



**Ngomeni Swimmers Ltd v Said & 8 others; St Patrick’s Hill School (Interested Party)
(Environment & Land Case 15 of 2010) [2024] KEELC 752 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 15 OF 2010**

EK MAKORI, J

FEBRUARY 15, 2024

**IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER
2006 & ADVOCATES REMUNERATION AMENDMENT ORDER, 2009**

AND

IN THE MATTER OF TAXATION OF PARTY & PARTY BILL OF COSTS

BETWEEN

NGOMENI SWIMMERS LTD APPLICANT

AND

ZEDI AHMED SAID 1ST DEFENDANT

THE HON ATTORNEY GENERAL 2ND DEFENDANT

THE LAND REGISTRAR, KILIFI 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

THE DIRECTOR OF SURVEY 5TH DEFENDANT

**THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 6TH
DEFENDANT**

THE REGISTRAR OF TITLES, MOMBASA 7TH DEFENDANT

TABU TUVA KHONDE 8TH DEFENDANT

KAHINDI KAINGU NGONDA 9TH DEFENDANT

AND

ST PATRICK’S HILL SCHOOL INTERESTED PARTY



RULING

1. The application dated 15th August 2023 seeks to have the taxation by the taxing master rendered on 21st June 2023 set aside, and for the Court to provide any other further orders as it would deem necessary, the application also sought to have costs provided.
2. The 8th and 9th respondents opposed the application and also raised a Preliminary Objection to the Reference dated 28th August 2023 stating that the reference was filed out of time and ought to be struck out with costs.
3. The Court directed both the preliminary Objection and the application be canvassed by way of written submissions.
4. The Preliminary Objection significantly raised the issue that a ruling in taxation was delivered by the taxing master on 21st June 2023. The Objection to the taxation was filed on 21st July 2023, a month after the taxation offending Sections 11(1) and 11(2) of the Advocates Remuneration Order. The 8th and 9th respondents averred that the reference having been brought well after 14 days had lapsed after the delivery of the taxation well offended express provisions of the law and therefore the reference ought to be struck out with costs.
5. The 8th and 9th respondents also stated that in any event, the reference alludes to the fact that no reasons were provided by the taxing master on request none have been provided for the consideration of this Court and therefore the Court cannot render its decision in vacuo.
6. The applicant in support of the reference and by the supporting affidavit by Mr. George Ouma, deposed on 15th August 2023 learned Counsel referred to a series of frustrations in getting the ruling delivered by the taxing master. Whereas it was indicated the same was emailed to the advocates, the same never reached the applicant's counsel. It will seem further that the taxing master will never provide those reasons and therefore the Court was argued to consider the reference and provide a ruling to meet the ends of justice.
7. The issues for the determination of this Court are whether the Preliminary Objection is sustainable and if the negative whether the Reference is germane and what orders will be proposed by this Court.
8. Before delving into the main application (Reference) let me deal with the preliminary Objection first. A Preliminary Objection as held in *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* [1969] E. A 696: where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, consists of:

Law, J.A. :

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”



Newbold, P.:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

9. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & Another [1995]* eKLR also captured the legal principle when it stated as follows:

“ A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. The impugned ruling in taxation was rendered by the taxing master of this Court on the 21st of June 2023. The Objection to the taxation was filed on 21st July 2023, a month after the taxation. It was expected that the following steps were to be taken by the applicant under where an appeal is anticipated - Rule 11 of the Advocates Remuneration Order:

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.
12. The applicant expressed dissatisfaction with the manner the ruling in taxation was delivered, it is not contested that the reference was filed well out of time. A month after the taxation ruling. However, the applicant ought first to have applied to this Court for enlargement of time. Even if I were to proceed to consider the merits of the reference, the one step jumped by the applicant by avoiding seeking an enlargement of time within which to file a Reference is fatal, this is not one of those clear cases where this Court can exercise discretion in favour of the applicant – see Mutungi J. in the case of *George Owino Odhiambo & 13 Others v Kenya Railways Corporation & Another [2022]* eKLR:

In the present matter, the ruling given by the taxing officer contained the reasons and it was superfluous for the applicant to seek reasons for the taxation when the same had been provided. The notice of objection to the taxation was filed well over two months from the date the ruling was delivered. No reasons whatsoever have been proffered for the delay. It was incumbent on the applicants to explain the delay in giving notice of objection and in filing the reference against the taxation. Extension of time is not a right of a party. It is an equitable



remedy that is only available to a deserving party. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. See the case of Nicholas Kiptoo Arap Korir Salat –vs- IEBC & 7 others (2014) eKLR where the Supreme Court laid the principles that should guide a court in exercising its discretion to extend time.

13. In fact, in this matter I have not even been approached to extend or enlarge the time with which to file a reference it would be foolhardy to discuss that issue on the filed reference itself. I have no jurisdiction. I down tools.
14. The upshot is that the Preliminary Objection dated 28th August 2023 is hereby sustained with the effect that the entire Reference filed herein and dated 15th August 2023 is hereby struck out with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 15TH DAY OF FEBRUARY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Ouma for the Applicant

Mr. Sumba for the 8th and 9th respondents

Court Clerk: Happy

