



REPUBLIC OF KENYA



**Musyoka Kimeu & Company Advocates v Nakata Savings & Credit Co-operative Society Limited
(Miscellaneous Application 88 of 2014) [2021] KEHC 205 (KLR) (9 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 88 OF 2014**

MW MUIGAI, J

NOVEMBER 9, 2021

BETWEEN

MUSYOKA KIMEU & COMPANY ADVOCATES APPLICANT

AND

**NAKATA SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED RESPONDENT**

RULING

1. By a Chamber Summons dated 7th May, 2017 the Respondent/ Applicant seeks the following orders:-
 1. THAT a stay of execution be issued against the order of the ruling dated and delivered on 29th May 2017.
 2. THAT the Respondent objects to the decision of the Taxing Officer given on 29th May 2017.
 3. THAT the costs of this application be provided for.
2. According to the Applicant, the Deputy Registrar applied discretionary powers excessively in increasing the instruction fees from Kshs.6, 300/- to Kshs.300, 000/-.
3. The Chamber Summons is supported by the affidavit of Duncan M. Matingi, the Respondent/ Applicant Chairman. He deposed that the Applicant herein demanded costs although they ceased acting for the Respondent even before the matter came up for pre-trial. He averred that the Respondent had paid a fee of Kshs. 82,040/- at the time of giving instructions.
4. According to the deponent, the Deputy Registrar ascertained basic instruction fees was Kshs. 6,300/- but excessively awarded an instruction fee of Kshs. 300,000/- which veers off from the scale set in the



Advocates Remuneration Order. He deposed that though the Deputy Registrar has the power to vary the fees, the increase of approximately 4,700% from the scale was unreasonable.

5. He averred that on 31st May, 2017 his advocates sought reasons from the Deputy Registrar as per annexure 'DMM1' which reasons were given on the same day as per the Ruling marked as 'DMM2'. According to the deponent, the items taxed cannot add up to the sum in the final order. He deposed that the taxing officer ought to have taxed each item individually to enable the parties ascertain how the final sum was arrived at. According to the deponent, it would only be proper that the ruling be stayed and a review of the costs taxed be done.
6. On behalf of the Respondent, a Notice of Preliminary Objection dated 20th November 2019 was filed on 2nd December, 2019 stating that the Chamber Summons is incompetent and based on misconception of the law. According to the Respondent, the Chamber Summons is fatally defective, incompetent and a nullity in that the same is grossly contravenes the express provisions of Paragraph 11 of the Advocate's (Remuneration) Order. It is urged that the entire application be dismissed with costs.

RESPONDENT'S /APPLICANT'S SUBMISSIONS

7. According to the Respondent/Applicant, two issues are necessary for determination:-
 - a. Did the taxing officer err in their jurisdiction excessively by increasing the instruction fees from Kshs.6,300/- to Kshs. 300,000/-?
 - b. Did the taxing officer err in their computation of the items in the bill?
8. It is submitted that the Respondent only acted for the Respondent/Applicant at the preliminary stage of the matter. It is submitted that the advocates had only filed pleadings wherein they had been tasked to seek injunctive orders against the County Government but before the hearing of the application they disagreed and the advocates filed an application to cease acting.
9. It is submitted that the value of the subject matter is not ascertainable. No valuation was done on the property hence discretion was with the taxing officer to determine the instruction fees. Reliance is placed on The Joreth case. According to the Applicant/Respondent, the taxing officer's powers to increase the instruction fees should not be applied arbitrarily and excessively without due regard to the law to avoid bias and impropriety. It is submitted that a clear reasoning ought to have been given by the taxing officer on how he arrived at the decision of increasing the instruction fees.
10. According to the Respondent/Applicant, the enumerated instruction fees under the 2009 Advocates Remuneration Order is Kshs. 6,300/- hence it cannot be explained how the fees were increased to kshs.300,000/- when the taxing officer had set out in his ruling that the value of subject matter could not be ascertained from the pleadings. Reliance is placed on the cases of Misc. Civil Application No. 319 of 2015, *Republic vs. The Commissioner of Domestic Taxes Ex parte Ukwala Supermarket Ltd & 2 Others*, *Paul Sesemogerere & Olum vs. AG* Civil Application No.5 of 2001(Unreported) and Misc. Civil Appl. No.319 of 2015, *Republic vs. The Commissioner of Domestic Taxes Ex Parte Ukwala Supermarket Ltd & 2 Others*.
11. It is submitted that this court has jurisdiction to hear this matter as set out in the cases of *First American Bank of Kenya vs. Shah & Others* [2002] eKLR wherein circumstances under which a High Court Judge would interfere with the taxing officer's exercise of the discretion and in *Moronge & Co. Advocates vs. Kenya Airports Authority* (2014) eKLR.
12. According to the Respondent/Applicant, the amount is not attributable to any item indicated in the bill. It is submitted that the final amount indicated in the ruling does not give a clear basis on how the



items as taxed add up to the final amount. Applicant's advocate urged the court to allow the application as prayed.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

13. On behalf of the Respondent, it is submitted that the whole of the Respondent/Applicant's argument is premised on Paragraph 11 of the Advocates Remuneration Order wherein the procedure is provided for a party objecting to the Taxing Officer's decision. According to the Respondent, the Applicant did not demonstrate that he issued a notice to taxing officer/ Deputy Registrar within 14 days of the decision on the items of the taxation he was objecting nor has he demonstrated that any reasons were issued on taxation. According to the Applicant, the court cannot on its own motion assume the responsibility of retaxing the Bill of costs without there being specific objection on itemized items. It is submitted that the application as drawn and filed is incompetent for non-compliance with Paragraph 11 of the Order. See *Moses Mwicigi & 14 Others vs IEBC & 5 Others* (2016) eKLR; *Visbit Talwar vs Anthony Thuo T/A Thuo Kanai Advocates* (2014) eKLR; *Lubullellah & Associates Advocates vs Nasser Ahmed T/A Airtime Business Solutions* Misc Case 719 of 2009
14. It is submitted that it is trite that the Judge can only interfere with the Taxing Officer's exercise of discretion if demonstrated that a mistake was done whilst the Taxing Officer was exercising the discretion to increase or reduce the instruction fees.

DETERMINATION

15. I have considered the Chamber Summons, the Preliminary Objection opposing the application and written submissions.
 1. The Respondent's main contention is that the Respondent/Applicant did not comply with Paragraph 11 of the Advocates Remuneration Order hence the Chamber Summons is incompetent. According to the Respondent, it grossly contravenes the aforesaid legal provision.
 2. The court finds the non-compliance alluded by the Respondent to be an issue for determination. The issue being whether the application is fatally defective, incompetent and a nullity.

COMPETENCY OF THE CHAMBER SUMMONS

18. Paragraph 11(1) and (2) of the Advocates Remuneration Order, stipulates as follows:
 - “(1) (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 his objection.”
19. It follows therefore an aggrieved party by the decision of the Taxing Officer may within 14 days give a notice in writing to the Taxing Officer of items of taxation to which he objects. The party upon receipt of Taxing Officer's reasons for his/her decision may within 14 days from receipt of reasons apply to a Judge by Chamber Summons.



20. It is the argument by the Applicant/Respondent that the court cannot suo moto assume the responsibility of re-taxing the bill of costs without there being specific objection to itemized items.
21. The ruling of the taxing officer was delivered on 29th May, 2017 while the Chamber Summons was filed on 9th June, 2017. The Chamber Summons was then filed within 14 days.
22. However, the court notes that the decision to file the Chamber Summons was not premised on reasons from the Taxing officer. It is also clear that no notice of objection was given to the Taxing officer as required under Paragraph 11(1). The Applicant/Respondent therefore complied with paragraph 11 partly. What is effect of non-compliance?
23. In *Ufundi Co-operative Savings and Credit Society v Njeri Onyango & Company Advocates* [2015] eKLR, D.A Onyancha J. was satisfied that the application before court was not different from the application filed in *Kenya Airport Authority Vs Queens Insurance Agency*, NRB HCCC No. 1430 of 2000 (unreported) where the Court found that the Applicant:
- i. Had not given notice in writing to the Taxing Officer of the items in the Bill of Taxation which he objected to.
 - ii. Had not sought and/or obtained record by the Taxing Officer of the reasons of the latter's decision on the complained of items.
 - iii. Had not waited for nor received the reasons for the taxing Officer's ruling before going ahead to file its application.
 - iv. Had accordingly not exhausted the mandatory provisions of the *Advocates Remuneration Order* Rule 11.
- The court went ahead to find that the application before it was incompetent and was only good enough for dismissal.”
24. According to Nyamweya J.(as she then was) in *Mwangangi & Company Advocates vs. Machakos County* [2018] eKLR in respect of the procedure for filing a reference under Paragraph 11 stated:-
- “The mandatory obligation set by the provisions is on the taxing officer to forward the reasons, however no timeframe is given within which this should be done. The timelines that apply are with respect to when the Objector should seek the said reasons and file the reference after receiving the reasons.”
25. However the Learned Judge went on to state that:-
- “Courts' power under paragraph 11 of the Advocates (Remuneration) Order is meant to be exercised to meet the ends of justice so that the objector is not barred from filing a reference in circumstances such as the one at hand. *The Court of Appeal in Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board* [2005] 1 KLR 528 considered the implication of a Taxing Officer's failure to record and/or furnish reason for his/ her decision as follows:-
- “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.”



26. In *Mwangangi & Company Advocates vs. Machakos County* (supra) the Applicant did annex the letter requesting for the reasons from the Taxing Officer but no reasons were provided by the time the reference was filed while in this case no notice of objection was filed hence no reasons were sought by the Applicant/Respondent.
27. The Applicant/Respondent herein did not comply with any of the procedure under paragraph 11 apart from filing the Chamber Summons within 14 days. That being the court observation, the court is fortified by the holding in *Ufundi Co-operative Savings and Credit Society vs. Njeri Onyango & Company Advocates* (supra) where the Learned Judge did not hesitate to find that the application was incompetent both in form and substance. In any case the Applicant/Respondent has not controverted the Respondent's assertion that the Chamber Summons is incompetent.
28. The argument by the Respondent that the court has been left to speculate the basis of the decision by the Taxing Officer as the procedure under paragraph 11 of the Order was not complied with is plausible. The taxing officer was not given the opportunity to give reasons.
29. Mativo J. in *KANU National Elections Board & 2 others v Salab Yakub Farah* [2018] eKLR held that:-
 19. It is trite that the court will not interfere with the exercise of the taxing master's discretion unless it appears that such has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue."
30. The court find that the Chamber Summons herein was incompetent. The preliminary Objection of 20th November 2019 is upheld.

STAY OF EXECUTION

31. Having determined the competency of the Chamber Summons, the second issue that is necessary for determination will be whether a stay of execution sought against the ruling of the taxing officer should be granted.
32. According to the Applicant/Respondent, the taxing officer applied the discretionary powers excessively to increase the minimum instruction fees of Kshs.6, 300/- to Kshs.300,000/-.In his ruling, the taxing officer did find that the subject matter could not be determined from the pleadings. The Applicant/Respondent is therefore seeking stay of execution against the decision.
33. The Chamber Summons is premised on Order 42 rule 6 of the Civil Procedure Rules, 2010:-
 - (2) No order for stay of execution shall be made under sub-rule (1) unless –
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

34. In *Labh Singh Harman Singh Ltd v Attorney General & 2 others* [2016] eKLR Muriithi J. stated that:-

“12. By analogy of the stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules, a court will in granting stay of execution pending hearing and determination of a reference to a judge from taxation of costs be guided by presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the applicant.

13. The court, while asserting jurisdiction to order stay of execution of the certificate of taxation of costs pending the hearing and determination of the reference to a judge, will determine whether the applicant stands to suffer substantial loss if stay is not granted and whether the applicant has provided security.”

35. The court notes that despite non-compliance with the procedure provided under paragraph 11 of the Order, the Chamber Summons which this court has declared incompetent was filed within time hence there was no unreasonable delay.

36. The court notes that the execution process had already commenced vide a Proclamation Notice dated 22nd November 2017 but this court vide Ruling by Hon. Kemei J issued stay of execution orders on 25th September, 2019 pending the hearing and determination of the Applicant/Respondent’s Chamber Summons.

37. As regards the provision of security, the condition is overtaken by events since this court on 25th September, 2019 ordered deposit of half of the taxed amount of taxed costs in the sum of Kshs.259,090.50/- or a Bank Guarantee to be furnished within 14 days from the date of the ruling. The court has not been informed court of non-compliance with the court orders.

38. According to the Applicant/Respondent, the Taxing officer increased the instruction fess to approximately 4,700% increase from the scale fees. The Respondent/Applicant asserted that the amount lacked clarity as it cannot be attributed to any item in the bill. In my view this is an arguable issue that the Respondent/Applicant should be given an opportunity to hear on. Indeed, Article 50(2) of the Constitution is to the effect that a party has a right to a fair trial.

39. Muriithi J. in *Labh Singh Harman Singh Ltd v Attorney General & 2 others* [2016] supra stated as follows:

“The position accords with the interests of justice that a party against whom substantial nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates Remuneration Order, which is the procedure for such determination. Otherwise such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time.”

40. In the result, the court is satisfied that the conditions necessary to grant stay of execution orders have been met.

41. The court has discretionary powers under Paragraph 11(4) to extend the time fixed under subparagraph (1) and (2) of paragraph 11 of the Advocates Remuneration Order. (ARO).



DISPOSITION

42. The court grants the following conditional orders:-
- a. The Respondent/Applicant shall within thirty (30) days from the date hereof give the requisite notice in writing in accordance with Paragraph 11 (1) of the Advocates' Remuneration Order, 2009, and subsequently comply with sub-paragraph (2) of paragraph 11 thereof with regard to the filing of a reference by Chamber Summons setting out its grounds of objection to the taxation of costs.
 - b. There shall be a stay of execution of the Certificate of Costs dated 10th October, 2017 pending the hearing and determination of the reference to be filed by Chamber Summons in accordance with Paragraph 11 of the Advocates' Remuneration Order.
 - c. Award of costs is a discretion of the court. The Respondent/Applicant did not comply with paragraph 11 of the Advocates' Remuneration Order hence the Respondent/Applicant will pay the costs of this application to the Respondent.

It so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 9TH DAY OF NOVEMBER 2021.

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

Mr. Nabwire holding brief Musyoka Kimeu - for Applicant

Ms Ndolo (online) - for Respondent/Applicant

Geoffrey -Court Assistant

