

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM MISC. APPL. NO. E444 OF 2022

IN THE MATTER OF THE ADVOCATES ACT

-AND-

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER, 2014
(SCHEDULE 6)

-AND-

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE &
CLIENT

-BETWEEN-

P. I. SAMBA & COMPANY ADVOCATES.....ADVOCATE/RESPONDENT

-VERSUS-

KIPROP BUNDOTICH.....1ST CLIENT/APPLICANT

DIANA JEPCHUMBA BUNDOTICH.....2ND CLIENT/APPLICANT

(A Reference from the Ruling delivered on 24th September 2024 by Hon. N. Kyanya, sitting as a Taxing Master).

RULING

1. The clients/applicants filed a Chamber Summons application dated 1st October 2024 and amended on 14th October 2024, under the provisions of Sections 1A, 1B, 3A & 7A(G) of the Civil Procedure Act, Order 42 Rule 6(1) of the Civil Procedure Rules, Section 11 of Advocates Act and Article 15(a) of the Constitution of Kenya. The clients pray for orders that the application herein be admitted as a Reference against the taxation proceedings, that this Court varies, reviews and/or sets aside the Taxing Master's Ruling and Certificate of Costs

dated 24th September 2024, and instead strikes out or dismisses the Advocate-Client bill of costs dated 13th June 2022 on grounds of fraudulent dealings. The client also prays for an order for enlargement of time to file a Notice of Objection and a Reference against the said taxation and Certificate of Costs.

2. The application is premised on the grounds on the face of the Amended Motion, and it is supported by an affidavit sworn on 1st October 2024 by Mr. Kiprof Bundotich, the 1st client herein. Mr. Bundotich averred that the Advocate was an in-house Legal Counsel on a salary basis from the year 2015 to May 2020, but she later resigned and filed the taxed documents after her resignation. He contended that the clients never instructed the Advocate to act and there is no instruction note, fee payment, or Notice of Appointment. Further, that Court records show that the Advocate was never properly on record. Mr. Bundotich contended that they had no knowledge of the substantive suit or the bill of costs dated 13th July 2022 as the same was never served upon them.
3. He stated that it is evident from the Court record that the substantive suit never proceeded for hearing and/or mention as itemized in the respondent's bill of costs, but what has been coming before Court are mentions and rulings in respect to the bill of costs dated 13th July 2022. Mr. Bundotich contended that the Advocate admitted lack of instructions in her application to cease from acting. He explained that the substantive suit had effectively been abandoned by late 2019 but the Advocate revived it fraudulently in 2020 by filing backdated documents to disguise mischief and enable fraudulent taxation. He contended that at the time of filing the bill of costs herein, the substantive suit had already been withdrawn against the clients.
4. In opposition to the application, the Advocate filed a replying affidavit sworn on 28th November 2024 by Ms Pennynah Samba, an Advocate of the High

Court of Kenya practising in the Advocate law firm and learned Counsel for the Advocate. Ms Samba averred that she was never engaged as an employee or in-house Counsel of the clients, as she was professionally instructed as an external Advocate to represent the clients in the parent suit, hence their relationship was purely on a retainer basis. She contended that the allegation that she fabricated or manufactured pleadings is false, malicious and unsupported by evidence, as the record shows that the clients were properly joined as third parties in the parent suit by a Court order, thus she acted under the clients' instructions in entering appearance, filing a statement of defence and preparing responses.

5. Ms Samba stated that there is a chronology of email correspondence between her, the clients and third parties such as NCBA Bank, confirming that the Advocate was actively engaged in preparing the clients' defence and acting upon their instructions. She further stated that the clients were duly served with pleadings at every stage as evidenced by the affidavits of service on record, and that their claim that they had no knowledge of the proceedings in the parent suit is misleading. Ms Samba contended that the parent suit was not abandoned in 2019, as it remained active and the Advocate continued to receive instructions from the clients her law firm's eventual application to cease from acting that was filed on 13th July 2021.
6. Ms Samba averred that the Taxing Master requested for pleadings from the parent suit, which the Advocate provided via email to the Court Assistant on 26th September 2022. She stated that additional pleadings were later obtained through a perusal request dated 30th September 2022 and forwarded by email on 5th October 2022. She contended that even the affidavits of service filed contradict the clients' claims that proceedings went undefended due to lack of service. She further averred that after the re-taxation Ruling delivered on 24th September 2024, the clients threatened the Advocate with criminal and

disciplinary action at the Law Society of Kenya if the Advocate proceeded to extract a Certificate of Costs and proceed with execution of the taxed costs.

7. Ms Samba contended that though the clients are seeking an order to strike out the bill of costs dated 13th June 2022 on account of fraud, allegations of fraud were not raised before the Taxing Master, thus they cannot be introduced at the Reference stage. The above notwithstanding, she asserted that the client's allegations of fraud remain unproven. She averred that the clients never contested the earlier Ruling on taxation which means that this Reference is only meant to avoid execution of Kshs.41,163,847.96. She further averred that taxations and references were concluded between October 2022 and September 2024, which shows that the clients had over 2 years to participate in these proceedings but failed to do so despite service. She contended that no plausible explanation for the delay has been offered, and that the application herein was only triggered by the threat of execution, which is not a ground for extension of time. Ms Samba asserted that no basis exists to interfere with the Taxing Master's Ruling of 24th September 2024.
8. The instant application was canvassed by way of written submissions. From the record and the Case Tracking System (CTS), the clients neither filed any submissions nor did they make oral submissions in Court, in support of the application herein. The Advocate's written submissions were filed on 29th November 2024 by the law firm of P. I. Samba & Company Advocates.
9. Ms Samba, appearing for her law firm submitted that the affidavit in support of the application herein is defective as the 1st client purports to swear the said affidavit on behalf of the 2nd client without the mandatory written authority required under Order 1 Rule 12(2) of the Civil Procedure Rules, 2010. She as such stated that the instant application is incompetent and should be dismissed.

She further submitted that this Reference is time-barred since it was filed one day after the 14-day period provided for under Rule 11 of the Advocates Remuneration Order and no explanation for the delay has been offered. She contended that extension of time being a discretionary and equitable remedy cannot be granted to the clients, who have approached this Court with unclean hands, having misrepresented facts regarding instructions, service, and their knowledge of the parent suit.

10. Ms Samba contended that the allegations of fraud are unsubstantiated and they were never raised before the Taxing Master, thus they cannot be introduced at the Reference stage. To this end, Counsel relied on the Court of Appeal case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited** [2020] KECA 894 (KLR). She cited the provisions of Section 108 of the Evidence Act and asserted that the clients have not discharged their burden of proving the allegations of fraud contained in their affidavit in support of the instant application. She cited the case of **First American Bank of Kenya vs. Shah and others** [2002] 1 EA 64, and submitted that interference with taxation is only permitted where there is an error of principle or where the Award is manifestly excessive, which have not been demonstrated by the clients herein. She urged this Court to dismiss the application herein with costs, noting that the clients' refusal to settle the taxed costs has unnecessarily escalated the costs of litigation.

ANALYSIS AND DETERMINATION.

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

- i) Whether the instant application is fatally defective;**
- ii) Whether the clients have made out a case for extension of time; and**
- iii) If the instant Reference is merited.**

Whether the instant application is fatally defective.

12. The Advocate submitted that the instant application is fatally defective, as the 1st client purports to swear it on behalf of the 2nd client without the mandatory written authority contemplated under Order 1 Rule 12(2) of the Civil Procedure Rules. She stated that the application herein is incompetent and ought to be dismissed.
13. It is however worthy of note that appearance of one of several plaintiffs or defendants for others is provided for under Order 1 Rule 13 of the Civil Procedure Rules and not order 1 Rule 12 of the Civil Procedure Rules, 2010, as stated by Ms Samba Advocate. Order 1 Rule 13 of the Civil Procedure Rules, 2010 provides that –
 - 1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.**
 - 2) The authority shall be in writing signed by the party giving it and shall be filed in the case.**

14. It is not in contest that at paragraph 1 of the affidavit in support of the instant application, the 1st client claimed to have authority to swear the affidavit on behalf of the 2nd client, but no such authority was attached to the said affidavit. The effect of a party's failure to comply with Order 1 Rule 13 of the Civil

Procedure Rules, 2010, was discussed by the Court in the case of **Savala & another v Ndanyi (Environment and Land Case Civil Suit 248 of 2021)** [2022] KEELC 2536 (KLR) (5 July 2022) (Ruling) as hereunder -

....a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding....lack of such an authority does not necessarily void the proceedings.....The case by his co-parties remain unprosecuted.

15. In view of the provisions of Order 1 Rule 13 of the Civil Procedure Rules, 2010 and the above decision, this Court finds that the 1st client's failure to demonstrate authority from the 2nd client to swear the affidavit in support of the instant application on her behalf does not in itself render the application herein invalid, as it cannot be said to be fatally defective on that account, as it may still properly proceed at the instance of the 1st client alone.
16. This Court therefore finds that the application herein is not fatally defective.

Whether the clients have made out a case for extension of time.

17. Rule 11(4) of the Advocates Remuneration Order provides that –

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

18. It is evident from the above provisions that Courts have the discretion to enlarge time within which an applicant may file or lodge a Reference challenging the decision of a Taxing Master. The procedure for objecting to a Taxing Master's decision is provided for under Rule 11(1) & (2) of the Advocates Remuneration Order which states as follows-

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 is not disputed that the Taxing Officer's Ruling was delivered on 24th September 2024. Dissatisfied with that decision, the clients issued a Notice of Objection through a letter dated 2nd October 2024, requesting for a copy of the Ruling together with the reasons for the decision. They also filed the instant application on the same date. Under Rule 11(1) of the Advocates Remuneration Order, the Notice of Objection ought to have been filed on or before 8th October 2024. This Court notes that although the said Notice was dated 2nd October 2024, it was filed on 9th October 2024, thereby rendering it one day late.

20. The Court of Appeal in the case of **Paul Wanjohi Mathenge v Duncan Gichane Mathenge** [2013] KECA 199 (KLR) while referring to other authorities made the following observation in regard to Rule 11(4) of the Advocates Remuneration Order-

The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In Henry Mukora Mwangi V Charles Gichina Mwangi – Civil Application No. Nai 26 of 2004, this Court held -

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi V Kenya Airways Ltd [2003] KLR 486 in which this Court stated;-Over the years, the Court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in Leo Sila Mutiso V Rose Hellen Wangari Mwangi – Civil Application No Nai 255 of 1997(unreported), the Court expressed itself thus; -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reasons for delay; thirdly (possibly), the chances of the appeal succeeding if the application is

granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

21. In dealing with an application under Rule 11(4) of the Advocates Remuneration Order, this Court has to consider the length of the delay, the reason for the delay, the chances of the Reference succeeding, and the degree of prejudice that will be occasioned on the respondent should the application be allowed.
22. No explanation for the delay in filing of the Notice of Objection has been proffered. This Court notes that the instant application was filed on 2nd October 2024, well before the expiry of the 14-day period provided for under Rule 11(1) of the Advocates Remuneration Order. In the application herein, the clients specifically pray for an order of extension of time to file a Notice of Objection in compliance with Rule 11(1) of the Advocates Remuneration Order, as well as extension of time to file a Reference against the Taxing Master’s Ruling and Certificate of Costs. I am therefore persuaded that the one-day delay in lodging the Notice of Objection was not occasioned by bad faith or malice on the part of the clients, given that they had already moved the Court for leave to extend time before the statutory period elapsed.
23. Nevertheless, this Court notes that Rule 11(2) of the Advocates Remuneration Order requires the Taxing Master upon receipt of a Notice of Objection, to promptly record and furnish the Objector with reasons for the decision on the disputed items. The Objector then has fourteen (14) days from the date of receiving those reasons to file a Reference setting out the grounds of objection.
24. As at the time of delivering this Ruling, the Taxing Master had not responded to the clients’ Notice of Objection. The Advocate neither alleged nor demonstrated any prejudice that the Advocate would suffer if time was extended to enable the clients to comply with Rule 11(1) of the Advocates Remuneration Order. The

Advocate contended that since the reasons for the Taxing Master's Ruling are contained in the Ruling, strict compliance with Rule 11(1) was unnecessary.

25. I am however persuaded that the clients have established sufficient grounds to warrant being granted an extension of time to file both a Notice of Objection and a Reference challenging the Taxing Officer's Ruling and Certificate of Costs.
26. Consequently, the instant application is admitted as a Reference against the said Ruling and Certificate of Costs.

If the instant reference is merited.

27. The High Court's jurisdiction in respect to References has been the subject of litigation over the years. The Court of Appeal in **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board** [2005] KECA 325 (KLR) addressed itself as follows in respect to this issue –

On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.

28. From the above decision, Courts can only interfere with a Taxing Master's decision where there has been an error in principle and not solely on questions of quantum as that is an area where the Taxing Officer is more experienced and therefore well versed in the job. This position was captured by the Court in the case of **Tom Ojienda v County Government of Meru** [2021] KEHC 7940 (KLR) as hereunder –

The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court in Visser vs Gubb 1981 (3) 753 (C) as follows;

“the court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

29. The clients contest the Taxing Master's Ruling of 24th September 2024 on the basis that the Advocate lacked instructions to represent them in the parent suit, and therefore the bill of costs dated 13th June 2022 was founded on fraudulent dealings.
30. The Advocate's bill of costs dated 13th June 2022 was initially taxed in a Ruling delivered by Hon. E.M. Nyakundi, Deputy Registrar, on 28th October 2022. Thereafter, the Advocate challenged that Ruling through an application dated 10th November 2022, which was determined by this Court in a Ruling delivered on 3rd May 2024. In that decision, the Court set aside the Taxing Master's

Ruling of 28th October 2022 insofar as it related to instruction fees and referred the bill of costs to a different Taxing Master for fresh taxation of item No. 1 on instruction fees together with the interest due to the Advocate.

31. The said bill of costs was subsequently placed before Hon. Kyanya, Deputy Registrar, who re-taxed item No. 1 on instruction fees and the interest due to the Advocate in a Ruling delivered on 24th September 2024. The Taxing Master's Ruling of 24th September 2024 was confined to the directions issued by this Court in its Ruling of 3rd May 2024. It is not in contest that this Court did not direct a determination of whether the Advocate had instructions from the clients to represent them in the parent suit. Further, the said issue was neither addressed by Hon. Kyanya in her Ruling of 24th September 2024 nor was it part of the issues before her for determination.
32. In the circumstances, this Court finds that the Taxing Master's Ruling of 24th September 2024 and the resultant Certificate of Costs cannot be challenged or set aside on grounds that were neither placed before the Taxing Master nor considered by her. This Court further finds that the instant application amounts to a delaying tactic by the clients aimed at denying the Advocate the enjoyment of the fruits of her judgment, longer than is necessary.
33. In the end this Court finds that the client's Reference is bereft of merits. It is hereby dismissed with costs to the Advocate.

It is so ordered.

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

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Bosire for the clients/applicants

Ms Samba for the Advocate/respondent

Ms B. Wokabi – Court Assistant.

ORIGINAL