



Shah & 2 others v Koki Mbulu & Co.Advocates (Miscellaneous Application 1404 of 2023) [2024] KEELC 4282 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4282 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION 1404 OF 2023**

**JO MBOYA, J
MAY 23, 2024**

BETWEEN

**JITESH SHAH 1ST APPLICANT
OSHWAL EDUCATION & RELIEF BOARD 2ND APPLICANT
OSHWAL UNIVERSITY TRUST 3RD APPLICANT**

AND

KOKI MBULU & CO.ADVOCATES RESPONDENT

RULING

1. The Applicants herein filed and/or commenced the Reference by way of Chamber Summons Application dated the 22nd December 2023 and in respect of which same [Applicants] have sought for the following reliefs;
 - i. That this Honourable Court be pleased to review, vary and set aside the decision of the Taxing Officer delivered on 11th December, 2023 that taxed the Respondent /Advocates-Client Bill of Costs dated 4th February, 2016 at Kshs. 10,117,980.00 Only.
 - ii. That the said Advocate and Client Bill of Costs dated 4th February, 2016 be remitted to a different Taxing Officer with directions for fresh Taxation, or the Court itself taxes the Advocate-Client Bill of Costs.
 - iii. That the costs of this Application be provided for.
2. The instant application is premised on various grounds which have been enumerated in the body thereof. Furthermore, the application beforehand is supported by the affidavit of Suhash Ratilal Shah [Deponent] sworn on even date and to which the deponent has exhibited a total of four [4] documents [annexures].



3. Upon being served with the application beforehand, the Advocate/Respondent proceeded to and filed a notice of preliminary objection dated the 9th February 2024 and in respect of which same [Respondent] has contended inter-alia that the Reference beforehand is misconceived and incompetent for non-compliance with the provision[s] of Rule 11[1] of the Advocates Remuneration Order. Consequently and in this regard, the Advocate/Respondent has implored the court to find and hold that there is no Reference before the court capable of being entertained and/or adjudicated upon on merits.
4. First forward, the Application beforehand came up for directions on the 13th March 2024 and whereupon the advocates for the respective parties covenanted to canvass and ventilate the Reference and the Preliminary Objection simultaneously. Furthermore, the Advocates also agreed to file and exchange written submissions in respect of the two [2] named items.
5. Arising from the foregoing, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions. In this regard, the Applicants thereafter proceeded to and filed written submissions dated the 22nd April 2024; whereas the Respondent filed written submissions dated the 26th April 2024.
6. For coherence, the two [2] sets of written submissions [details in terms of the preceding paragraph] form part of the record of the court.

Parties' Submissions:

a. Applicants' Submissions:

7. The Applicants' herein filed written submissions dated the 22nd April 2024 and in respect of which same [Applicants] have adopted the grounds contained at the foot of the Reference and thereafter reiterated the averments in the body of the supporting affidavit.
8. Furthermore, learned counsel for the Applicants has thereafter proceeded to and highlighted three [3] pertinent issues for consideration and determination by the court.
9. Firstly, learned counsel for the Applicants has submitted that the preliminary objection which has been filed and mounted by the Respondent herein is misconceived and thus legally untenable. In any event, learned counsel for the Applicants has submitted that what is purported to be a preliminary objection does not satisfy the threshold established and expounded in the case of *Mukisa Biscuits Manufacturing Ltd vs Westend Distributors* [1969] EA.
10. Arising from the foregoing, learned counsel for the Applicants has invited the court to find and hold that the preliminary objection under reference is not tenable and hence ought to be dismissed.
11. Secondly, learned counsel for the Applicants has submitted that upon the delivery of the Ruling by the Taxing Officer, which was delivered on the 11th December 2023, the Applicants herein wrote a letter dated the 13th December 2023 and wherein same [Applicants] requested to be supplied with the reasons for the taxation by the taxing officer.
12. Furthermore, learned counsel for the Applicants has submitted that even though same [Applicants' Advocate] sought to be supplied with the reasons for the taxation, the learned taxing officer has failed to respond to and/or avail the reasons for the taxation.
13. Be that as it may, learned counsel for the Applicants has submitted that despite the failure by the taxing officer to revert and avail the reasons for the taxation, the taxing officer however, titled her Ruling as



the Ruling and reasons for taxation and hence the Applicants herein were able to proceed and file the Reference beforehand.

14. Additionally, learned counsel for the Applicants has submitted that the Reference beforehand was indeed filed and mounted within the prescribed timelines and hence the Reference is competent and thus ought to be determined on merits.
15. Thirdly, learned counsel for the Applicants has submitted that the learned taxing officer erred in taxing various items in the Respondent's bill of costs and hence there are manifest errors [of commission and omission] which should attract interference with the certificate of taxation by this court.
16. In particular, learned counsel for the Applicants has submitted that the learned taxing officer proceeded to tax the Respondent's bill of cost on the basis that the Respondent herein had been instructed to represent the Applicants in the transaction relating to the sale and purchase of L.R No. 10879/4; whereas the Respondent herein was only engaged for purposes of offering an opinion to the 1st Applicant and not otherwise.
17. Furthermore, learned counsel for the Applicants has submitted that by proceeding to tax the instruction fees on the basis that the Respondent had been retained to represent the Applicants in the sale of the named property, the learned taxing officer committed a grave error which vitiates the impugned Ruling and by extension, the resultant certificate of taxation.
18. Other than the foregoing, learned counsel for the Applicants has also contended that the learned taxing officer also failed to address her judicial mind to the totality of the issues which were apparent at the foot of the Respondent's bill of costs and thereby proceeded to and made awards which were not only exaggerated but not merited.
19. In view of the foregoing, learned counsel for the Applicants has therefore implored the court to find and hold that the Ruling of the taxing officer and the resultant certificate of taxation are thus vitiated by errors of commission and omission and thus same [certificate of taxation] warrants interference by the court.
20. In support of the foregoing submissions, learned counsel for the Applicants has cited various decisions inter-alia Thomas James Arthur vs Nyeri Electricity Undertaking [1961]EA 492; Joreth vs Kigano & Associates [2002]eKLR Republic vs Ministry of Agriculture & 20 Others Ex-parte Samuel Muciri Wanjuguna [2006]eKLR.
21. Premised on the foregoing, learned counsel for the Applicants has therefore invited the court to find and hold that the Application beforehand is meritorious and thus ought to be allowed.

b. Respondent's Submissions:

22. The Respondent herein adopted and reiterated the grounds contained at the foot of the Notice of Preliminary Objection dated the 9th February 2024 and thereafter proceeded to and highlighted one [1] salient issue for consideration by the court.
23. According to the Respondent, the Applicants herein were obligated to issue and file a Notice of Objection to Taxation in accordance with the provisions of Rule 11[1] of the Advocates Remuneration Order and which stipulates the ingredients that must be captured and reflected at the foot of such a notice of objection.
24. Furthermore, learned counsel for the Respondent has contended that the letter which was filed by and on behalf of the Applicants herein did not identify and/or isolate the items which the Applicants seek



to challenge vide the Reference. In this regard, it was contended that the failure to advert to and or highlight the items sought to be impugned, renders the entire Reference incompetent and invalid.

25. Arising from the foregoing, the Respondent has therefore invited the court to find and hold that the Reference before the court is incompetent and invalid for want of compliance with the express provisions of the law.
26. In support of the foregoing submissions, the Respondent herein has cited and relied on various decisions, inter-alia, the case of the Speaker of National Assembly vs James Jenga Karume [1982]eKLR, Raila Odinga vs IEBC & Others [2013]eKLR and Multiline Motors Kenya Ltd vs Migori County Government [UR].
27. In a nutshell, the Respondent herein has implored the court to find and hold that the Reference beforehand is invalid and thus ought to be struck out with costs.

Issues for Determination:

28. Having reviewed the Reference by way of Chamber Summons Application as well as the Notice of Preliminary Objection; and upon consideration of the written submissions filed by and on behalf of the parties, the following issues crystallize [emerge] and are thus worthy of determination.
 - i. Whether the Notice of Preliminary Objection raises a pure point of law and thus meets the threshold for what constitute[s] a Preliminary objection.
 - ii. Whether the Applicants herein complied with the provisions of Rule 11[1] of the Advocates Remuneration Order and if not the legal consequence attendant thereto.
 - iii. Whether the Reference before the court is meritorious.

Analysis And Determination:

Issue Number 1

Whether the Notice of Preliminary Objection raises a pure point of law and thus meets the threshold for what constitute[s] a Preliminary Objection.

29. The Respondent herein filed a Notice of Preliminary Objection dated the 9th February 2024 and in respect of which same [Respondent] contended that the Reference beforehand was incompetent and thus invalid for non-compliance with the provisions of Rule 11[1] of the Advocates Remuneration Order.
30. According to the Respondent, the issues alluded to at the foot of the Notice of Preliminary Objection constitutes and espouse pure issues of law, which are based on the settled facts as contained in the documentation and pleadings filed by the Applicants herein. In this respect, the Respondent has contended that the preliminary objection alludes to pure issues of law which are not underpinned on disputed facts.
31. On the other hand, learned counsel for the Applicants has submitted that what is touted as preliminary objection by and on behalf of the Respondent herein does not meet the threshold highlighted in the case of Mukisa Biscuit Manufacturing Ltd vs West End Distributors [1969]EA 696. Pertinently, learned counsel for the Applicants has submitted that the purported notice of preliminary objection is therefore misconceived and legally tenable.
32. To start with, there is no gainsaying that a preliminary objection can only be raised and canvassed when the facts are settled and not in dispute. For good measure, a preliminary objection is taken and/or



raised on the assumption that the facts as pleaded by the adverse party, [in this case], the Applicants are correct and admitted.

33. Besides, it is also important to underscore that a preliminary objection cannot be raised and/or canvassed where what is being agitated falls for the exercise of discretion by the court. Instructively, where a matter falls for exercise of discretion by the court then the preliminary objection would be premature and misconceived.
34. Suffice it to point out that the circumstances under which a preliminary objection can be raised and canvassed have been spoken to and elaborated upon by various Courts, including the Supreme Court of Kenya [the apex court] and whose decision[s] are binding on all the rest of the Courts by dint of the provisions of Article 163[7] of *the Constitution*, 2010.
35. In the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR, the court stated and held thus:

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –vs.– West End Distributors (1969) EA 696: ‘a preliminary objection consists of a 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 to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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’.”
36. Furthermore, the Supreme Court of Kenya [the apex court] reverted to and also elaborated upon what constitutes a preliminary objection and the circumstances under which same [Preliminary Objection] can be raised in the case of *Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014)* [2015] KESC 2 (KLR) (15 December 2015) (Ruling), where the court held thus;
 16. It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (see Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR).
37. Having taken into account the succinct exposition of the law [details in terms of the preceding paragraphs], it is now appropriate to revert back to the matter beforehand and consider whether what has been raised by and on behalf of the Respondent constitutes pure question[s] of law or otherwise.
38. Pertinently, all that the Respondent is contending is to the effect that the Applicants herein did not comply with and/or satisfy the requirement[s] stipulated vide Rule 11[1] of the Advocates Remuneration Order.
39. To my mind, the determination of whether or not the Applicants complied with the said provisions of the law is a question of law to be determined from the totality of the documents [read pleadings] filed by the Applicants and not otherwise.



40. Further and in any event, the preliminary objection has been taken upon juxtaposition of the letter dated the 13th December 2023 [being the letter requesting for reasons] as against the provision of Rule 11[1] of the Advocates Remuneration Order.
41. In my humble view, the issue being agitated by and on behalf of the Respondent is based on a settled fact, namely, the competence of the impugned letter and not otherwise. To this end, it is my finding and holding that the preliminary objection espouses a pure question and/or point of law, which can be determined on the basis of the facts as pleaded by the adverse party [Applicants].

Issue Number2

Whether the Applicants herein complied with the provisions of Rule 11[1] of the Advocates Remuneration Order and if not the legal consequence attendant thereto.

42. Having found and held that the notice of preliminary objection dated the 9th February 2024, raises and espouses a pure point of law; the next question that now merits due interrogation and consideration is whether the preliminary objection is meritorious.
43. To start with, it is Respondent's contention that the Applicants herein did not comply with the provisions of Rule 11[1] of the Advocates Remuneration Order and that the failure to do so vitiates and invalidates Reference before the court.
44. Before interrogating whether or not the provisions of Rule 11[1] of the Advocates Remuneration Order were complied with, it is imperative to reproduce the said provisions for ease of reference.
45. Same are reproduced as hereunder:
 - “ 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 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 already expired.”
46. From the foregoing reproduction, it is evident and apparent that any party who wishes to object to the decision of the taxing officer is obligated to issue a notice in writing to the taxing officer of the items of taxation to which he [Applicant] objects to. Pertinently, the notice of objection must advert to and identify the items which are sought to be objected to and/ or challenged vide the intended Reference.



47. My understanding of the provisions of Rule 11[1] of the Advocates remuneration Order [supra] drives me to the conclusion that an Applicant cannot file an omnibus notice of objection or better still, a letter seeking for reasons for the taxation and thereafter imagine that such an omnibus request suffices for purposes of Rule 11[1] [supra].
48. Instructively, the provisions of Rule 11[supra] were crafted to serve a specific and designated purpose and hence it behooves all and sundry, the Applicant herein not excepted to comply. For good measure, it is apposite to state and underscore that the provisions of the said Rule are meant to delineate and define the scope of issue[s] that the Applicant intends to canvass before the Court during the Reference.
49. Furthermore, it is important to underscore that the import, tenor and significance of Rule 11[1] [supra] have since been amplified and elaborated upon by the Court of Appeal in the case of Machira & Co. Advocates v Arthur K. Magugu & another [2012] eKLR, where the court stated thus:
12. Sub-rule (1) requires the party objecting to give notice in writing within 14 days “of the items of taxation to which he objects.” As the trial judge correctly found, the Respondents notice of 1st August 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them.
 13. As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1st August 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.
50. To the extent that the letter dated the 13th December 2023 [which the Applicant herein relies upon], did not identify and/or advert to the items of the taxation being objected to, it is my finding and holding that the said letter does not meet and/or satisfy the legal threshold prescribed vide Rule 11[1] [Supra].
51. Consequently and in view of the foregoing, I come to the conclusion that the Reference beforehand does not comply with the mandatory provisions of the law and hence same is not only incompetent but invalid.
52. In view of the foregoing, I am in agreement with and do accept the submissions by the Respondent that the Reference beforehand is incompetent and a nullity; and thus merits being struck out.
53. Before departing from the issue herein, it is imperative to state and underscore that it behooves the parties, the Applicants not excepted, to endeavor to comply with the provisions of the law; and where there has been a failure to do so, it behooves the defaulting party to justify and/or account for the default.
54. Be that as it may, it does not fall with the purview and competence of the litigants and/or their advocates to disregard the Rules of procedure with abandon and perhaps to imagine that even when same [Litigants] have disregarded the rules, such disregard will be glossed over and/or better still, be countenanced by the court[s] even without any explanation being offered [tendered].



55. To buttress the foregoing, it is important to draw the attention of the Applicants and their learned counsel to the ratio decidendi in the case of Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 2 others [2013] eKLR, where the court stated as hereunder:

“A five-judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of Mumo Matemu vs. Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 as follows:

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.”

56. Furthermore, the necessity to comply with the Rules of procedure and more particularly, the ones which are intertwined with the substance of the matter was also adverted to and elaborated upon by the Supreme Court of Kenya [the Apex Court] in the case of Patricia Cherotich Sawe versus Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR, where the court stated as hereunder:

(31) Although the appellant involves the principal of the prevalence of substance over form, this Court did signal in *Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others*, Petition No. 14 of 2013, that “Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls.” Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite.

57. In a nutshell, my answer to issue number two [2] is twofold. Firstly, the Applicants herein did not comply with and/or adhere to the clear provisions of Rule 11[1] of the Advocates Remuneration Order, 2014.

58. Secondly, the failure to comply with and/or adhere to the provisions of Rule 11[1] [supra] vitiates the entire Reference and renders same invalid for all intents and purposes.

Issue Number3

Whether the Reference before the court is meritorious.

59. The Applicants herein had contended that the learned taxing officer committed various errors whilst taxing the Respondent’s bill of costs. In this regard, learned counsel for the Applicants’ thus contended that the Ruling under reference and the resultant certificate of taxation was therefore vitiated by errors of principles.

60. On the basis of the contention that the learned taxing officer committed assorted errors of commission and omission, learned counsel for the Applicants proceeded to and invited the court to interfere with the certificate of taxation and thereby remit the Respondent’s bill of costs to a different taxing officer for purposes of [sic] re-taxation.

61. Despite the submissions by and on behalf of learned counsel for the Applicants, it is imperative to state and outline that the court can only engage with and/or undertake investigations to ascertain whether the certificate of taxation is wrought with or replete of errors [improprieties], only if there was a competent Reference before the court and not otherwise.



62. However, whilst discussing issue number two [2] hereinbefore, this court has since found and held that the Reference before the court is invalid and thus a nullity. Consequently, there is no gainsaying that there is no Reference upon which the court can engage with in an endeavor to discern [sic] whether the taxing officer committed any errors or otherwise, in the course of the taxation.
63. Simply put, the court herein cannot therefore be called upon to undertake the interrogation sought for in vacuum.
64. To my mind, the invitation by and on behalf of the Applicants herein [which seeks a determination on the merits] is therefore misconceived and stillborn.

Final Disposition:

65. From the foregoing analysis [details in terms of the preceding paragraphs], it must have become evident and apparent that the Reference beforehand is not only premature and misconceived; but same is equally legally untenable.
66. Consequently and in the premises, I now proceed to and do hereby make the following orders:
- I. The Reference Vide Chamber Summons Application Dated 22Nd December 2023 Be And Is Hereby Struck Out.
 - ii. Costs Of The Reference Be And Are Hereby Awarded To The Respondent And The Same [Costs], Shall Be Taxed By The Deputy Registrar.
67. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2024.

HON. JUSTICE OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant.

Mr. Nyanjwa h/b for Mr. Emmanuel Mummia for the Applicants.

Ms. Koki Mbulu for the Respondent

