



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS NO. 33 OF 2015

A.M. KIMANI & CO. ADVOCATES.....ADVOCATES/APPLICANT

VERSUS

TRIDENT INSURANCE CO. LIMITED.....CLIENT/RESPONDENT

RULING

1. On 27th July 2015 the learned Taxing Officer delivered her ruling, in which the Advocate was awarded Kshs. 60,788.04 as costs.
2. The client was dissatisfied with the said ruling and decided to challenge it.
3. On 7th August 2015 the client lodged a Reference before the High Court. Through the said Reference, the client said that it was dissatisfied and aggrieved with the decision of the Taxing Officer. Therefore, the client indicated that it was asking the court to review the decision.
4. The client proposed to have the Order made on 27th July 2015, set aside. The client further proposed to have the Advocates Bill of costs dated 15th January 2015, struck out with costs. Finally, the client proposed that it be awarded the costs of the reference.
5. Upon being served with the Reference, the Advocate filed a Preliminary Objection. The Notice of the Preliminary Objection raised the following 3 issues;

“1. THAT no objection was ever taken against the Taxation as is required by paragraph 11 (1) of the Advocates Remuneration Order and hence there is no competent reference before the court.

2. THAT the documents filed herein do not conform with the provisions of paragraph 11 (1) of the Advocates Remuneration Order and the said defect is incurable.

3. THAT the said Applicant’s documents filed in court are an abuse of the process of the court and have no basis in law?.

6. It was the Advocates prayer, in the Preliminary Objection, that the court should strike out the client’s reference.

7. This ruling is in relation to the Preliminary Objection.

8. When canvassing the said Preliminary Objection, Miss Kimani advocate submitted that the Reference was incompetent, because it had been filed without having complied with paragraph 11 (1) of the Advocates Act. According to the advocate, the court ought to have been moved by way

of a Chamber Summons. Instead, the client had filed a Reference.

9. Secondly, the client is said to have failed to write to the Taxing Officer to seek the reasons for her decision. The advocate submitted that it was a prerequisite for the filing of a reference that the aggrieved party should first seek reasons from the taxing officer, so that the aggrieved party could appreciate why and how the Taxing Officer arrived at the decision.

10. If the aggrieved party had filed a reference before first seeking reasons from the Taxing Officer, the advocate considered such a failure to be fatal.

11. In answer to the Preliminary Objection, the client said, that in its understanding, the Objection was premised on the provisions of paragraph 11 (1) of the Advocates Remuneration Order. That paragraph reads as follows;

“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?.

12. There is doubt at all that the applicable provision is paragraph 11 (1) of the Advocates Remuneration Order. Therefore, the advocate in this case erred by placing reliance on paragraph 11 (1) of the Advocates Act.

13. It is thus interesting to note that whilst challenging the validity of the reference, the advocate invoked the wrong provision of the law, to criticize the client for having filed a reference instead of a chamber summons.

14. If the error by the client was so grave as asserted by the advocate, the same reasoning would probably apply to the preliminary objection.

15. However, I hold the considered view that a Reference from the decision of a taxing officer cannot be deemed fatal simply because it was so titled. In other words, the use of the title “Reference”, instead of a “Chamber Summons” should not render the reference fatal.

16. The application by the person objecting to the decision of the taxing officer is called a Reference.

17. In **MACHIRA & CO. ADVOCATES Vs. ARTHUR K. MAGUGU & ANOTHER, CIVIL APPEAL No. 199 of 2002**, the Court of Appeal said the following concerning Rule 11 of the Advocates Remuneration Order;

“Rule 11 thereof provides for ventilation of grievances from such decision through references to a Judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be used loosely?.

18. Having compared appeals to reviews, the Court of Appeal expressed the view that neither of them were applicable when a party was challenging the decision of a taxing officer. This is what the court said;

“In our view the Rules Committee intended to avoid all that and provide a simple and expeditious mode of dealing with decisions on advocates’ bills of costs through references under Rule 11, to a Judge in chambers?.

19. In the circumstances, I find that content rather than the label given to the procedure utilized, is the key determinant. In effect, by calling its application a reference, the client did not commit a fatal error.

But could a reference be lodged before the client had given notice of its objection to the specific decisions it had issues with?

20. Paragraph 11 (1) of the Advocates Remuneration Order stipulates that the party who had any objection to the decision of the taxing officer should give notice in writing. The said notice is supposed to specify the items of taxation to which the party objects.

21. Paragraph 11 (2) of the Advocates Remuneration Order provides as follows;

“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”.

22. My reading of paragraph 11 (2) is that the reason why an aggrieved party is required to give notice in writing, is that it informs the taxing officer of the items in respect to which the taxing officer should give reasons for the decision he had already made.

23. In **UFUNDI CO-OPERATIVES SAVINGS & CREDIT SOCIETY Vs NJERI ONYANGO & CO. ADVOCATES, Misc. APPLICATION No. 100** of 2013, Onyancha J. held that the reference before him was *“incompetent, both in form and substance”*.

24. In that case, the applicant had not given any notice to the taxing officer of the items which the applicant was objecting to in the decision of the taxing officer. Secondly, the applicant had filed a Notice of Motion, instead of a Chamber Summons.

25. In this case, the taxing officer delivered a written ruling. The client has annexed to its application, a copy of the said ruling.

26. The question which we must then confront is whether or not the client was still obliged to give notice to the taxing officer, if the ruling which it was challenging had incorporated the taxing officer’s reasons.

27. In **EVANS THIGA GATURU Vs KENYA COMMERCIAL BANK LTD, Misc. APPLICATION No. 343** of 2011 Odunga J. held as follows;

“In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles. 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, as it happened in the case of Kerendi Manduku & Company Vs Gatheca Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent”.

28. In this case, the reasons for the decision of the taxing officer were contained in the ruling. Therefore, by dint of the reasoning of my learned brother, Odunga J., if the reference had been filed after more than 14 days had lapsed, from the date when the taxing officer delivered her ruling, the reference would have been incompetent.

29. By necessary implication, the reference filed within 14 days of the delivery of the ruling which contained the taxing officer’s reasons for the said decision, would render the reference

competent.

30. In **EVANS M. GAKUU & 66 OTHERS Vs NATIONAL BANK of KENYA LIMITED & 8 OTHERS, Hccc No. 287 of 2009**, Odunga J. said;

“Accordingly, the mere fact that the applicants did not seek the reasons before filing the reference does not, ipso facto, render the reference incompetent. If the applicants, in their wisdom, believed that the decision was self-sufficient in terms of the reasons thereof, there was no need for them to seek the reasons. However, it would have been better to notify the respondents of their intention to object to the taxation. Failure to do so alone, however, where there is no allegation that the respondents have been thereby prejudiced, ought not to lock the applicants from the seat of justice”.

31. I am in full agreement with my learned brother, on that score.

32. As I have already said, the ruling by the taxing officer had reasons within it. Therefore, the applicant did not have to give notice, in which it would have been required to specify the items which it was challenging, so as to enable the taxing officer give her reasons.

33. The Reference lodged by the client appears, on a *prima facie* basis, to indicate the reasons why the client believes that the taxing officer’s decision was wrong.

34. The fact that the basis of the applicant’s contestation is contained in the reference rather than in the initial notice, does not prejudice the respondent.

35. In the result, I find no merit in the Preliminary Objection. The respondent will have an adequate opportunity to answer to the reference and thereafter, the court will be in a position to render justice on the merits of the case.

36. The Preliminary Objection is therefore overruled.

37. The costs of the said Preliminary Objection are awarded to the applicant.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of April 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Miss Ameyo for the Advocates/Applicant

Miss Kimani for the Client/Respondent

Collins Odhiambo – Court clerk.