 451,250/- be issued to the applicant
3. That costs be provided
2. The application is premised upon the provisions of the *Advocates' Act* and Rules 2, 11(1) and (2) of the *Advocates' Remuneration Order* 2009, the application is based on the grounds on the face of it and supported by the Affidavit of Samuel Kihara Ndiba advocate.
3. The applicant's case is that his firm Kihara Ndiba & n Company Advocates was instructed by Peter Kuria to act on behalf of the estate of the late Eliud Njoroge Kuria. The applicant petitioned for grant of letters of the administration and four administrators including Peter Kuria, and were appointed.
4. According to the applicant, in the year 2014 the administrators disagreed and three of them Benard Njoroge, Simon Muhia, Phylis Wangari appointed another advocate leaving the applicant to represent Peter Kuria and other beneficiaries.
5. The applicant deposes that he filed Advocate/Client Bill of costs which was taxed by Hon. V Kiptoon on 2/7/2015 at Kshs. 902,500/- awarded but the applicant was awarded half of the amount Kshs. 451,250/= as instructions fees since the matter had not been completed.
6. The applicant states that his firm and firm of Shem Kebongo & Co Advocates continued to act jointly on behalf of the estate and eventually drew distribution of the estate to the beneficiaries which was concluded by the Judgment of 24th April, 2019.
7. The applicant states that he moved the court for directions on hon the certificate of taxation would proceed and the applicant was directed to seek leave to file substantive application. The applicant filed an application dated 28th September, 2021.
8. The applicant deposes that when Hon G. Sitati was determining the application she acknowledged the findings of Hon. V. Kiptoon as per the value of the subject matter of 120,000,000/- the instruction fees was Kshs. 902,500/= pursuant to the *Remuneration Order* 2009 but failed to issue a certificate of costs.
9. The applicant prays this court to review the two rulings and certificate of costs issued commensurate with instructions justifiable payable to an advocate pursuant to *Remuneration Order* 2009.
10. The client/respondent in opposing the application filed a Preliminary Objection dated 13th October, 2022 for the following reasons: -
  1. The advocate/applicant's chamber summons dated 13th July, 2022 are time barred and therefore this Honorable court should not entertain them
  2. The said application challenges a bill of costs ruling delivered on and July 2015 by Hon. V. Kiptoon
  3. The said application is brought under the *Advocates Act* and the Advocates' Remuneration Order Rules 2, 11(1) and (2)
  4. The *Advocates' Remuneration Order* Rule 11 provides;



- i) 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
  - ii) The taxing officer shall forthwith record and forward to 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 parties concerned, setting out the grounds of objection..."
5. The said application which has been brought to court as a reference was filed this year (2022) challenging a ruling delivered in the year 2015 and therefore contravenes the above said provisions of the law.
6. The said application is also bad in law since in prayer one (1) and two (2) it seeks to review rulings delivered by taxing masters
7. Order 45 of the [Civil Procedure](#) provides as follows: -
  1.
    - 1) any person considering himself aggrieved-
      - a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
      - (b) By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
8. It is therefore clear that an application for review should be made to the court that passed the order, decree or judgment being challenged and the advocate/applicant herein has definitely contravened the above stated provisions of the [Civil Procedure Rules](#) by seeking review in this honourable court
9. This honourable court should therefore dismiss the said application with costs
11. The matter was canvassed by way of written submissions. The Applicant's submissions are dated 1st November 2022 whilst the Client/respondent's submissions are dated 3rd January, 2023.

### **Determination**

12. I have considered the pleadings and submissions before the court and the issues arising for determination are whether the preliminary Objection has merit and whether rulings on taxation should be reviewed by this court.
13. The client/respondent has raised an objection that the application seeking review of the taxing masters' decisions of and July 2015 and 8th July, 2022 is time barred by the provisions of the [Advocates Act](#) and [Remuneration Order](#).



14. The Court of Appeal in *Nitin Properties Ltd v. Singh Kalsi & another* [1995] eKLR also captured the legal principle when it stated as follows:

“A Preliminary Objection raises a pure point of law, which is argued 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.”

15. In *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* (1969) EA 696, the court of appeal held as follows: -

Law, JA.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.”

Newbold, P.:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

16. An objection must raise a pure point of law. The Client/ respondent has relied on the provisions of the *Advocates Remuneration Order* Rule 11 (1) and (2) which give a party 14 days to object to a tax master's decision. The respondent argues that the advocate/applicant did not file any objection within the 14 days as required.

17. The Advocate/applicant argues that the amount that was awarded to him by Hon V. Kiptoon was half of the instruction's fees since by the time the bill was being taxed, the matter was yet to be completed.

18. When the bill was first taxed on and July, 2015, the applicant/advocate did not file any objection to the taxation. When the matter was concluded, the applicant sought leave to file an application, the leave was granted. The applicant through an application dated 28<sup>th</sup> September, 2021 sought for the following: -

- i. That a certificate of taxation be issued on the ruling delivered on 2/7/2015 by Hon. V. Kiptoon
- ii. That judgment be entered for the applicant against the Respondent for the unpaid balance in the sum of Kshs. 451,250 together with interest at 14% from 24/4/2019 when succession cause No. 2423 was finalized.”

19. From the wording of the prayers in that application, the advocate/applicant was not raising an objection, he was asking for a certificate of taxation to be issued. The applicant was also seeking to be paid the other half of instruction fees since when Hon. V Kiptoon delivered his, the succession was halfway through.



20. The applicant is now seeking that this court reviews the tax master's award specifically the issue of instruction fees. This is an objection to the taxation and such an objection ought to be filed within 14 days after the tax master's decision.
21. The applicant has submitted that an advocate is entitled to the whole amount of instructions whether the relationship between the advocate and the client is severed or not or whether the matter is completed or not. This means that the applicant knew this from the beginning and did not lodge the Objection against the Tax master's decision.
22. The applicant waited for the matter to come to an end so that he could ask for the other half of the instruction fees but the ruling by Hon V. Kiptoon was delivered with regard to the bill of costs filed before the matter was concluded.
23. If instruction fees should be paid in full as per the argument of the applicant, he ought to have lodged an objection within 14 days after the ruling was delivered in 2015. The applicant is now time barred to lodge any objection after eight (8) years.
24. The Client/Applicant's argument is also that the Advocate/Applicant is seeking for review of orders by Hon. V Kiptoon and Hon. G. Sitati. The respondent's argument is that a review should be done by the court that has given the orders; that the applicant should have filed an appeal to this court instead of review.
25. Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review. Order 45 rule 1 (b) states that an order for review is to be made to the court that made the order, without unreasonable delay.
26. The applicant is seeking review from this court yet the orders were granted by the lower court. The applicant did not seek review of the Orders of Hon. V. Kiptoon and therefore Hon. G Sitati in her ruling stated that an award of Kshs.451,250 would be tantamount to review of Hon. Kiptoon's orders. Hon G. Sitati could not entertain the attempt to review since it was not directly pleaded for in the said application.
27. The advocate/applicant order seeking review of orders of the subordinate court in this court cannot be granted. The applicant should have either filed a review in the lower court or file an appeal in this court.
28. I therefore find that the preliminary objection dated 13th October, 2023 has merit as it has raised pure points of law and it is sufficient to dispose off the advocate/ applicant's chamber summons application dated 13th July, 2022.
29. The chamber Summons application dated 13th July, 2022 is hereby dismissed.
30. Costs shall be in the cause.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023**

.....

**E.K. OGOLA**

**JUDGE**

**Ruling read and delivered in chambers online in the presence of:**

Mr. Kihara for the Advocate/Applicant



Mr. Mbuthia for the Client/Respondent

Ms. Gisiele M Court Assistant

