



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 480 OF 2014**

**N.W. AMOLO T/A AMOLO KIBANYA&CO. ADVOCATES.....APPLICANT**

**VERSUS**

**SAMSON KEENGU NYAMWEYA.....RESPONDENT**

**RULING**

1. By an application dated 6<sup>th</sup> October 2015 filed on 7<sup>th</sup> October 2015 the applicant Samson Keengu Nyamweya through the firm of Ombati Ongau & Company Advocates seek from this court orders that :-

1. The decision of the taxing officer made on 2nd July 2015 be set aside/varied and or reviewed.
2. The certificate of costs issued by the taxing officer herein be set aside and or varied.
3. The court be pleased to re-assess the fees due to items Nos 1 and 2 of the Advocates in respect of the said bill of costs and make findings on the same.
4. The costs of the application be provided for.

2. The application which is brought under the express provisions of Paragraph 11 Rule 2 of the Advocates Remuneration (sic) [Order] is predicated on the grounds that:-

- a) The taxing officer erred in law by failing to apply the principles applicable for taxation and tax the bill of costs according to the applicable schedule provided for in the Advocates Remuneration Order.
- b) The Taxing officer erred in law and in fact by failing to indicate the amount in the bill of costs for each and every item. The taxing master did not tax the bill of costs in accordance with the law or at all.
- c) The taxing master erred in law by failing to apply the applicable principles s and tax the bill of costs according to the applicable schedule provided for in the Advocates Remuneration Order.
- d) The taxing officer failed to exercise her discretion judiciously when she held that the amount payable is kshs 4,278,490.00.
- e) The taxing master failed to consider the submissions of the respondent/applicant hence arriving

at a wrong decision.

3. The application was further supported by the affidavit sworn by the applicant Samson Keengu Nyamweya on 6<sup>th</sup> October 2015 wherein he deposes that he was dissatisfied with the ruling of the taxing officer made on 2<sup>nd</sup> July 2015 hence he instructed his advocates to file Notice of objection to taxation and requesting for reasons and that his advocates received a letter on 7<sup>th</sup> September 2015 by post saying that the reasons were as per the ruling. He annexed the said letter and envelope sending (posting) the letter.

4. That on 8<sup>th</sup> September his advocate applied for a certified copy of the ruling and as the court file was missing, the request was only accepted on 16<sup>th</sup> September 2015 and that it was not until 2<sup>nd</sup> October 2015 that the certified ruling and reasons for taxation were issued to his advocate.

5. The application was opposed by the respondent/ N.W. Amolo & B.W. Kibanya Advocates, through a replying affidavit sworn by Neville Walusala Amolo who deposes that the application by the applicant/client is incompetent, a gross abuse of the court process and lacks merit. That the applicant's allegation that he never instructed the advocate was self serving falsehood given that he had on 20<sup>th</sup> August 2008 filed an application to remove the advocate's firm from acting for him and to be replaced by CBG Ouma & Company Advocates. That the issue of legal representation of the applicant by the respondent was decided by Honourable Justice Serگون in his ruling on 18<sup>th</sup> December 2014 wherein the respondent's firm was directed to file and tax a bill of costs against the applicant herein . That costs in HCC 229/2009 were taxed at shs 2,400,000 which sum was claimed by the applicant through the respondent advocate's office. That after party and party bill of costs had been taxed at 2,850,172-96 the applicant herein entered into a secret and direct negotiations with Mr A.D.O. Rachier the Chairman of Gor Mahia Football Club and the Kenya Premier League Limited resulting in an agreement that the applicant be paid kshs 2,000,000 instead of the taxed amount.

6. That the respondent was not party to the above arrangement until 15<sup>th</sup> May 2014 vide a letter written by Macharia Mwangi and Njeru Advocates. That the applicant had entered into a secret arrangement compromising the taxed party and party costs by accepting shs 2 million which was less than the taxed costs of shs 2,850,172.96. That the applicant was not entitled to the said sum of money or any other sum but that he should have collected the whole taxed sum and paid it to the respondent's law firm together with an addition kshs 1,425,086.48 being advocate/client costs component making it shs 4,275,259.44 payable to the advocate. That it is therefore not in good faith for the applicant to challenge the taxation of shs 4,278,490 in favour of the respondent since he acted dishonestly by taking away shs 2,000,000 of the taxed costs.

7. In the supplementary affidavit sworn by the applicant Samson Keengu Nyamweya on 6<sup>th</sup> October 2015 annexing some exhibits, the applicant deposed repeating his depositions in the supporting affidavit on when the advocate applied for certified copy of the ruling and when the reasons for taxation were received.

8. In another replying affidavit of Neville Walusala Amolo sworn on 3<sup>rd</sup> September 2015, the respondent deposed that immediately after the taxation the applicant wrote a letter dated 2<sup>nd</sup> July 2015 asking for reasons of the taxation and that the respondent also wrote his letter of 6<sup>th</sup> July 2015 seeking for reasons why 16% VAT was not awarded. That on 9<sup>th</sup> July 2015 the Deputy Registrar F. Wangila wrote a letter stating her reasons were in her ruling on record. That no chamber summons had been filed under paragraph 11(2) of the Advocates Remuneration Order objecting to the decision of the taxing officer nor was enlargement of time to do so under paragraph 11(4) sought hence there was no basis for entertaining the chamber summons dated 20<sup>th</sup> July 2015 . The parties' advocates urged the application orally before me on 22<sup>nd</sup> March 2016.

9. Mr Ombati advocate representing the applicant/client submitted relying on the grounds and replying affidavit of Mr Samson Keengu Nyamweya. He submitted that the main suit was HCC 229/2008 and there was an advocate on record. That the respondent came on record in 2013 and only filed a notice of

change of advocates on a date when the suit was withdrawn. That the applicants never instructed the respondent in 2008 and neither did he file any defence. That the respondent only appeared on one day when he filed his notice of change of advocates and suit was withdrawn. That the taxing officer therefore failed to consider the work done by the advocate before arriving at the decision that she did. That the bill of costs as drawn and the ruling did not consider the applicant's submissions. That the bill of costs as taxed was too excessive since the work done was for one day hence it was unjustified. He prayed for setting aside of the decision of the taxing officer.

10. In an intense rejoinder, Mr Amolo opposed the Reference, relying on his replying affidavit sworn on 17<sup>th</sup> March 2016 and urging the court to first find out whether there was a competent reference before the court. He submitted that paragraph 11 of the Advocates Remuneration Order should be thoroughly examined by the court.

11. That the taxation was done on 2<sup>nd</sup> July 2015 yet the Reference was filed on 7<sup>th</sup> October 2015 hence the reference was filed 3 months after taxation without seeking leave of court. It was also submitted that the applicant filed a motion seeking for stay of proceedings which application has never been prosecuted.

12. According to the respondent, the Deputy Registrar's letter was clear that she had given her reasons in her ruling. Further he denied that he came on record on 11<sup>th</sup> December 2013 in HCC 229/2013. That he filed and taxed his client's bill of costs on 27<sup>th</sup> June 2013 on behalf of his client which was duly taxed.

13. Mr Amolo further submitted that he came on record on 10<sup>th</sup> June 2008 and addressed the court presided over by Honourable Waweru J although Mr Ashitambasi was in court. That he is entitled to the entire party and party bill of costs as well as the advocate/client bill of costs in accordance with part B of Schedule 6 of the Advocates Remuneration Amendment Order. That he was entitled to party and party bill of costs plus ½ thereof under client/advocate bill of costs and that while he was pursuing the taxed party and party costs, his client the applicant herein negotiated with the other party secretly and was paid the said money which belonged to the respondent/advocate.

14. The respondent advocate fully supported the figures arrived at by the taxing officer since there is no specific error that the taxing officer was alleged to have made. Mr Amolo urged the court not to disturb the taxation by the taxing officer. He further submitted that the court should examine the conduct of the applicant who went behind his advocate's back to abuse the court process to prejudice the advocate and deny him his just dues.

15. In a brief rejoinder, Mr Ombati counsel for the applicant/client submitted that the reference was filed in time since he only received communication on 7<sup>th</sup> September 2015 and filed the reference on 7<sup>th</sup> October 2015. They then applied for certified copy of the ruling and the court file allegedly went missing and only got it on 2<sup>nd</sup> October 2015 and filed the Reference on 7<sup>th</sup> October 2015 hence the reference was properly on record and competent. Mr Ombati also submitted that party and party costs belongs to the party and not to the lawyer. That the applicant therefore took what rightly belonged to him. He submitted that in any case, the applicable Remuneration Order was the old one where the increase on advocate/client bill of costs is 1/3 and not ½ which the Deputy Registrar/taxing officer erroneously made. That his client was seeking the protection of the court against exorbitant costs. He urged the court to vary the orders of the taxing officer.

16. I have carefully considered the Reference filed on 7<sup>th</sup> October 2016 by the applicant/client. I have also considered the replying affidavits and the parties' advocates' respective rival submissions. None of the parties to the Reference cited any case law in support of their respective positions. In my humble view, this matter raises the following issues for determination.

1. Whether the Reference as filed is competent.
2. Whether the taxing officer erred in her taxation of the client/advocate bill of costs.

3. Whether the respondent is entitled to the party to party costs as taxed and
4. Which Remuneration Order is applicable in the circumstances of this case.
5. What orders should this court make?
6. Who should bear the costs of this application/Reference?

17. On the first issue of whether the Reference is competent, this court is of the view that should it find the reference incompetent and amenable for striking out then it shall not delve into the merits of the reference and therefore the rest of the issues framed above. The respondent/advocate contended that the Reference was filed 3 months after the taxation without first obtaining leave of court under paragraph 11 (4) of the Advocates Remuneration Order. Further, that no objection to taxation was ever filed and served hence the Reference as filed is incompetent since there is no credible evidence as to when the applicant received communication on the reasons for taxation. On the other hand, the applicant maintains that the Reference was filed in time.

18. To answer the above issue on the competence of the Reference, which issue I shall consider it as preliminary objection, which, if found to be in the affirmative will dispose of the entire reference, I must set out the procedure for challenging taxation undertaken by the taxing officer.

19. Paragraph 11 of the Advocates Remuneration Order provides that :

***“11(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 taxation to which he objects. 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 in chambers which shall be served on all the parties concerned, setting out the grounds of his objection.***

***Any person aggrieved by the decision of the judge upon any objection referred to such judge under sub- paragraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

***The High Court shall have power in its discretion by order enlarge the time fixed by subparagraph(1) or subparagraph(2) of 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 time sought to be enlarged may have already expired.***

20. From the above provisions, it is clear to me that any party wishing to object to a taxation decision must give notice of objection in writing within 14 days after such decision. The notice must also specify the items of taxation which are objected to. Upon receipt of such notice of objection, the taxing officer is expected to record and forward to the objector the reasons for his decision on those items. The objector is then expected to, within 14 days from the date of receipt of the reasons file a reference by chamber summons and serve all the parties.

21. In situations where the reasons for the decision are contained in the taxing officer’s ruling, it would not be necessary for the party objecting to issue a notice to the taxing officer. Seeking for reasons. The above position finds support in **Ahmednassir Abdikadir & Company Advocates V National Bank of Kenya Ltd (2) [2006] 1EA 5** where the court held that:

***“ Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already***

*contained in he considered ruling, there is no need to seek for further reason simply because of the unfortunate wording of Subrule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.(emphasis added).*

22. The above position was also approved by Honourable Odunga J in **Evans Thiga Gaturu Advocate V Kenya Commercial Bank Ltd [2012] e KLR** where the learned judge stated that:

*“ 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 necessary a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference.”*

23. In the instant case, the taxation ruling was delivered on 2<sup>nd</sup> July 2015 in the presence of Mr Ombati Advocate for the applicant/client/respondent and Mr Amolo/advocate/application. On the said date, Mr Ombati sought for stay of 30 days which though opposed by the respondent/advocate, the taxing officer granted. That ruling is clearly headed **“Ruling and reasons for taxation.”** Thereafter on 6<sup>th</sup> July 2015 the applicant advocate/respondent herein filed a letter to court, urging the court to give reasons for failure to award 16% VAT in the bill of costs dated 3<sup>rd</sup> June 2014 as taxed. On 3<sup>rd</sup> July 2015, the applicant/client herein gave notice of objection based on all items ranging between 1 to 2 taxing the bill at kshs 4,278,490 as ruled by the taxing master on them. The applicant also applied for reasons of the taxing officer on those items.

24. On 9<sup>th</sup> July 2015 the taxing officer wrote to both the applicant and respondents referring to their letters of 6<sup>th</sup> July 2015 and 2<sup>nd</sup> July 2015 seeking for reasons for the taxation and stating that **“ the reasons sought for are as per ruling on record. You may obtain a copy upon payment of the required court fees”**. That letter was received by the respondent/advocate’s firm on 22<sup>nd</sup> July 2015 at 11.37 am whereas the applicant/client’s advocate contends that the letter was received by them on 7<sup>th</sup> September 2015 by post, which was over 2 months from the date of taxation.

25. From the above described scenario, it is clear that the Notice of Objection was filed within time of 14 days after the date of taxation. In the said notice, the applicant sought reasons for the taxation on items 1 and 2 of the Advocate’s Bill of costs. However, there was no response to that request until 7<sup>th</sup> September 2015 vide letter of taxing officer dated 9<sup>th</sup> July 2015 stating that the reasons were in the said ruling of taxation. The provision of paragraph 11(2) require that the taxing officer do forthwith forward to the objectors the reasons for his decision on the specified items and that the objector would then be required, if dissatisfied with the reasons given, file a reference within 14 days from the date of receipt of the reasons.

26. In this case, the applicant gave notice of objection to the taxation in writing and in time. The taxing officer responded vide her letter dated 9<sup>th</sup> July 2015 but there is no evidence that the letter was served upon the applicant’s advocate with dispatch. The applicant contends that it was posted and only received on 7<sup>th</sup> September 2015. There is no contrary evidence of service of that letter upon the applicant’s counsel. The letter was received on 7<sup>th</sup> September 2015 as per the envelope of posting SKN 4(b). Albeit the respondent contends that there is no evidence that the envelope was the one used for posting that letter, the standard of proof in civil cases is one of on a balance of probabilities and not beyond reasonable doubt . The envelope was annexed to a sworn affidavit of the applicant. If that was a false deposition, then it was upon the respondent to prove that it was indeed a false deposition. He could have availed evidence to discredit that deposition by the applicant say, by producing an affidavit sworn by the court official who posted the letter and when that posting was done, since the fact of posting is not disputed. The envelope is on the judiciary letter head and a date stamp which is not clear but nonetheless addressed to the applicant’s counsels Ms Ombati Ongau & Company Advocates.

27. In my view, on a balance of probabilities, I believe that the annexed copy of envelope is the one

which was used to post the letter of “reasons” to the applicant’s counsel.

28. The other important question therefore would be whether the Reference was filed within 14 days after receiving the communication from the taxing officer on 7<sup>th</sup> September 2015. Evidence on record and as submitted shows that From 7<sup>th</sup> September 2015, the Reference by way of Chamber Summons was expected to be filed on or before 23<sup>rd</sup> September 2015. However, the Reference was not filed on or before 23<sup>rd</sup> September 2015. Instead, it was filed on 7<sup>th</sup> October, 2015. The applicant’s explanation for filing the reference on 7<sup>th</sup> October 2015 is that his advocates “ applied for the certified copy of the ruling on 8<sup>th</sup> September 2015,” but that the court file was missing and only accepted the letter on 16<sup>th</sup> September 2015. He annexes to his affidavit the copy of the said letter for proceedings received in court on 16<sup>th</sup> September 2015 and receipt for shs 120/- issued on 23<sup>rd</sup> September 2015.

29. No doubt, at the time they said request for certified copy of ruling on taxation was being received in court, time for filing of the Reference had not lapsed. In other words, the applicant could still have filed the Reference on that same date of 16<sup>th</sup> September 2015 when he ‘ traced’ the court file, assuming it is true that the court file went missing as alleged. However, he waited until 2<sup>nd</sup> October 2015 after getting certified copy of the ruling, as opposed to the reasons for taxation, before filing of this Reference on 7<sup>th</sup> October 2016.that being the case, clearly, the reference herein was filed out of time and it could only be resuscitated if the applicant had sought for enlargement of time under Paragraph 11(4) of the Advocates Remuneration Order. If the applicant did not find the court file between 7<sup>th</sup> September 2015 when he received communication on reasons for the taxation and 23<sup>rd</sup> September 2015 which was the last date for the filing of the reference to the judge in chambers as required under Paragraph 11 Rule (2) of the Advocates Remuneration Order, he had an opportunity under Paragraph 11(4) to apply for enlargement of time and give such reasons as “ **failure to trace the court file or to obtain certified copy of the ruling on taxation within the stipulated time for filing of the Reference.**”

30. Instead, the applicant simply filed the Reference out of time and did not even bother to seek, after filing it out of time, leave of court to enlarge time within which the filed reference should have been filed. The latter position would also apply because paragraph 11(4) is clear that such an application for enlargement of time could still be made“ **notwithstanding that the time sought to be enlarged may have already expired.**”

31. Furthermore, the applicant could have included in his application for stay filed on 20<sup>th</sup> July 2015 before expiry of the 14 days for filing Reference, a prayer for enlargement of time which application for stay was nonetheless never prosecuted.

32. The respondent did give to the applicant sufficient notice that this Reference was incompetent and that it was filed out of time as per the replying affidavit of Neville Walusala Amolo sworn on 3<sup>rd</sup> September 2015. I reiterate that the applicant had ample opportunity to file his reference within the stipulated 14 days after the date of receipt of the reasons for taxation but which opportunity he squandered. The excuses he was provided in this Reference for filing it out of time would have served as perfect reasons in an application seeking for enlargement of time and not a defence to an incompetent Reference which was filed out of the stipulated statutory period and without leave of court being obtained whether before or after filing of the incompetent Reference.

33. This court is divested with jurisdiction to determine the merits of a reference that is filed outside the statutory stipulated period. And without jurisdiction, the court can do no more than down its tools.

34. Consequently, I have no choice to make but to find that the Reference herein dated 6<sup>th</sup> October 2015 challenging the taxation of the taxing officer Honourable F. Wangila -Deputy Registrar made on 2<sup>nd</sup> July 2015 was filed out of time and therefore incurably and fatally incompetent and I proceed to strike it out with costs to the Advocate/Respondent/main applicant.

35. Having struck out the Reference on account that it was incompetently filed out of time without leave

of court, I do not wish to make any specific pronouncement on the merits of the Reference as this decision does not necessarily foreclose any right of the applicant to apply for extension of time as far as the law may permit, which pronouncement might prejudice the parties' respective positions.

36. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 19<sup>th</sup> day of July, 2016.

**R.E. ABURILI**

**JUDGE**

In the presence of:

Mr Chesang H/b for Mr Ombati

Mr Mulandi h/b for Mr Amolo

Court Assistant: Adline