



Migos Ogamba & Co. Advocates v CMC Motors Group Limited (Application E101 of 2022) [2023] KEHC 23328 (KLR) (Judicial Review) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E101 OF 2022
J NGAAH, J
OCTOBER 13, 2023**

BETWEEN

MIGOS OGAMBA & CO. ADVOCATES APPLICANT

AND

CMC MOTORS GROUP LIMITED RESPONDENT

RULING

1. Before court is an application by the respondent dated 29 May 2023 expressed to be filed under paragraph 11(1), (2) and (4) of the [Advocates \(Remuneration\) Order](#).
2. The prayers sought have been framed as follows:
 1. This application be certified urgent and be heard *ex-parte* in the first instance.
 2. There be stay of execution of the taxed costs arising out of the ruling of 30th March 2023 pending the inter- partes hearing and determination of this application.
 2. The time within which the respondent should object to the decision of the taxing officer of this court made on 30th March 2023 be extended and the objection dated 26th May 2023 be deemed to have been made within time.
 3. The time within which the respondent should file a reference against the decision of the taxing officer of this court made on 30th March 2023 be extended and the reference filed herein be deemed to have been filed within time.
 4. The decision of the taxing officer made on 30th March 2023 on the applicant's Bill of Costs dated 4th August 2021 be set aside.



5. This court be pleased to assess/tax the costs lawfully payable to the applicant on the said Bill of Costs.
6. In the alternative, the Bill of Costs dated 4th August 2023 be taxed afresh by a different taxing officer other than Hon. Christine Asuna Okello.
7. The costs of this application be in cause”
2. The application is based on the affidavit of Susan Mwangi sworn on 29 May 2023. Jacktone Ng’edi and Peter Ayoma who are employees in the firm of advocates representing the applicant have also sworn affidavits in support of the application.
3. According to the applicant, which I will hereinafter refer to as “CMC”, the respondent filed an advocate/client bill of costs dated 4 August 2023. The ruling on the bill costs was scheduled to be delivered on 30 March 2023 but on the material date the taxing officer informed the parties that the ruling would be sent to parties by email.
4. However, the ruling was not sent to parties as promised as a result of which CMC’s employees made several follow-ups with the court seeking to obtain a copy of the ruling. In particular, Peter Ayoma, a process server who, as noted is an employee in CMC’s firm of advocates, swore that on 18 April 2023, he went to the registry and spoke to one of the court assistants in the judicial review division whom he identified as Beja. Beja informed him that the court file was not readily available and, therefore, it was not possible to obtain the ruling on that particular day.
5. He went back to the registry on 27 April 2023. On this particular day, he spoke to one David at the registry. David asked him to seek assistance from the court clerk, apparently attached to the taxing officer. However, the court clerk was not available.
6. He again went to the registry on 4 May 2023 and this time round, he found the court clerk who told him that he was going to look for the court file and sent the ruling by email. Ayoma left him with his email address which he has indicated in his affidavit to be litigation.kenya@dentons.com. But the ruling was not sent and so he asked his colleague, Jactone Ng’edi to follow up the matter.
7. Jacktone Ng’edi swore that he visited the court registry on 19 May 2023. The court file was not traced on that day. It was also not traced on 24 May 2023 when he went back to the registry for the ruling. It is only on 25 May 2023 he was given a copy of the ruling.
8. Ms. Mwangi has sworn that, by this date, the time within which CMC ought to have objected to the decision of the taxing officer and filed a reference had lapsed.
9. One of the reasons why CMC would want to refer the taxation to the judge is that although taxing officer indicated in her ruling that the bill of costs was unopposed and that CMC did not file its submissions, CMC had in fact filed its submissions on 31 January 2023.
10. Thus, it is urged that the taxing officer did not exercise her discretion properly as she failed to consider relevant factors and that had she considered them, she would not have justified an increase of the instruction fees awarded to the applicant.
11. Apart from failing to consider CMC’s submissions in which CMC had, inter alia, submitted that the nature of the case was not that complex as to award the amount which the taxing officer awarded there were no novel questions of law that were raised in the initial matter as the only issue was the procedure followed by the procuring entity in terminating the tender.



12. CMC has, therefore, urged that unless the court intervenes, the applicant is likely to obtain a certificate of taxation and commence execution against the respondent.
13. Mr Edwin Wangwe Waudu, the learned counsel for the respondent, swore a replying affidavit on behalf of the respondent opposing the application.
14. As far as the prayer for stay of execution is concerned, counsel stated that CMC has not demonstrated that it has satisfied the conditions set out under order 42 rule 6 (1) and (2) of the [Civil Procedure Rules](#). Again, CMC has not demonstrated that it is bound to suffer substantial loss if execution proceeds and neither has it provided any security in the event that its application fails.
15. On the question of extension of time, counsel has stated that the court must be satisfied that the applicant has given a good cause for the delay in filing the reference. According to counsel, no explanation has been given for the delay.
16. The ruling, it has been urged, was delivered and sent to the parties on 30 March 2023 and no reason has been given why the CMC's counsel took 56 days to obtain a physical copy of the ruling. The learned counsel for CMC has further deposed that there is no evidence that CMC's legal representatives visited the court registry as alleged.
17. But even if it was to be assumed that the CMC obtained the ruling on 25 May 2023 it has not been explained why it took another five days to file the present application.
18. As far as the exercise of discretion by the taxing officer is concerned, counsel has urged that there is no basis upon which to interfere with that discretion. The mere fact that the taxing master indicated in her ruling that no submissions had been filed is not, by itself, a sufficient reason to impute improper conduct on the part of the taxing master.
19. I have considered submissions by counsel and the answer to the dispute may very well be found on the court record.
20. The record shows that the ruling on the taxation of the bill of costs was set for 9 March 2023. There is, however, a notice to the public on the cause list for the week of 6 March 2023 to 10 March 2023 to the effect that Hon. Asuna Okello, who taxed the bill in question, was not sitting from 7 March 2023 to 10 March 2023. Matters scheduled before the taxing officer during that period were rescheduled to other dates. As far as the ruling on the bill of costs is concerned, the notice indicated that it had been deferred to 30 March 2023.
21. The proceedings in court on 30 March 2023 show that the ruling was delivered on a virtual platform on the material date. Mr. Kagoya is recorded to have appeared for the respondent. There was no appearance for CMC. There is a handwritten note on the cause list of that particular day indicating that the ruling was to be sent to parties by way of email.
22. Mr. Waudu has confirmed that his firm received the ruling by email on this particular date. A copy of the email from the judicial review division exhibited on Mr. Waudu's affidavit shows that the ruling was sent to litigation.kenya@denton.com and justice@migosogamba.com which, apparently, are the email addresses for the applicant's counsel and the respondent's counsel respectively.
23. Mr. Ocheing indicated the ruling could not have reached his firm because there was an omission of one letter from his firm's email address. Instead of addressing the email to litigation.kenya@dentons.com the email was directed to litigation.kenya@denton.com. Letter "s" on the word 'dentons' was missing.



24. There should not be any dispute that if an email is sent to an email address wrongly spelt, it will not reach its intended addressee.
25. Apart from the visits which CMCs employees allege they made to the registry in pursuit of the hard copy ruling, there is evidence that on 14 April 2023 CMCs advocates filed in court a letter addressed to the deputy registrar enquiring about the ruling which was to be sent to them on 30 March 2023. The letter reads in part:
- “We refer to the directions given by the court on 30th March 2023.
- The ruling on the bill of costs filed by the advocate was to be shared by email. We are yet to receive a copy of the ruling.
- Please let us have it.”
26. There are two other emails respectively dated 19 April 2023 and 20 April 2023 addressed to the deputy registrar enquiring about the ruling. The email address through which they were sent is indicated as litigation.kenya@dentons.com. There is no evidence that neither these emails nor the letter addressed to the deputy registrar were responded to.
27. This combination of facts points to the conclusion that the ruling was not sent to CMC’s advocates as promised and their employees had to visit the registry on several occasions before they eventually obtained a hard copy of that ruling. And when they got it, they were out of time either to file an objection or a reference to this court. I am satisfied with the factual basis upon which CMCs application is mounted.
28. As far as the law is concerned, paragraph 11(4) of the *Advocates Remuneration Order* provides a window for extension of time. It reads as follows:
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) of 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 sought time may have already expired.
29. Paragraph 11(1) to which reference has been made provides room for a party who is dissatisfied with the decision of a taxing officer to object to that decision. The objection must specify the particular items to which an aggrieved party objects and where such an objection has to be taken, it must be done within 14 days of the date of the taxing officer’s decision. This paragraph reads as follows:
1. should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of the taxation to which he objects.
30. Paragraph 11(2), on the other hand, enjoins the taxing officer to respond to the objection and, in his response, give reasons why and how he came to tax the disputed items the way he did. Once he receives the reasons, the objector will have 14 days within which to file a reference to a judge in chambers. This subparagraph reads as follows:
- (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 14 days from the receipt of the reasons apply to a judge by a chamber summons which shall be served on all the parties concerned setting out the grounds of his objection.



31. The ruling in the case at hand contained the reasons for taxation. As a matter of fact, it is captioned “ruling and reasons for taxation on the applicant’s party and party bill of costs dated 4th August 2022”. Reference to party and party bill of costs appears to be erroneous as the bill was an advocate –client bill of costs. But the point is, whatever bill it was, reasons were given in the ruling.
32. I note that one of the prayers sought by CMC is for enlargement of time to file an objection under paragraph 11(1) of the Advocates Remuneration Order. Would the objection be necessary where reasons for taxation have been given?
33. My humble view on this question has always been that what emerges from paragraph 11(1) and (2) is that there is nothing untoward when a taxing officer taxes a bill without giving any reasons on why and how he taxed the entire bill or any items thereof in the manner he did. He may, for instance, say “the amount taxed off on item 1 is such amount” without saying anything further. It is in such a case that a party who is aggrieved by the taxation will file an objection against the taxation and thereby enjoin the taxing master to go further and give his reasons for taxation.
34. It is also apparent from these two subparagraphs that the grounds upon which a reference can be mounted would, ordinarily, arise from the reasons proffered by the taxing master for his decision. Dissatisfaction with the taxation per se is not necessarily a ground to file a reference. It is after reasons for taxation have been given that an aggrieved party may found a cause for the reference.
35. What this implies is that it is possible that a party may not be satisfied with the taxation of any particular item or items in the bill of costs. But his doubts on the validity of the taxation may be removed after the taxing master has explained himself and given reasons for taxing the disputed items in which event it will not be necessary to proceed any further and file a reference or chamber summons challenging the decision of the taxing master. He will only take this step if he is not satisfied with the explanation or the reasons given by the taxing master.
36. It follows that where reasons for taxation of the bill or any particular items are given in the decision of the taxing master, the objection serves no other purpose than, perhaps, informing the taxing master that a party to proceedings before him is dissatisfied with his taxation. But such information may not serve any useful purpose since the taxing master is not required to take any further action on an objection that may be served upon him after he has already given reasons for his decision. Lodging of the notice of objection, in these circumstances, would be superfluous, to say the least.
37. Nonetheless, if for whatever it is worth, the applicant feels bound to serve the objection in compliance with paragraph 11(2), nothing stops him from doing so. However, it would be irrational on his part for him to sit pretty, after service of the objection, waiting for the taxing master to respond to the objection and give reasons that have otherwise been given in the taxing master’s decision. The clock for filing the reference starts ticking the moment the applicant receives the reasons.
38. A reference would not be rendered incompetent merely because it is not preceded by an objection even in a case where the taxing master has given reasons in the initial decision on the taxation in issue.
39. The reasons are necessary, in part, to challenge the taxation and where they have been given, nothing stands in the way of an aggrieved party to mount a challenge against the decision of the taxing master. In which event, I have to repeat, time starts running the moment the reasons are received irrespective of whether they are given in the initial taxation decision or after an objection to the taxation has been lodged.
40. In conclusion on this question, I would say that extension of time to lodge an objection where reasons have been given is in my humble view, an exercise in futility.



41. For the reasons I have given, there is a justification for enlargement of time to enable the applicant to refer the decision of the taxing officer to this court for interrogation. I am satisfied with the explanation given for the delay in filing the reference.
42. Except for the prayer of stay of execution, the rest of the prayers would be properly considered in the context of the reference, once filed.
43. As far as the prayer for stay is concerned, I would say that it is premature at this stage of the proceedings. The first step for the CMC to take was to seek to have time enlarged. Once a reference has been filed the question whether any sort of stay is necessary will be considered in the reference.
44. I hereby allow the application to the extent that time for filing the reference is hereby enlarged. CMC has seven days from the date of this ruling to file and serve its reference.
45. The respondent firm of advocates will file and serve its response to the reference within seven days of the date of service of CMC's response. CMC will file and serve written submissions within seven days of the date of service of the respondent's response while the respondent will file its submissions seven days after service of the CMCs submissions. Highlighting of submissions will be on 13 December 2023. The costs of this application will abide the outcome of the reference. It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER 2023

NGAAH JAIRUS

JUDGE

