



**Muthaura Ayugi and Njonjo Advocates v Musimba Investments  
Limited (Miscellaneous Civil Application E830 of 2020)  
[2021] KEHC 240 (KLR) (Commercial and Tax) (12 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 240 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E830 OF 2020  
DAS MAJANJA, J  
NOVEMBER 12, 2021**

**BETWEEN**

**MUTHAURA AYUGI AND NJONJO ADVOCATES ..... APPLICANT**

**AND**

**MUSIMBA INVESTMENTS LIMITED ..... RESPONDENT**

**RULING**

1. The Applicant (“Advocates”) have filed the Chamber Summons dated 27<sup>th</sup> August 2021 (“the Reference”) under Rule 11(2) of the Advocates Remuneration Order (“the Order”) from the decision of the Deputy Registrar delivered on 20<sup>th</sup> November 2020 dismissing their Advocate/Client Bill of Costs dated 24<sup>th</sup> June 2020 (“the Bill of Costs”).
2. The application is supported by the affidavit of Angela Cherono, an advocate practising in the firm of Advocates, sworn on 27<sup>th</sup> August 2021. It is opposed by the Respondent (“Client”) through the replying affidavit of Patrick Mweu Musimba sworn on 11<sup>th</sup> November 2021. The facts necessary for determination of this Reference are not in dispute. The Client instructed the Advocates to act for it in *Nairobi Civil Appeal No. 138 of 2013, Musimba Investment Limited v Nokia Corporation* in the Court of Appeal. In due course the parties disagreed and the Advocates filed the Bill of Costs.
3. When the Bill of Costs came up for taxation, the Client raised a preliminary objection contending that since the subject of the Bill of Costs arose from proceedings in the Court of Appeal, the matter ought to be taxed in the Court of Appeal. It argued that as a result the Deputy Registrar of the High Court lacks jurisdiction to tax the Bill and that it is only the Registrar of the Court of Appeal who has jurisdiction under Rule 111 of the *Court of Appeal Rules* (“the Rules”). The Deputy Registrar upheld the preliminary objection and dismissed the Bill of Costs thus precipitating this Reference.



4. Both parties made brief oral arguments in support of their respective positions. I have also had the opportunity to review the record and in particular the parties written submissions before the Deputy Registrar. The singular issue for determination is whether the Registrar of the High Court has jurisdiction to tax an Advocate Client bill of costs arising from instructions in a matter in the Court of Appeal. For ease of reference, Rule 111 of the Rules provides as follows:

111. Taxation

- (1) Registrar shall be a taxing officer with power to tax the costs arising out any application or appeal to the Court as between party and party.
- (2) Such costs shall be taxed in accordance with the rules and scale set out in the Third Schedule.
- (3) The remuneration of an advocate by his clients in respect of application or appeal shall be governed by the rules and scales to proceedings in the High Court.

5. In their deposition before the Deputy Registrar, the Advocates deponed that they initially attempted to file the Bill of Costs in the Court of Appeal but it was rejected by the court through notification by an email dated 23<sup>rd</sup> June 2020 stating, “Kindly file the bill of costs in the High court as this court only received party-party bill of costs only” hence they had no option but to file it in the High Court. The Advocates contend that Rule 111 of the Rules only donate power to the Registrar of the Court of Appeal to tax bills of costs as between party and party and that there is no rule that donates express power to the Registrar of the Court to tax Advocate Client bill of costs. The Advocates add that their position is reinforced by Rule 111(3) referring to and providing that the taxation shall be governed by the rules and scales to proceedings in the High Court.

6. The Advocates also rely on Paragraph 2 and 10 of the Advocates Remuneration Order to argue that it is the Deputy Registrar of the High Court that has jurisdiction to tax Advocate Client bill of costs. They add that under Article 165(3)(a) of the *Constitution*, the High Court has unlimited original jurisdiction in civil and criminal matters hence in the absence of an express provision in the Rules granting the Registrar of the Court of Appeal jurisdiction to tax costs as between Advocate and Client, then the High Court has jurisdiction.

7. The Client relies on the express wording of Rule 111 of the Rules to argue that it is the Registrar of the Court of Appeal that has exclusive jurisdiction to deal with matters taxation arising from any application or appeal in the Court of Appeal not only in respect of the party and party bills of costs but also Advocate Client bills of costs. The Client buttresses its argument by relying of the definition of Registrar in Rule 2 of the Rules as being Registrar of the Court of Appeal and not the Registrar of the High Court. It cites *Muema Kitulu and Co., Advocates v Kenya Deposit Insurance Corporation ML HC Misc. Appl. No. 78 of 2016 [2016] eKLR* where Ochieng J., held that it is only Registrar of the Court of Appeal who has jurisdiction to tax bills of costs in relation to any services rendered before the Court of Appeal.

8. The Client fortifies its case by arguing that Rule 111(3) of the Rules is clear that what guides the Registrar of the Court of Appeal in taxing the Advocate Client bill are the rules and scales applicable to the High Court in the Advocates Remuneration Order. The Client argues that since the Deputy Registrar lacks jurisdiction, the Reference should be dismissed.

9. Resolution of this matter turns on the interpretation of Rule 111 of the Rules which is the express provisions that deals with taxation in the Rules. In interpreting the rule, the court is obliged to read the Rule as a whole within the context of not only the Court of Appeal Rules but also the *Appellate*



*Jurisdiction Act* (Chapter 9 of the laws of Kenya) which provides the rule-making authority. Rule 111 is in three parts. Sub rule 1 and 2 deal with taxation of party and party costs while sub-rule 3 deals with remuneration of the advocate by his client.

10. Sub-rule 1 of Rule 111 expressly empowers the Registrar to tax costs as between “party and party” which refers to the party and party bill of costs arising from appeals and application in the Court of Appeal. Sub-rule 2 then proceeds to provide that taxation of the party and party bill of costs is in accordance with the Third Schedule. The Third Schedule sets out the applicable scale of costs applicable to proceedings in the Court of Appeal.
11. Sub-rule 3 refers to the remuneration of the Advocate by his client. This means that the matter of remuneration between an Advocate and a client including taxation of the Advocate client bill of costs relating to services rendered to an appeal and an application in the Court of Appeal shall be, “governed by the rules and scales to the proceedings in the High Court”. What then is the meaning of the phrase rules and scales? The rules applicable to proceedings in the High Court are those contained in the Advocates Remuneration Orders. These rules set out the Advocate is to be remunerated for services rendered to his client and what happens in the event of a dispute. The scales referred to are the respective schedules to the Advocates Remuneration Order that set out the basic minimum fee for defined services. The phrase “rules and scales” in Rule 111(3) must be read to mean the Advocates Remuneration Order and the Schedules as amended from time to time. In essence therefore the Rule 111(3) delegates the power to tax an Advocate client bill of costs to the High Court.
12. In addition, sub-rule 1 and 2 of Rule 111 are to be read together as they deal with the same subject; the party and party bill of costs. Sub-rule 3, on the other hand, deals with remuneration of the Advocate by his client. Had the rule maker intended to grant the Registrar of the Court of Appeal jurisdiction, it would have declared as much in the manner expressed in sub-rule 1.
13. If I may digress a bit, the reason for this delegation is a historical and arises from the days when the Court of Appeal was a supranational court in the form of the Court of Appeal for East Africa. With Advocates practising in the partner countries, it was understood that remuneration disputes between Advocates and their Clients should be resolved in the Superior Courts of the partner states rather than in Nairobi where the Court was seated since the issue of remuneration of Advocates was a local issue prescribed by local legislation. Hence Rule 111(3) delegated this authority to the respective Superior Courts by providing that the “rules and scales” applicable to the High Court shall apply.
14. I have read the decision in *Muema Kitulu and Co., Advocates v Kenya Deposit Insurance Corporation (Supra) where Ochieng J.*, held that an Advocate client bill of costs relating to proceedings in the Court of Appeal must be taxed in the Court of Appeal. The decision is not binding but persuasive. The learned judge did not consider the meaning of the phrase “governed by the rules and scale to proceedings in the High Court” which is at the heart of the provision. On my part, I have considered the entire Rule 111 and I find that any other interpretation would ignore not only the intent of the provision but also its language. The rules referred to cannot be divorced from the scales. I am therefore constrained to depart from the decision of my learned brother.
15. Before I conclude the matter, I wish to touch on the order by the Deputy Registrar dismissing the Bill of Costs. Dismissal of an application or suit implies that the matter was heard on merit hence the aggrieved party cannot bring or re-file the same matter. On the other hand, a matter is struck out when it is determined on the basis of some technical reason for example lack of jurisdiction or compliance with some procedural rule (see *Enock Kirao Mubhanji v Hamid Abdalla Mbarak MLD HC ELC No. 50 of 2012 [2013]eKLLR*). In this case, the Bill of Costs was determined not on its merits but on the ground of lack of jurisdiction hence it ought to have been struck out and not dismissed.



16. It must now be clear that the Reference must be allowed. I find and hold that Rule 111(3) grants jurisdiction to the Registrar of the High Court under the Advocates Remuneration Order to tax Advocate Client bill of costs arising from services rendered in an appeal and/or application in the Court of Appeal.
17. For reasons I have set out, I allow the Chamber Summons dated 27<sup>th</sup> August 2021 on the following terms:
  - (a) The ruling and order of the Deputy Registrar dated 20<sup>th</sup> November 2020 be and is hereby set aside and substituted with an order that the Respondent's Preliminary Objection is dismissed.
  - (b) The Bill of Costs shall now be taxed.
  - (c) The Respondent shall bear the costs of this Reference and proceedings before the Deputy Registrar.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF NOVEMBER 2021.**

**D.S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Nyaribo instructed by Muthaura, Ayugi and Njonjo Advocates for the Advocates/Applicant

Ms Mwaniki instructed by Andrew and Steve Advocates for the Respondent.

