



George Maengwe t/a G.M Maengwe & Company Advocates v Mokal Investments Limited (Environment and Land Miscellaneous Application E007 of 2023) [2024] KEELC 4040 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4040 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2023
LA OMOLLO, J
MAY 16, 2024

BETWEEN

**GEORGE MAENGWE T/A G.M MAENGWE & COMPANY
ADVOCATES APPLICANT**

AND

MOKAL INVESTMENTS LIMITED RESPONDENT

(IN THE MATTER OF AN APPLICATION BY ADVENTURES ALOFT (K) LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION, MANDAMUS AND IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012 AND IN THE MATTER OF THE FAIR ADMINISTRATIONS ACT, 2015 AND IN THE MATTER OF THE TERMINATE ACCESS TO THE PROPERTY KNOWN AS CIS/MARA/TALEK/11 BETWEEN 1 | Page RULING ELCMISC APPL. NO. E020 OF 2023 DELIVERED VIA)

RULING

1. This ruling is in respect of the Respondent/Applicant's Chamber Summons dated 5th December, 2023. The said application is expressed to be brought under Rule 11 of the [Advocates Remuneration Order](#).
2. The application is filed under Certificate of Urgency and seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That the time for lodging a reference as against the decision of the taxing master dated the 7th November, 2023 be extended and the reference herein be deemed as validated.



- d. That the decision of the taxing master delivered on the 7th November, 2023 be set aside and substituted thereof a decision striking out the advocate-client bill of costs.
 - e. That the costs of this reference be awarded to the client.
3. The application is based on the grounds on its face and the supporting affidavit of Isaac Kiprono, the Respondent/Applicant's director sworn on 5th December, 2023.

Factual Background.

4. The Applicant/Respondent commenced the present proceedings vide the Advocate-Client Bill of Costs dated 13th February, 2023 on the same date.
5. The Advocate-Client bill of costs was taxed on 7th November, 2023 at Kshs 2,026,700/=.
6. The application under consideration first came up for hearing on 6th February, 2024 when the court gave directions that the application would be disposed off by way of written submissions.
7. The application was mentioned severally before it was reserved for ruling on 11th April, 2024.

Respondent/Applicant's Contention.

8. It is the Respondent/Applicant's contention that on 7th November, 2023 the Deputy Registrar Environment and Land Court delivered a ruling on the advocate-client bill of costs filed in the present matter where he taxed the bill of costs at Kshs 2,026,700/=.
9. It is also the Respondent/Applicant's contention that on 15th November, 2023 its advocates on record applied for a copy of the ruling and the ruling was sent to the advocates on 20th November, 2023.
10. It is further the Respondent/Applicant's contention that by the time the ruling was sent and a decision made to file the reference, the prescribed period of 14 days under the law had lapsed.
11. The Respondent/Applicant contends that in order for it to make a decision, it had to convene a meeting of its directors which delayed the matter.
12. The Respondent/Applicant also contends that the delay was not inordinate and was excusable and therefore it sought that the period be extended and the reference validated.
13. The Respondent/Applicant further contends that the taxing master erred in relying on Schedule 6 of the Advocates Remuneration (amendment) Order 2014 and yet the matter which led to the filing of the taxation was filed in the Magistrate's court. The applicable schedule was Schedule 7 of the Advocates Remuneration Amendment Order 2014.
14. The Respondent/Applicant contends that the taxing master's finding that the matter was novel and complex was erroneous as the same was not backed up by the record of the court.
15. The Respondent/Applicant also contends that the Applicant/Respondent failed to discharge the retainer based in instructions and therefore improperly incurred costs by filing a suit in a court that did not have jurisdiction to deal with the matter.
16. The Respondent/Applicant further contends that the said facts were placed before the taxing officer through an affidavit that was sworn on 22nd May, 2023.



17. It is the Respondent/Applicant's contention that the bill of costs was instituted in an improper manner as the Applicant/Respondent did not file an application for taxation as required by paragraph 11 (1) of the [Advocates Remuneration Order](#) which issue was also raised before the taxing officer.
18. It is also the Respondent/Applicant's contention that the taxing officer in his ruling went contrary to an earlier order that he had given on 17th May, 2023 where he had ordered the Applicant/Respondent to show cause why the bill of costs ought not to be struck out.
19. It is further the Respondent/Applicant's contention that the taxing officer awarded getting up fees in a matter that was filed in the Magistrate's Court where no such provision exists.
20. The Respondent/Applicant contends that the Taxing Officer failed to factor in the fact that the advocate had been paid Kshs 50,000/= as retainer.
21. He ends his deposition by seeking that the execution of the decision of the taxing master be stayed awaiting the determination of the reference.

Applicant/Respondent's Response.

22. The Applicant/Respondent filed a Replying Affidavit on 10th January, 2024.
23. He deposes that he was served with a ruling notice by the Respondent/Applicant's advocates on 24th October, 2024.
24. He also deposes that the taxing officer delivered his ruling on 7th November, 2023 in his favour.
25. He further deposes that after the ruling was delivered, the Respondent/Applicant ought to have given a notice to the taxing officer of the items to which he was objecting to as required under paragraph 11(1) of the [Advocates Remuneration Order](#).
26. It is his deposition that to date the Respondent/Applicant has not given any Notice of Objection to the taxing officer's ruling and as such its application offends Paragraph 11(1) of the [Advocates Remuneration Order](#).
27. It is also his deposition that the Respondent/Applicant was seeking for extension of time to file a reference and yet he had not annexed any Notice of Objection or a draft reference as required to warrant this court to exercise its discretion.
28. It is further his deposition that the Respondent/Applicant was a "cunning person" and cannot be trusted as it was the one that served the Ruling Notice and that its advocate was present in court when the taxing officer delivered his

ruling.

29. The Applicant/Respondent deposes that the Respondent/Applicant stated that the time for filing a reference lapsed while it was studying the ruling and convening a meeting of the directors.
30. The Applicant/Respondent also deposes that the Respondent/Applicant's conduct of switching positions and goal posts from one point to another was meant to defeat the cause of justice and cannot be dignified with exercise of equitable discretion in its favour.
31. The Applicant/Respondent further deposes that the provisions of Rule 11(1) of the [Advocates Remuneration Order](#) was enacted for a purpose and therefore deserved to be complied with.



32. The Applicant/Respondent ends his deposition by stating that the Respondent/Applicant had not complied with the law and therefore its application constitutes an abuse of the due process of the court.

Issues for determination.

33. The Applicant/Respondent filed his submissions on 4th March, 2024 while the Respondent/Applicant did not file any submissions.

34. The Applicant/Respondent submits that this court has no jurisdiction to hear and determine the Respondent/Applicant's application and that the Respondent/Applicant has not followed the mandatory procedure for challenging an order of taxation as provided for under paragraph 11(1) of the [Advocates Remuneration Order](#).

35. The Applicant/Respondent relies on paragraph 11(1) and (4) of the [Advocates Remuneration Order](#) and reiterates that the Respondent/Applicant did not file any Notice of Objection and in its absence, this court lacks jurisdiction to entertain the Respondent/Applicant's application.

36. The Applicant/Respondent relies on the judicial decision of [Macfoy v United Africa Ltd](#) (1961) 3 ALL E.R. 1169 and seeks that the Respondent/Applicant's application be dismissed with costs.

Analysis and determination.

37. After considering the Respondent/Applicant's application, the response thereto and the submissions, the issues that arise for determination are:

a. Whether the Respondent/Applicant's application has merit.

b. Who should bear the costs of the application.

38. The Respondent/Applicant is seeking the following orders;

a. That time for lodging a reference against the taxing officer's ruling delivered on 7th November, 2023 be extended.

b. That the decision of the taxing officer delivered on 7th November, 2023 be set aside.

A. Whether time for lodging a reference against the taxing officer's decision should be extended.

39. The Respondent/Applicant's application is based on the grounds that the period prescribed for filing a reference lapsed as it was studying the ruling and convening a meeting of its directors for the purpose of giving instructions. The other ground is that the decision of the taxing officer on the bill of costs was contrary to an earlier decision requiring the Applicant/Respondent to show cause why the Bill of Costs should not be allowed.

40. The Applicant/Respondent opposes the said application and argues that since the Respondent/Applicant did not file any Notice of Objection to the taxing officer's decision, this court lacks the jurisdiction to entertain its application and it should therefore be dismissed with costs.

41. Paragraph 11 of the [Advocates Remuneration Order](#) provides 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.”
42. It is important to first address the Applicant/Respondent’s contention that since the Respondent/Applicant did not file a Notice of Objection, then this court does not have the jurisdiction to hear and determine the Respondent/Applicant’s application.
43. There is no doubt that the notice of objection is the first step in the process of filing a reference. The notice of objection is intended to bring it to the attention of the taxing master that the party is disputing the manner in which certain items in the bill of cost have been taxed. The taxing master, on receipt of the notice of objection, gives

reasons for taxing the disputed items.

44. My view is that the objection notice sets in motion the giving of reasons by the taxing master. Where reasons have been given in the ruling it is not necessary to serve a notice of objection upon the taxing master. A reference is not an appeal but is in the nature of an appeal. It would be absurd for a party to give notice to a judge or a magistrate that he/she shall be appealing against a decision of the court unless of course that notice requires the Judge or magistrate to do something in respect of the intended appeal. What would be the need of serving a notice of objection on a taxing master who has already given reasons for his/her decision?
45. More often than not, taxing masters give reasons for their decisions in the rulings on taxation. My view is that in such circumstances, is not mandatory to give a notice of objection. The notice of objection is only necessary where the taxing master has not given a reason for his/ her decision.
46. In *Abmed Nasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd* [2006] eKLR the court held as follows;

“Although rule 11(1) of the *Advocates Remuneration Order* stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of sub rule (2) of rule 11 of the *Advocates Remuneration Order* demands so. The said rule was not indeed to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling... Therefore the reference having been filed way out of the period prescribed should have been dismissed



but having been given due consideration in substance the same is dismissed.” (Emphasis mine).

47. As was held in *Abmed Nasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd* (*supra*), where the reasons for the taxation on the disputed items in the bill are already contained in the ruling, there is no need to seek for further reasons.
48. Therefore, failure to file a Notice of Objection is not fatal to the Respondent/Applicant’s application as urged by the Applicant/Respondent.
49. Having dispensed with that preliminary issue, I will go on to address the question whether or not to extend time for lodging a reference and whether the reference already filed should be validated.
50. In *County Government of Tana River v Miller and Company Advocates* [2021] eKLR the court held as follows;

“It is noted that paragraph 11 (1) (2) of the *Advocates Remuneration Order* do not speak to the relevant factors that the Court should consider when exercising its discretion on whether or not an extension of time should be granted. Guidance must therefore be solved from case law in *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR the Court of Appeal while referring to other authorities observed; -

“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.”



51. The taxing officer delivered his decision on 7th November, 2023 in the presence of counsel for both the Respondent/Applicant and the Applicant/Respondent.
52. The Respondent/Applicant therefore had fourteen days within which to file a reference which ought to have been filed by 21st November, 2023.
53. In *County Government of Tana River v Miller and Company Advocates* (*supra*) the court further held as follows;

“As stated in the above cases the length of the delay and reasons for non-compliance of the time lines are important factors to influence the exercise of discretion of the Court. [Emphasis Mine]. In calculating the length of delay in making the application for an extension of time the period will start running from 14th day of April, 2021 when the bill of cost was taxed by the taxing master to the 7th day of May, 2021 which time the aggrieved Applicant lodged the chambers summons for extension of time. The delay in filing the application was on or about an overreach of 8 days. In seeking to balance the interest of the respective parties the failure to comply was not inordinate. In addition, the Applicant in his affidavit has explained the reasons which let time to lapse. That hurdle has therefore been satisfied as a sufficient cause for this Court to extend time in favour of the Applicant to file a Reference under paragraph 11 (1) (2) of the *Advocates Remuneration Order*.”

54. The Respondent/Applicant filed the application under consideration on 6th December, 2023 which was twenty-eight days after the taxing officer delivered his ruling and fourteen days after expiry of the period within which to file a reference.
55. As afore stated, the Respondent/Applicant argues that the period lapsed as it was studying the ruling and convening a meeting of its directors to get instructions.
56. The Respondent/Applicant annexed to its application a copy of a letter dated 15th November, 2023 written by Mr. Tobias Mogambi and addressed to the Deputy Registrar, Environment and Land Court requesting for a copy of the ruling delivered on 15th November, 2023.
57. The Respondent/Applicant also annexed to its application a copy of a letter dated 20th November, 2023 written by Wambua Kigamwa and addressed to the Respondent/Applicant informing it that the taxing officer had taxed the Applicant/Respondent's bill of costs at Kshs 2,026,700/=. The letter also seeks instructions to file a reference to challenge the taxation.
58. It is important to note that the Respondent/Applicant did not annex to his application any evidence to show that it indeed convened a meeting of its directors with the intention of getting instructions to file the reference.
59. It also seems that the Respondent/Applicant was informed of the delivery of the said ruling thirteen days after it was delivered.
60. My view is that in the present matter, the delay of fourteen days was not inordinate and further that it is in the interest of justice that time be extended to file a reference under paragraph 11 (1) and (2) of the *Advocates Remuneration Order*.
B. Whether the decision of the taxing master delivered on the should be set aside.
61. The Respondent/Applicant is also seeking that the decision of the taxing officer delivered on 7th November, 2023 be set aside. This question shall be determined in a reference.



62. The Respondent Applicant hoped that this issue would be determined in this application but I decline to do so for the reason that the instant application seeks numerous and diverse prayers.
63. I also note that the Applicant/Respondent only responded to the prayer on enlargement of time. Strictly speaking this application is not a reference and should have been filed as a Notice of motion.
64. I find that this prayer is premature and cannot therefore be granted.

C. Who shall pay costs of the application?

65. It is now settled that costs shall follow the event. This is in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition

66. The application dated 14/3/2023 is hereby allowed in the following terms.
 - a. Time for lodging a reference against the decision of the taxing master dated the 7th November, 2023 is hereby enlarged.
 - b. The Respondent/Applicant shall file and serve the reference within 14 days of the date hereof.
 - c. The orders of *status quo* issued by this court on 11/12/2023 shall remain in force pending the hearing and determination of the reference.
 - d. In the event of failure to comply with (b) above, prayer (c) shall stand vacated.
 - e. The costs of this application shall abide the outcome of the reference.
67. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 16 DAY OF MAY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Chelangat for Maengwe for the Applicant.

Mr. Mugambi for Wambua Kigamwa for the Respondent.

Court Assistant; Mr. Joseph Makori.

