



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 23 OF 2018

OKOTH AND COMPANY ADVOCATES.....ADVOCATE/APPLICANT

=VERSUS=

MOUNT KENYA UNIVERSITY.....CLIENT/ RESPONDENT

RULING

1. M/s Okoth and Company Advocates, the applicant/advocate in the present Miscellaneous Application lodged an advocate/client bill of costs dated 30/5/2017 in Nairobi ELC Miscellaneous Application Number 106 of 2017. On 4/12/2017, the taxing officer of the court, Hon I N Barasa rendered a ruling in the said suit, in which she made a finding to the effect that the advocate and the client (Mount Kenya University) had entered into an agreement for fees and therefore the jurisdiction of the taxing officer to tax the bill was ousted. The taxing officer consequently disallowed the advocate/client bill of costs which the advocate had presented in the said suit.

2. Aggrieved by the decision of the taxing officer in Nairobi ELC Miscellaneous Application Number 106 of 2017, the advocate brought the present reference under Paragraph 11 (2) of the Advocates (Remuneration) Order in the present suit, Nairobi Miscellaneous Application Number 23 of 2018, objecting to the decision of the taxing officer. The reference was brought by way of chamber summons dated 17/2/2018.

3. On 3/5/2018, the client filed a notice of preliminary objection seeking to have the reference struck out on the following grounds:

1. Rule 11 (2) of the Advocates (Remuneration) Order, requires a reference to be lodged within fourteen days of receipt of reasons of the decision. It is now settled that when a taxing officer has rendered a ruling explaining the basis of her taxation, a party need not to apply for reasons under rule 11 (1), but should lodge its reference on the basis of the ruling delivered and time runs from the date such ruling was delivered.

2. The application herein is misconceived and bad in law. The applicant ought to have filed the reference in the same matter i.e ELC Misc. 106 of 2017 Okoth & Company Vs Mount Kenya University but not file a separate miscellaneous application.

3. A reference or objection to the decision on taxation under the provision of paragraph 11 of the Advocates Remuneration Order is filed in the same matter in which a bill is taxed.

4. The said preliminary objection is the subject of this ruling. It was canvassed through written submissions. Both the objector (client) and the applicant (advocate) filed written submissions on 31/7/2019. I have considered the said submissions. I will first deal with the second and third grounds of objection because they raise the question of competency of the present suit and the jurisdiction of the court to entertain the suit.

5. The gist of the objector's objection under the second and third ground is that a reference under Rule 11 (2) of the Advocates (Remuneration) Order ought to be filed in the same cause in which the taxation was made and objection filed. Rules 11 (1) and (2) provide thus:

“11 (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”

6. The position of the applicant is that there is no statutory requirement that a reference under Rule 11 (2) be filed in the same cause and that a reference can properly be filed in a different cause. The applicant further submits that Article 159(2) (d) of the Constitution empowers this court to administer justice without undue regard to procedural technicalities. Their view is that as long as there is no specific law barring a party from initiating a new cause and prosecuting a reference therein, the applicant should not be precluded from prosecuting the present reference.

7. My understanding of a reference under Rule 11 (2) is that it comprises of both the cause and the entire record giving rise to the chamber summons contemplated under the rule. The record includes the bill of costs, all the documents presented to the taxing officer to aid in the taxation, the parties’ submissions, the ruling or decision of the taxing officer, the notice of objection, all correspondence under the rule, and the chamber summons itself. To argue that a party aggrieved by a decision of the taxing officer is at liberty to challenge the decision through the platform of a fresh cause is, in my view, erroneous. The platform available to the aggrieved party is the cause in which the taxing officer made the impugned decision.

8. Indeed, Musinga J (as he then was) correctly held in **Kimatta & Co Advocates v Joyce Wambui Jarvis (2005) eKLR** that the proper platform for taking proceedings to ventilate grievances under Rule 11 of the Advocates (Remuneration) Order is the cause in which the impugned decision was made. He rendered himself thus:

“It does not require to be stated that the application under sub rule (4) has to be made in the same file or cause under which the objection was made in the first place, it is logical. The application has to be made in the cause under which the taxation was done so that the judge, in exercising his discretion one way or the other can see when the objection as required under paragraph 11 (1) was made and the sequence of events that followed thereafter in order to determine whether there are good grounds upon which an extension of time can be allowed under paragraph 11 (4)”

9. I therefore agree with the objector that the present cause is incompetent because the reference herein ought to have been presented and prosecuted in Nairobi ELC Miscellaneous Application Number 106 of 2017 in which the impugned decision was made. The present suit is not the proper forum for challenging the impugned decision. The net result is that the present reference stands to be struck out.

10. I will not make any determination on the first ground of objection because to do so may prejudice the advocate in the event that the advocate ultimately elects to ventilate their grievances through a reference within the cause in which the impugned decision was made. It would be unfair to shut that door through this ruling in which I have already found that the court cannot entertain the present reference because it ought to have been filed in a different cause.

11. The net result is that the reference herein, and indeed the entire suit, is struck out for having been brought in the wrong cause. The client shall have costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF NOVEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

M/s Mcharo Advocate holding brief for Mr Karanja the client

M/s Ndinda Advocate holding brief for Mr Odoyo for the Advocate

Court Clerk - Mr Waweru