

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM MISC. APPL. NO. E154 OF 2024**

PAUL MAINGI MUSYIMI T/A MUSYIMI

& ASSOCIATES ADVOCATES.....ADVOCATE/RESPONDENT

-VERSUS-

AHMED NOORANI.....1<sup>ST</sup> CLIENT/APPLICANT

SCHON AHMED NOORANI.....2<sup>ND</sup> CLIENT/APPLICANT

*(A Reference from the Ruling delivered on 14<sup>th</sup> October 2024 by Hon. Chembeni L. Adisa, sitting as a Taxing Officer).*

**RULING**

1. Before me is a Chamber Summons dated 30<sup>th</sup> October 2024 filed by the clients/applicants pursuant to the provisions of Order 11 & Section 51(2) of the Advocates Remuneration Order 1962, as amended. The clients seek an order that the Deputy Registrar's decision, taxing the Advocate/Client bill of costs be set aside on the ground that there was no retainer between the parties.
2. The application is anchored on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Mr. Schon Noorani, the 2<sup>nd</sup> applicant herein. He averred that there was no retainer between the clients and the Advocate. He contended that they had previously retained the Advocate in **HCC No. 398 of 2018**, which was concluded in their favour. That though the defendant in that suit appealed against the Judgment therein, they also initiated out-of-court negotiations which led to an amicable settlement. He averred that

unbeknownst to the clients, the Advocate responded to an application for stay of execution without instructions, despite the matter already having been settled.

3. Mr. Noorani stated that upon learning of this, the clients appointed the law firm of Asa & Asa Associates to come on record, but he and was informed that the Advocate herein was still appearing as acting Counsel. He asserted that the Advocate wrongly held out that he had instructions, prompting a change of Advocates purely to comply with procedure. Mr. Noorani averred that at the said time, he was unwell and routinely signed documents, making any signed documents insufficient to prove instructions. He further averred that the Taxing Officer misapplied the law by taxing the bill as if it was based on instructions to handle an appeal, which was never pursued due to the settlement.
4. In opposition thereto, the Advocate filed a replying affidavit sworn on 6<sup>th</sup> November 2024 by Mr. Paul Maingi Musyimi, an Advocate of the High Court of Kenya. He averred that the instant application is procedurally flawed for failing to comply with Rule 11 of the Advocates Remuneration Order. He contended that the objection letters relied upon do not properly raise the dismissal of the application dated 25<sup>th</sup> June 2024 as a ground for Reference, whereas the issues for determination should be limited to taxation of items 1–12 of the bill of costs not the existence of a retainer. In addition, he stated that the Reference herein is incompetent and time-barred, as no valid objection was filed or served and/or uploaded on the CTS system within the prescribed 14 days.
5. Mr. Musyimi asserted that the Taxing Officer correctly held that a retainer existed between the parties herein and that she did not err in her findings. He contended that the clients are not truthful regarding instructions, since the 2<sup>nd</sup> client knowingly signed the replying affidavit in respect to **Civil Appeal No.**

**602 of 2019** and was satisfied when a stay of execution was denied by the Court of Appeal as he could pursue execution in **Milimani HCCOM No. 398 of 2018**. Further, that the clients' current evidence was never placed before the Taxing Officer hence it has been improperly introduced. He averred that he has represented the clients in multiple matters against Mr. Rajendra Ratilal Sanghani, but the clients are attempting to conflate fee liabilities across those cases to avoid payment.

6. In a rejoinder, the clients filed a further affidavit sworn on 15<sup>th</sup> November 2024 by Mr. Schon Noorani, the 2<sup>nd</sup> applicant herein. He contended that the Notice of Objection dated 14<sup>th</sup> October 2024 was filed and served within time, the day after delivery of the Taxing Officer's Ruling, as evidenced by Court email records, thus complying with the provisions of Rule 11 of the Advocates Remuneration Order. He contended that no reasons for the Ruling have been issued by the Taxing Officer to date. He averred that the 2<sup>nd</sup> notice dated 28<sup>th</sup> October 2024 was merely a procedural reminder requesting for reasons from the Taxing Officer, not a fresh objection. Mr. Noorani stated that the Taxing Officer erred by taxing the bill without it being fixed for hearing or inviting submissions from the parties, thereby violating the clients' right to be heard under Articles 47 & 50 of the Constitution and the Fair Administrative Action Act.
7. The application herein was canvassed by way of written submissions. The clients' submissions were filed on 4<sup>th</sup> February 2025 & 6<sup>th</sup> February 2025 by the law firm of Abuodha & Omino Advocates, while the Advocate's submissions were filed by the law firm of Maingi Musyimi & Associates Advocates on 4<sup>th</sup> February 2025.

8. Mr. Omino, learned Counsel for the clients submitted that where a retainer is in dispute such as is the case herein, the Court must first rule on that issue before proceeding to tax the bill. He argued that there was no express or implied retainer for the Court of Appeal matter and no Notice of Appointment or Address of Service was filed by the Advocate. He stated that the Advocates bill of costs is defective for various reasons including the fact that no pending appeal exists, the Advocate was not instructed to act at the Court of Appeal, the bill ignores applicable appellate fee scales and no jurisdiction exists to tax the bill in the absence of a retainer. Counsel relied on the case of **Njuguna Kahari & Kiai Advocates v Gacanga** [2024] KEELC 3868 (KLR), and asserted that the burden of proving a retainer lies with the Advocate. He also referred to the case of the **Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd** [1989] KLR 1, and submitted that taxation without jurisdiction in the absence of a retainer is void.
9. Mr. Maingi, learned Counsel for the Advocate relied on the case of **Ufundi Co-operative Savings and Credit Society v Njeri Onyango & Company Advocates** [2015] KEHC 4070 (KLR), and submitted that the clients did not file a written Notice of Objection within the 14-day period required under Rule 11 of the Advocates Remuneration Order. He further submitted that no objection letter was filed with the Court on 14<sup>th</sup> October 2024 as evidenced by a screenshot from the Judiciary's e-filing portal. He argued that the only evidence provided by the clients is an email dated 28<sup>th</sup> October 2024, well outside the 14-day window, suggesting an attempt to mislead the Court. Additionally, he stated that the clients failed to invoke Rule 11(4) of the Advocates Remuneration Order to seek an extension of time and cannot now rely on alleged informal communication to validate the objection.

10. Counsel submitted that pursuant to the provisions of Rule 11(1) of the Advocates Remuneration Order, an objection to a Ruling on taxation must be specifically set out in writing to the Taxing Officer, but in the alleged objection letters dated 14<sup>th</sup> & 28<sup>th</sup> October 2024, the clients stated that they object only to items Nos. 1 - 12 of the Advocates bill of costs, and the issue of the existence of a retainer was not among the items objected to, thus it should not be considered in the Reference. He relied on the case of **Independent Electoral and Boundaries Commission & another v Mule & 3 others** [2014] KECA 890 (KLR) and invoked the principle that parties are bound by their pleadings.
11. Mr. Maingi contended that failure to annex the Certificate of Costs and the Taxing Officer's Ruling to the application herein, is a material procedural defect. He referred to the case of **Mereka & Company Advocates v Zakhem Construction (Kenya)** [2014] KEHC 1257 (KLR), and asserted that the Taxing Officer exercised proper discretion in finding that there was a retainer. He argued that the clients' claim of lack of instructions is contradicted by evidence indicating knowledge and consent of the Advocate's actions, such as defending an application at the Court of Appeal. Counsel stated that the clients are estopped from denying the Advocate's authority, having already participated and benefited from their services. While invoking the principle of approbation and reprobation to oppose the clients' contradictory positions, Mr. Maingi referred to the case of **Royal Ngao Holdings Limited v N.K. Brothers Limited** [2020] KEHC 2550 (KLR).
12. In a rejoinder, Mr. Omino maintained that a letter requesting for reasons for taxation was indeed written and filed on 14<sup>th</sup> October 2024, with evidence provided through a screenshot from the Court's e-filing and email systems, both of which are recognized. He argued that although Courts have previously held

that Taxing Officers may not need to issue separate reasons if already included in their rulings, in this case, a request was made but not acted upon, thus it was assumed that the reasons remained the same. Additionally, Counsel relied on the case of **Odhiambo Owiti & Co Advocates v Equator Bottlers Limited** [2022] KEHC 804 (KLR), and submitted that failure to submit such a letter does not invalidate the objection. Mr. Omino asserted that the objection covered all items with the core issue being the lack of a valid retainer. He argued that a retainer is not a billable item but a legal issue the Taxing Officer considered. Further, that Rule 11 of the Advocates Remuneration Order allows an objection to go beyond mere numerical items, so as include legal questions.

**ANALYSIS AND DETERMINATION.**

13. I have considered the instant application, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavit by the Advocate and the written submissions by Counsel for the parties. The issues that arise for determination are –

**i) Whether the instant Reference is fatally defective for want of compliance with the provisions of Rule 11 of the Advocates Remuneration Order; and**

**ii) Whether the instant Reference is merited.**

**Whether the instant Reference is fatally defective for want of compliance with the provisions of Rule 11 of the Advocates Remuneration Order.**

14. The Advocate contends that the clients failed to comply with the provisions of Rule 11 of the Advocates Remuneration Order, thus rendering the instant application fatally defective. The procedure for objecting to a Taxing Officer's

decision is provided for under Rule 11 of the Advocates Remuneration Order which states as hereunder –

***Objection to decision on taxation and appeal to Court of Appeal***

- 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.***
- 3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***
- 4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for 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.***

15. The Taxing Officer delivered a Ruling on the Advocate's bill of costs dated 1<sup>st</sup> February 2024 on 14<sup>th</sup> October 2024. Being dissatisfied with the said Ruling, the clients were required to file a Notice of Objection with the Taxing Officer in accordance with Rule 11(1) of the Advocates Remuneration Order, specifying

the aspects of the decision they were objecting to, and request for reasons for the said decision. The clients assert that they complied with this requirement by submitting a Notice of Objection dated 14<sup>th</sup> October 2024, which was sent via email on 15<sup>th</sup> October 2024, and later followed up by a reminder vide a letter dated 28<sup>th</sup> October 2024.

16. It is however evident that the said objection was not filed through the Case Tracking System (CTS), which is the Judiciary's official portal for filing of pleadings and tracking of cases. While I acknowledge that two filing methods exist, that is, the CTS and email, pleadings submitted via email are only deemed to be properly filed when the CTS is down and the Judiciary has issued a Notice permitting the filing of pleadings via email. In this case, the clients have neither alleged nor demonstrated any reason for bypassing the CTS when filing the Notice of Objection under Rule 11 of the Advocates Remuneration Order, especially so, considering that all their other pleadings and submissions in this matter have consistently been filed through the CTS.
17. Additionally, although the clients assert that the Notice of Objection dated 14<sup>th</sup> October 2024 was filed via email on 15<sup>th</sup> October 2024, no evidence to substantiate the said allegation has been tendered. The email communication annexed to the clients' further affidavit was sent on 28<sup>th</sup> October 2024 and no evidence has been provided to show that the Notice of Objection dated 14<sup>th</sup> October 2024 was ever filed. Further, there is no acknowledgment or official stamp from the Taxing Officer or Court Registry confirming receipt of the said objection or the alleged letter of reminder dated 28<sup>th</sup> October 2024 via email.
18. This Court is of the considered view that while a Notice of Objection may have been drafted and sent by email, the procedural requirements of Rule 11(1) of the Advocates Remuneration Order, and particularly, the requirement that the

Notice be formally and verifiably filed with the Taxing Officer within 14 days, do not appear to have been satisfied in the manner recognized by the Court system. Therefore, strictly speaking, there was non-compliance with Rule 11(1) of the Advocates Remuneration Order. In the oft cited case of **Matiri Mburu & Chepkemboi Advocates vs Occidental Insurance Company Limited** [2017] eKLR, the Court in striking out a Reference held that -

*the provisions of Paragraph 11 of the Remuneration Order serve several purposes. Firstly, the requirement that a party seeking reasons gives a notice of items objected to, serves to narrow down the issues, and secondly, give notice to the adverse party and the taxing Officer of his objection. Thus, the taxing Officer, adverse party and ultimately the reference court in their respective roles can focus on the specific matter objected to rather than entire bills of costs, which often run into several pages. The objective is obvious: the expeditious disposal of taxation disputes. Thus, compliances with the requirements of paragraph 11 of the Remuneration Order is not a mere technicality that can be pushed aside peremptorily as the Applicant appears to suggest.*

19. This Court's jurisdiction to hear and determine a Reference is dependent on strict compliance with Rule 11(1) of the Advocates Remuneration Order. Further, this Court is of the considered view that a Notice of Objection is akin to a Memorandum of Appeal, serving a foundational role in initiating the Reference process. Consequently, failure to file and serve a Notice of Objection is not a mere procedural lapse that can be cured under Article 159(2)(d) of the Constitution of Kenya in the name of substantive justice. To the contrary, non-compliance is fatal as it undermines the Court's jurisdiction to hear the Reference. In the case of **Moses Mwicigi & 14 others v Independent**

**Electoral and Boundaries Commission & 5 others** [2016] eKLR, the Supreme Court of Kenya considered the importance of adherence to laid down procedures in approaching a Court of law as follows -

*This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.*

*Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2) (d) of the constitution, which proclaims that, "...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.*

20. This Court holds that compliance with the provisions of Rule 11(1) of the Advocates Remuneration Order is mandatory, and failure to comply with the said provisions is fatal.
21. I therefore find that this Court's jurisdiction has not been properly invoked. As such, I have no jurisdiction to hear and determine the Reference herein on

merits. I therefore lay down my tools as was held by the Court of Appeal in the case of the **Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd** (supra).

22. The upshot is that the instant application is fatally defective. It is hereby struck out with costs to the Advocate.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 3<sup>rd</sup> day of October 2025. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Omino for the applicant

Mr. Maingi for the Advocate/respondent

Ms B. Wokabi – Court Assistant.