



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NUMBER 1534 OF 2005**

**KARUME INVESTMENTS LIMITED. .... APPELLANT**

**VERSUS**

**KENYA SHELL LIMITED. .... 1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS. .... 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

This is a ruling on the Chamber Summons dated the 28<sup>th</sup> May, 2014 and filed by the Advocate for the interested party on the 30<sup>th</sup> May, 2014. The same is brought under Rule 11 of the Advocates (remuneration) Order.

The Applicant seeks for orders that: -

- a. ***The requirement for giving notice to the taxing officer under Rule 11 (1) of the Advocates (remuneration) order be excused.***
- b. ***The Applicant's objection to the decision of the taxing officer on time 1 of the Applicant's Bill of Costs dated 26<sup>th</sup> August, 2013 and filed on the 23<sup>rd</sup> September, 2013 be heard and decided.***
- c. ***The costs of the Application be provided for.***

The Application is based on the grounds on the body of the Chamber Summons and the Affidavit in support of the Application sworn by Kiragu Kimani Advocate on the 29<sup>th</sup> May, 2014.

In summary, the deponent depones that ruling on taxation of the Applicant's Bill of Costs dated 26<sup>th</sup> August, 2013 was delivered on the 17<sup>th</sup> March, 2014 and the Applicant is desirous of objecting to the decision of the taxing officer on item 1 of the said Bill of Costs. His firm inadvertently failed to give notice to the taxing officer as required by Rule 11 (1) of the Advocates (Remuneration) Order. The taxing officer erred in applying Schedule VI (1) of the Advocates Remuneration Order instead of Schedule VI(j).

The Taxing officer erred in holding that the instruction fees in the matter was Ksh.500,000/- which is manifestly inadequate and he failed to appreciate the fact that the value of the subject matter was estimated at Ksh.65,500,000/-.

He further deponed that the taxing officer erred in not applying the principles set out in the case of **Premchand Raichand Limited and Another Vs Quarry Services of East Africa and Others (No. 3)**

1972 EA 162, which are that a successful litigant ought to be fairly reimbursed for costs, that the general level of remuneration for Advocates must be such as to attract recruits to the profession and that so far as practicable there should be consistency in the awards made.

In view of the above, he depones that it is only fair and just that the time allowed for giving notice to the taxing master under Rule 11(1) of the Advocates (Remuneration) Order be excused and the Applicant's objection to the decision of the taxing officer on all the items of the Applicants Bill of Costs dated 26<sup>th</sup> August, 2013 be heard and decided.

That the interested party filed Karume Investments Ltd Vs Kenya Shell Ltd & Commissioner of Lands which was dismissed and in the process of getting the costs in the Court of Appeal taxed, the Applicant overlooked this matter and hence the delay in requesting for the reasons for the decision and filing the present Application.

The Application is opposed and in opposition, the interested party filed a replying Affidavit sworn by Robert Mwaura on the 17<sup>th</sup> November, 2014. The Deponent is the General Manager of the Interested Party (Karume Investments Limited). In summary he depones that on advice given by his Advocates on record, the Applicant's application dated 28<sup>th</sup> May, 2014 is premature, misconceived, incompetent and bad in law. The Applicant ought to have sought leave of the court to enlarge time within which to object to the decision of the Registrar as provided for under Rule 11(4) of the Advocates (Remuneration) Order, the requirement of the notice of objection to the taxing officer is mandatory and the same cannot be excused. The jurisdiction of this court can only be exercised after the taxing offer has given his reasons and therefore, the jurisdiction of this court has not arisen.

He further depones that the taxing officer exercised his discretion judiciously in assessing the instruction fees at Ksh.500,000/- and that the amount is within reasonable limits and was not manifestly inadequate to warrant interference by this Honourable court.

The parties had agreed to proceed by way of written submissions and on the 6<sup>th</sup> October, 2015 it came up for highlighting of the same.

In his submission counsel for the Applicant addressed the court on two issues.

1. Whether the application is defective.
2. Whether the taxing officer made an error.

On the first issue, he submitted that the Respondent in the Replying Affidavit had argued that the Applicant is improperly before the court for the reason that he ought to have filed a notice of objection under Order 11 (1) of the Advocate (Remuneration Order). In his view, this was an attempt by the interested party to take us back to the dark age of technicalities and that position cannot stand in light of Article 159(2) (d) of the Constitution.

He further argued that the requirement under Rule 11(1) aforesaid to request for reasons from the taxing officer has been rendered superfluous in the recent times because the taxing officers deliver their ruling setting out sufficient details. He referred the court to the case of Evans Gaturu Vs Kenya Commercial Bank where Justice Odunga noted ***"it will be full hardy to request for the reasons of the taxing officer when the same have been contained in the ruling."***

He explained the delay in filing the Application and in his submission the delay was caused by the fact that their firm of Advocates was filing another Bill of Costs against the interested party in the Court of Appeal and due to inadvertent error there was a delay in filing the notice to the Registrar. He urged the court to enlarge time within which to file the reference and declare it to have been properly filed.

He further submitted that the interested party has not shown any prejudice that it will suffer if time is extended. On the other hand, if the court declines to extend the time, the Applicant will be deprived of his

right to claim compensation for time and effort made in prosecuting the Judicial Review Application. He also took issue with the taxing officer in failing to consider the value of the subject matter in assessing the instructions fees payable to the Applicant and that in his view, was a fundamental error in principle on the part of the taxing officer and for that reason the decision of the taxing officer should be set aside. He relied on the decisions of **Republic Vs Public Procurement Complaints Review and Appeals Board & another ex parte E. A. Cables Ltd (2012) eKLR** and also the decision of **Republic Vs Kenya Revenue Authority Ex parte Middle East Bank Kenya Limited (2012) eKLR**. In his submission, a sum of Ksh.500,000/- awarded by the taxing officer was inordinately low and meagre. He submitted that a successful litigant has to be well compensated and urged the court to substitute the award of Ksh.500,000/- with Ksh.1,500,000/- as prayed in the Application. He relied on the case of **Devshi Dhanji Vs Khanji Karan Patel** and urged the court to allow the Application.

On her part, learned counsel for the Interested Party/Respondent M/S Ochola in her submissions addressed the two issues raised by the counsel for the Applicant. She referred the court to Rule 11(1) of the Advocates Remuneration Order and submitted that before filing of the reference, the Applicant ought to have given notice to the taxing officer of the intention to refer the matter to the High Court. The reference should be filed within 14 days of the said notice. The Applicant admitted having not filed the notice but gave reasons for the failure and relied on Article 159(2) (d) of the Constitution.

In her submission, failure to file a reference within time is not a mere technicality and Article 159 (2) (d) cannot come to the aid of the Applicant as an omission to comply with a provision of a statute amounts to failure to comply with a substantive procedure of law. The Applicant ought to have sought leave of the court to enlarge time and failure to do so, the discretion of the court has not been properly involved. She relied on the case of **Evans Gaturu Vs Kenya Commercial Bank (supra)**.

On the Applicant's submission that the court has jurisdiction to enlarge time, she submitted that parties are bound by their pleadings and a court cannot grant what it has not been asked to and failure to do so by the Applicant renders the reference incompetent.

As to whether the figure of Ksh.500,000/- awarded by the taxing officer is justified she relied on the case of **First American Bank of Kenya Vs Shah & Others, Case No. 2255 of 2000** and submitted that it is the discretion of taxing officer to increase or reduce the instruction fees and in her view, the taxing officer exercised her discretion judiciously as what was in consideration was a prerogative orders and not the substantive hearing of the matter. She also referred to the case of **Republic Vs Commissioner for Co-operative Development & another ex parte County Council of Kiambu JR. Misc. Application No. 6 of 2009** where it was held that in Judicial Review the amount in dispute is not necessarily the determinant factor in assessing the quantum of costs payable. She urged the court to dismiss the Application.

This court has carefully considered the Application, the Affidavits in support, the Replying Affidavits, list of authorities and the submissions made by both counsels in the matter. In my view and as rightly put by both counsels the two issues for the court to decide is whether the Application is defective, and whether the taxing officer made an error.

In dealing with the first issue, the court will consider if the Applicant is properly before the court and whether the orders sought are tenable in law in view of Rule 11(1) of the Advocates (Remuneration) Order. It is clear that the reasons for the decision of the taxing officer are to be sought for by way of notice within 14 days of the decision and the reference is to be lodged within 14 days of the receipt of the reasons.

In the case of **Muriu Mungai & Co. Advocates Vs New Kenya Co-operative Creameries Ltd, HCCC 692 of 2007** the court was of the view that: -

***“It is mandatory for an Applicant who objects to the taxation to annex the ruling, giving reasons by the taxing master supporting the taxation....Nowhere it is provided that if there be a delay in the taxing master giving reasons for taxation or if a party applies for particulars outside the period of the 14 days provided under Rule 11(1), and the reasons are not given within the prescribed period, a party is at***

**liberty to proceed and file a reference without the reasons.”**

Rule 11(4) gives the court powers to enlarge time if the same lapses before a step needed to be done is done or taken. In the case of **Evans Thiga Gaturu Vs Kenya Commercial Bank**, Justice Odunga referred to the case of **Paul Gicheru T/A Gicheru & Co. Advocates Vs Kargua (K) Construction Co. Ltd** HCMCA No. 124/2007 where the learned Judge was of the view that:

**“Under Rule 11(2) of the Advocates (Remuneration Order) the taxing officer was required to record and forward to the objector the reasons for his/her decision of items 1 and 2. This is a mandatory requirement as the word used is “shall”. It is only after receipt of these reasons that an objector may within another fourteen (14) days of receipt of the reasons that he can file application raising his objections before a judge...while the taxing master did not give specific reasons even by reiteration and referred to the entire body of his ruling, he complied with the requirement at least by way of procedure, if nothing else. In such a case, if the ruling is detailed and answers the inquiry, it is arguable that it would be superfluous for the taxing master to give any other reasons or repeat himself... But it is not correct to say that if the ruling of the taxing master is actually a ruling then there is no need to request for such reason. If this was correct interpretation, then there would be no need for the Rules Committee to set out an elaborate and long procedure as set out in the Rule.... All an aggrieved person would have required to do is to give notice of objection within 14 days of the decision being made and thereafter file the application/reference within another 14 days. The words in Rule 11(2) are certain and clear that the taxing master must give the reasons for the decision within 14 days of the Notice of Objection being filed.**

In my own view, Rule 11(1) is a statutory provision which cannot be ignored or wished away. As Justice Odunga rightly put it in the case of Evans Gaturu, the provision is vague and there is need for it to be re-looked into a fresh but for now, it is part of our laws and it cannot be ignored. The Applicant herein admitted having not given notice of objection to the taxing officer. In such event, the Applicant ought to have sought leave of this Honourable Court under rule 11(4) for extension of time which he failed to do but instead asked this court to waive the requirement for giving the notice. I have perused the Advocates Remuneration order and there is no provision for waiver of the notice.

As submitted by the counsel for the interested party, it is trite law that a party is bound by its pleadings. In his submissions, the counsel for the Applicant asked this court to extend time within which to give the notice to the taxing officer but he has not made such a prayer in his Chamber Summons dated 28<sup>th</sup> May, 2015. In the premises aforesaid, this Honourable Court finds itself unable to come to his aid as a court can only grant a relief that has been sought for.

Having dealt with the issue of whether the application is defective or not, I find no need of delving into the other issue of whether the taxing officer made an error as the finding in the first issue will determine the outcome of the Application.

For the foregoing reasons, I find that the Application dated 28<sup>th</sup> May, 2014 is incompetent and it is hereby struck out with costs to the Respondent.

Dated and delivered at Nairobi this 5<sup>th</sup> day of November, 2015.

.....

**LUCY NJUGUNA**

**JUDGE**

**In the presence of**

..... for the Appellant.

..... for the Respondent.