



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 253 OF 2017**

**SAMUEL WAIYA GITHUKURIO.....PLAINTIFF /APPLICANT**

**VERSUS**

**STEPHEN MUNGAI WAITA.....DEFENDANT/RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 11<sup>th</sup> February 2019 brought under paragraph 11(1) & (2) of the Advocates Remuneration Order and all other enabling provisions of the law where the Applicant has challenged the ruling of the Deputy Registrar in regard to the Bill of Costs dated the 17<sup>th</sup> May 2017.
2. The said application is supported by the grounds set on its face as well as on the supporting affidavit of Nderitu Komu, Counsel for the Applicant herein.
3. The facts giving rise to the present situation are that the Plaintiff herein instituted the present suit vide a plaint dated the 14<sup>th</sup> April 2016 wherein the Defendant entered appearance and filed his statement of defence dated the 5<sup>th</sup> September 2016. Alongside the said statement of defence, the Defendant filed a Preliminary Objection seeking to strike out the suit. It was before the said Preliminary Objection could be heard that the Plaintiff discontinued the suit wherein the court marked the same as discontinued with costs to the Defendants.
4. Pursuant to the discontinuation of the suit by the Plaintiff, the Defendant herein filed a Bill of Costs dated 17<sup>th</sup> May 2017 where they sought for costs to be taxed at Ksh 183,420/=.
5. The said Bill of Costs was canvassed through written submissions wherein on 22<sup>nd</sup> October 2018 the Deputy Registrar delivered a ruling taxing the Bill of Costs at Ksh 196,595/= which is the subject matter herein.
6. The application was disposed of by way of written submission wherein the Plaintiff /Applicant faulted the taxing master for taxing the instruction fee in item No.1 at Ksh 122,400/= wherein the Defendant had sought for a sum of Ksh.100,000/= Secondly, that the taxing master in reaching the decision he had reached to tax the instructions fee at that amount, had relied on a value of the subject suit being Ksh 1,200,00/- wherein the pleadings had not disclosed the said value. The Applicant relied on the decided case of **Elijah Momanyi p/a Anassi Momanyi & Co Advocates vs Bartera Maiyo [2006] eKLR** to submit that there having been no disclosure of the subject matter, the taxing officer ought to have taxed the instruction fees with the guidance of the provisions of Section 1(b) of schedule 6 of the Advocates Remuneration Order which placed the instruction fee in such a scenario as ksh 75,000/= . That since the Plaintiff /Applicant's suit did not go to full trial, the instruction fee ought to have been taxed at 75% of the fee chargeable under item 1(b).
7. That Plaintiff /Applicant also challenged the getting up fee on item 2 of the bill of cost which had been taxed the fee at Ksh 40,800/= in contravention of the provisions of Section 2(ii) of Schedule 6 of the Advocates Remuneration Order which provides that the getting up fee is not chargeable until the case has been confirmed for hearing. That in the present circumstance, the Plaintiff withdrew the instant suit before the suit had been confirmed for hearing. Ref was made to the case of **Metro Petroleum Limited vs Onyango Oloo & Co Advocates [2016] KLR**.
8. The Applicant challenged item 6 of the Bill of Costs where the taxing master had awarded the Defendant ksh 1,100/= despite there having been no provision for drawing of submission under the Advocates Remuneration Order.
9. The Applicant also took issue with item 11, and 12 of the Bill of Costs wherein the matter had been taken out by consent, and item 13 where the suit had been withdrawn and of which the fee ought to have been charged at Ksh. 1,000/= respectively but where the taxing master taxed the items at Ksh 2,100/=

10. Item No. 18 was also challenged for having been taxed at Ksh 1,100/= yet the Advocates Remuneration Order, did not have provision for this item.
11. The Applicant faulted the taxing master for taxing items No. 20 and 22 at Ksh 3,190/= yet the matter had already been transferred to the Nyahururu Court from Nakuru where the travelling expense had now reduced to a considerable rate of Ksh 400/=and therefore the taxing master ought to have taxed the same off to a sum of ksh 2,580/= for both these items.
12. The Applicant, in his further submission submitted that although the Plaintiff did not issue a notice in writing to the Deputy Registrar seeking reasons on how taxation was done, yet it is also not in dispute that the period within which the Plaintiff ought to have filed his notice of objection was extended by consent on the 5<sup>th</sup> December 2019 wherein on the following day, the Plaintiff filed Notice of Objections. Subsequently, the Plaintiff was supplied with a copy of the ruling which contained the reasons as how the taxing officer had taxed the Defendant's bill of costs.
13. The Applicant sought to have the ruling of the taxing master set aside and re-taxed as far as the items herein above were concerned.
14. The Reference was opposed by the Respondent both in their grounds of opposition as well as in their submissions wherein they submitted that indeed the Plaintiff's suit against the Defendant was discontinued vide a notice dated or two and February 2017 wherein costs of the suit were awarded to the Defendant.
15. That the Defendant presented a very modest Bill of Costs dated 17<sup>th</sup> May 2017 for taxation which was canvassed by way of written submissions. A ruling was subsequently delivered where costs were assessed on the 22<sup>nd</sup> October 2018 at Ksh 196,495/= and a certificate of costs was issued on 7<sup>th</sup> November 2018.
16. The Defendant submitted that paragraph 11 of the advocates remuneration order stipulated that a party who wished to object to the decision of the taxing officer should do so within 14 days after the decision by giving notice in writing to the taxing officer of the items of taxation to which he objected. The Plaintiff gave no such notice but filed the chamber summons application dated 19<sup>th</sup> November 2018 where he sought inter alia that time be enlarged for lodging a notice of objection to the ruling on taxation of the Defendants Bill of Costs to which the Defendants understood the application as one that was seeking for time to comply with the provisions of paragraph 11(1) of the advocates (remuneration) order, so by a consent entered on the 5<sup>th</sup> of December 2018, the application was allowed.
17. It was their submission that the chamber summons was fatally defective, an abuse of the court process and prematurely before the court and the same therefor ought to be struck out with costs for reasons that after time to which to file a reference was extended, the Plaintiff did not comply with the provisions of paragraph 11 of the Advocates Remuneration Order by first issuing a notice in writing to the taxing officer within 14 days of the ruling and secondly receiving reasons on the items the Plaintiff wished to object to, as provided for in paragraph 11(2). That further, the written decision of the taxing officer was not on the record
18. That on the items objected to, they relied entirely on their written submissions filed on the 6<sup>th</sup> July 2018 to submit that the taxing officer did not exceed his powers which he had exercised discretion within the law. The Defendant relied on the decided case of **Rogan Kamper & Grosvenor [1989] KLR** as quoted in the case of **Metro Petroleum Ltd vs Onyango Oloo & Co. & Another [2016] eKLR**, to submit to that the amount awarded was not manifestly excessive. That the taxing master was right in assessing the value of the subject matter at Ksh 1,200,000/=. That the dispute was over land parcel No. Nyandarua/Kaimbaga/1339 and 1340 measuring 1.38 Ha (3.4 acres) and 0.375 Ha (1 acres) respectively which values exceeded Ksh 1,200,000/= as adopted by the court.
19. That the Plaintiff did not supply a of valuation report to counter the value given by the Defendant. That the provisions of Section 1(b) of Schedule 6 were not applicable as the value of the subject matter was known. The Defendant relied on the case of **Joreth Ltd vs Kigano & Associates Civil Appeal No. 66 of 1999** as quoted in paragraph 3 of **Metro Petroleum Ltd** (supra) to submit that the court had taken into consideration the value of the subject matter and maybe the actual reason for assessment would have been given by the taxing master had the Plaintiff complied with the law.
20. That whereas the Preliminary Objection was to proceed by way of written submissions, the suit was defended wherein the defense had been filed and therefore the taxing master was right in awarding the getting up fee.
21. The Defendant submitted and that drafting of submissions were pleadings provided for under paragraph 4 of Schedule 6 which provided for Ksh 1,100/=
22. That in as far as item 11 was concerned, that the matter had been scheduled for mention for direction on the hearing of the main suit wherein it was agreed by consent that the notice of Preliminary Objection be heard first. The Defendant was therefore entitled to attendance fee, for the mention, at a sum of Ksh 2,100/= and which was on a lower scale considering that Counsel had travelled from Nyahururu to Nakuru. That this was applicable to items No. 12 and 13 where counsel attended court for the mentions.
23. That further, as far as item No. 18 was concerned, a notice of Preliminary Objection was a pleading as provided for in paragraph 4 of the schedule. That as far as items No 20 and 22 were concerned, the service fee was to be calculated from the High Court where the matter was filed. The pleadings in those two items were filed in ELC at Nakuru and served upon counsel for the Plaintiff in Nyahururu town.
24. That under paragraph 9, service within 3 kilometers of the High Court was Ksh 1,400/=. Nyahururu was not within the 3 km of Nakuru law courts. That every additional Kilometer was accessed at Ksh 35 km per. Nyahururu town was approximately 57 km from Nakuru and the additional sum therefore translated to Ksh 1,995/= bringing a total of Ksh 3,395/=. That the sum of Ksh 3,290/= awarded in items 20 and 22 was therefore on a low scale considering that the Defendant did not even charge travelling and subsistence expenses incurred by the process server.

25. The Defendant thus sought that the application be dismissed as the same was frivolous and a waste of precious judicial time.

**Determination.**

26. I have considered the foregoing. The first issue for consideration is whether the application is properly before the Court, and whether the Applicant deserved the orders sought.

27. From the above proceedings, it is clear that this matter was instituted by the Plaintiff against the Defendant vide a plaint dated the 14<sup>th</sup> April 2016 wherein the Defendant filed their statement of Defence and Preliminary Objection dated the 5<sup>th</sup> September 2016 on an equal date.

28. While the matter was awaiting the disposition of the Preliminary Objection in which parties had consented to dispose by way of written submissions, on the 20<sup>th</sup> February 2017, the Plaintiff herein filed a Notice for discontinuation of the suit dated the 10<sup>th</sup> February 2017 where the same was allowed on the 9<sup>th</sup> May 2017 with costs to the Defendant.

29. The Defendant filed his bill of cost dated the 17<sup>th</sup> May 2017 for Ksh 183,420/= wherein vide an application dated the 16<sup>th</sup> June 2017 the Plaintiff sought to have the said certificate of taxation set aside. By consent, parties set the same aside on the 5<sup>th</sup> March 2018 in favour of fresh taxation. Parties thereafter submitted their Bill of taxation which was canvassed by way of written submissions. The taxing master delivered his ruling on the 22<sup>nd</sup> October 2018 where he taxed the Bill of Costs at Ksh 195,495/=

30. Vide an application dated the 19<sup>th</sup> November 2018, the Plaintiff /Applicant sought for enlargement of time for lodging a Notice of Objection to the ruling on taxation on the Defendant's Bill of Costs dated the 17<sup>th</sup> May 2017. This application was set for hearing inter-parties on the 5<sup>th</sup> November 2018 wherein by consent the application was allowed in terms of staying of execution of the taxed costs as well as the enlargement of time to lodge a notice of objection to the ruling on taxation.

31. The Applicant subsequently filed a notice of objection to taxation dated the 6<sup>th</sup> December 2018 on the equal date wherein he also sought for reasons from the Deputy Registrar for taxing the said Bill of Costs at Ksh 196,495/=.

32. It is clear that upon the consent having been adopted as an order of the court on the 5<sup>th</sup> December 2018, the Applicant/Advocate filed a notice of objection to taxation dated the 6<sup>th</sup> December 2018 on an equal date which was within the stipulated time limit.

33. From the record, the same is silent on what happened to this application as the next time parties were in court, they sought to proceed with the present reference where the Applicant sought to set the ruling dated the 22<sup>nd</sup> October 2018 aside and/or re-tax the items herein above submitted.

34. The reference was opposed by the Defendant for reasons that the Plaintiff had not complied with the provisions of paragraph 11 of the Advocates' Remuneration order.

35. The provisions of Paragraph 11 of the Advocates (Remuneration) Order provide 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 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 subparagraph (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 expired.*

36. In the present case, it is clear that before the taxing master could address the Notice of objection dated the 6<sup>th</sup> December 2018 and give his reasons for his decision on the flagged items, the objector filed the present reference dated 11<sup>th</sup> February 2019.

37. The purpose of obtaining reasons for a decision by a taxing master is merely intended to give the objector an indication as to whether or not the taxing master had erred in his or her assessment of costs with a view to filing a reference. It was not the intention that an objector could request for reasons for the sake of it just because the same was provided for in Paragraph 11 of the Advocates Remuneration Order.

38. In **Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board Nairobi Civil Appeal No. 220 of 2004** the court of Appeal held that;

*“It is true that the taxing officer did not record the reasons for the decision on the items objected to after receipt of the respondent’s notice. It seems that the taxing officer decided to rely on the reasons in the ruling on taxation dated 23rd February, 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance.”*

39. In the case of **National Oil Corporation Limited v Real Energy Limited & another [2016] eKLR** the judge had this to say;

*“In my view there is no magic in requiring the Taxing Officer to furnish reasons before making a reference. Where reasons are contained in the decision a party ought not to seek the same simply because it is fashionable to do so. Accordingly, nothing turns on the issue that the applicant did not seek the reasons for the decision before filing the reference.”*

40. *I am in agreement with the finding of the court herein above. I have looked at the Ruling that was delivered on the 22<sup>nd</sup> October 2018 and find that the said ruling on the taxation contained reasons for the same. There is therefore no magic in the act of requesting for reasons and it would not serve a different purpose to ask for reasons when the same are contained in the ruling. The finding of this court therefore is that the reference was properly filed and it is not defective for the fact that the same was filed in absence of a request for reasons.*

41. On the second issue on Rule 11 of the Advocates (Remuneration) Order that provides that a reference should be filed within 14 days from the date of receipt of reasons from the taxing officer, I find that whereas the Ruling of the taxing officer was delivered on the 22<sup>nd</sup> October 2018, the present reference was filed on the 11<sup>th</sup> February 2019 which was 4 months later. No reason was given for the late filing months after the date of the ruling. Rule 11 is particular that a reference should be filed 14 days from the date of receipt of reasons. In this case, although the Applicant requested for reasons from the registrar, yet the same can be discerned from the taxing master’s ruling of 22<sup>nd</sup> October 2018 and therefore time started to run on the date the ruling was delivered.

42. The Applicant did not seek leave of this court to file the application out of time in accordance with rule 11 (4) of the Advocates (Remuneration) Orders stated herein above. In the case of **Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited [2012] eKLR**, the court held as follows:

*“If the client considered the said decision to contain the reasons, he could file the reference within 14 days from the date thereof. If, on the other hand, he was of the view that there were no reasons contained in the decision, he could request for the same in writing, in which case, he would be bound to wait for the same. If, however, at a later stage he decided to prefer the reference notwithstanding the failure by the Taxing Master, after the lapse of the 14 day period, it is my view that he would be bound to apply for extension of time under Rule 11(4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure by the Taxing Master to furnish him with the reasons which, according to the decision in **Kipkorir, Titoo & Kiara Advocates (suprs)**, is a ground for allowing a reference. However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given if even by the time of making the same reference, the said reasons have not been furnished.”*

43. The finding of this court is therefore that, the application was filed out of time and without the leave of the court. In the premises, the Chamber Summons dated 11<sup>th</sup> February 2019 is struck out with costs.

**Dated and delivered at Nyahururu this 29<sup>th</sup> day of October 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**