



**Mwendwa Mwinzi & Associates Advocates v Muraya (Environment and Land Miscellaneous (Reference) Application 137 of 2023) [2024] KEELC 5816 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5816 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS  
(REFERENCE) APPLICATION 137 OF 2023**

**JO MBOYA, J**

**JULY 29, 2024**

**IN THE MATTER OF THE ADVOCATE/CLIENT BILL OF  
COSTS UNDER THE ADVOCATES (REMUNERATION)  
ORDER OF THE ADVOCATES ACT, CAP 16, LAWS OF KENYA.**

**BETWEEN**

**MWENDWA MWINZI & ASSOCIATES ADVOCATES ..... ADVOCATE**

**AND**

**GEOFFREY MACHARIA MURAYA ..... CLIENT**

**RULING**

1. The client/Applicant herein has approached the court vide Chamber Summons Application [Reference] dated the 21st May 2024 and in respect of which same [client/Applicant] seeks for the following reliefs [verbatim]:
  - i. That this application be certified as urgent, service dispensed with and heard *Ex-parte* in the first instance.
  - ii. That this Honourable court be pleased to set aside the decision of the taxing officer dated 14th May 2024 with respect to all items (instruction fees) in the bill of costs dated 14th December 2023.
  - iii. That this Honourable court be pleased to hear, determine and allow the Client/Applicant's application.
  - iv. That this Honourable court be pleased to make a finding that to the extent of the subject matter valued at Ksh 1, 800,000 Only, the basic instruction fees to file a suit and defend a counterclaim is governed under the provisions of schedule 6A of the [Advocates \(Remuneration\) Order 2014](#)



and that the said amount is increased unreasonably against the provisions of schedule 6 B and tax the same accordingly.

- v. That subject to prayers 1 and 4 hereinabove, the Honourable Court be pleased to tax the Advocates/Client Bill of Costs dated 14th December 2023 afresh.
  - vi. That costs of this application be provided for.
2. The instant application [Reference] is premised on various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit of the Applicant sworn on even date and to which the deponent has exhibited one annexure.
  3. The Advocate herein responded to the application beforehand vide Replying affidavit sworn on the 10th June 2024 and in respect of which the advocate has contended inter-alia that the reference beforehand is not only misconceived but same is also a ploy to delay and/or obstruct the recovery of the costs which were duly taxed and certified by the taxing officer.
  4. Suffice it to point out that the application beforehand came up for hearing on the 12th June 2024 whereupon the advocates for the parties covenanted to canvass and ventilate same [application] vide written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
  5. Pursuant to and in line with the directions by the court, the parties proceeded to and filed written submissions. For good measure, the said submissions are on record of the court.

#### **Parties Submissions:**

##### **a. Applicants submissions:**

6. The Applicant herein filed written submissions and wherein same [Applicant] adopted and reiterated the grounds contained in the body of the reference as well as the averments adverted to in the body of the supporting affidavit.
7. Furthermore, learned counsel for the Applicant thereafter ventured forward and canvassed three [3] salient and pertinent issues for consideration and determination by the court.
8. Firstly, learned counsel for the Applicant has submitted that the learned taxing officer erred in fact and in law in proceeding to assess the instructions fees on the basis that the suit property, which was at the foot of the dispute in ELC 367 of 2012 was valued at Kes.30 Million whereas the value thereof was [sic] Kes.1, 800, 000/= only.
9. Arising from the foregoing, learned counsel for the Applicant has therefore contended that the taxation and award of instruction fees on the basis of Kes.30 Million only was erroneous and thus constitutes an error of principle, which should attract interference by this court.
10. Secondly, learned counsel for the Applicant has also submitted that following the rendition and/or delivery of the ruling by the taxing officer, the Applicant herein felt aggrieved and filed a notice of objection to taxation. For good measure, counsel has posited that the notice of objection to taxation was filed and lodged with the court on the 21st May 2024. Consequently, it has been contended that the said notice of objection was filed timeously and in accordance with Rule 11[1] of the *Advocates Remuneration Order*.
11. Finally, learned counsel for the Applicant has submitted that even though the Applicant herein had filed and lodged the notice of objection to taxation and wherein same [Applicant] sought for reason



for the taxation, the taxing officer has not availed and or supplied the reasons for the taxation of the disputed items.

12. In view of the foregoing, learned counsel for the Applicant has submitted that the application beforehand is therefore meritorious and thus same ought to be allowed. Furthermore, counsel has implored the court to proceed and tax the advocate client bill of costs taking into account that the value of the subject matter was Kes.1, 800, 000/= only and not otherwise.

#### **b. Respondent's Submissions:**

13. The advocate/ Respondent filed written submission and wherein same [Respondent] has reiterated the averments contained in the body of the Replying affidavit and thereafter same has highlighted and canvassed two [2] salient issues for consideration by the court.
14. First and foremost, learned counsel for the Respondent has submitted that the reference before the court is incompetent and thus same [reference] ought to be struck out. In particular, learned counsel for the Respondent has posited that the notice of objection to taxation filed by and on behalf of the Applicant does not comply with and or adhere to the terms of Rule 11[1] of the *Advocates Remuneration Order*.
15. Secondly, learned counsel for the Respondent has submitted that the reference before the court is also devoid and bereft of merits, insofar as the Applicant has neither established nor demonstrated any error of principle in the body of the ruling rendered and delivered by the taxing officer.
16. At any rate, learned counsel has posited that the suit property which was in dispute vide ELC No. 367 of 2012 and wherein the Respondent was retained to act for the Applicant was valued in the sum of Kes.30 Million and not otherwise.
17. To this end, learned counsel for the Respondent has cited and referenced the further amended Plaint dated the 22nd June 2017; and wherein the value of the suit property was captured, itemized and highlighted.
18. In view of the foregoing, learned counsel for the Respondent has invited the court to find and hold that the Chamber Summons Application [ reference] before the court is not only premature and misconceived, but same is also a calculated tactic to delay the recovery of the taxed costs.
19. Consequently, the Respondent has urged that the application be dismissed.

#### **Issues for Determination:**

20. Having reviewed the application [reference] as well as the response thereto; and upon consideration of the written submissions filed on behalf of the respective parties, the following issues do emerge and are thus worthy of consideration;
  - i. Whether the reference before the court is competent and thus legally tenable.
  - ii. Whether the Applicant has established and or demonstrated any scintilla of error of principle or at all to warrant the impeachment of the certificate of taxation.

#### **Analysis and Determination:**

##### **Issue Number 1 Whether the reference before the court is competent and thus legally tenable.**

21. The Applicant herein is aggrieved and dissatisfied with the ruling of the taxing officer and the consequential certificate of taxation arising from the ruling which was delivered on the 14th May 2024.



22. Arising from the foregoing, the Applicant herein proceeded to and filed a Notice of objection to taxation and wherein same [Applicant] sought to be availed and/or supplied with the reasons for the taxation in respect of the contested items in the bill of costs.
23. To be able to appreciate the contents of the Notice of objection to Taxation which was filed by the Applicant, it suffices to reproduce the entirety of the said notice. For coherence, the contents thereof are reproduced as hereunder;

To;

Deputy Registrar

Environment and Land Court

Milimani Law Court

Nairobi.

Notice of Objection to the Registrar's Taxation of the

Advocate/Client Bill of Cost Dated 14th December 2023.

(Under paragraph 11(1) & 2 of the advocates remuneration order).

Take notice that the Respondent Geoffrey Macharia Muraya objects to the Hon. Deputy Registrar's decision in the Ruling delivered on 14th May 2024 on the Advocate/Client bill of cost dated 14th December 2023 as it relates to the contested items on the said bill.

The Respondent herein further requests for the Taxing Master's reasons for the said decision as provided for under paragraph 11(2) of the advocates Remuneration Order.

Dated At Nairobi This Day Of 2024

R.O.Nyamweya & Company

Advocates For The Respo

Drawn And Filed By:-

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24. Having reproduced the Notice of objection to taxation which was issued and lodged by the Applicant herein, the question that does arise is whether or not the notice of objection to taxation beforehand meets and satisfies the requisite ingredients in terms of Rule 11[1] of the [Advocates Remuneration Order](#).
25. To start with, the provisions of Rule 11[1] of the [Advocates Remuneration Order](#) are such that any party desirous to object to taxation, is obligated to issue and lodge a notice of objection to taxation within 14 days from the date of the delivery of the ruling sought to be impeached.



26. Furthermore, the provisions [*supra*] also underscore that the notice of objection to taxation, which must no doubt be lodged within 14 days must also highlight and/or enlist the items of the taxation that are sought to be objected to. Simply put, the notice of objection to taxation must relate to specific and named items of the bill of costs, whose taxation is sought to be challenged.
27. Put differently, the provisions of Rule 11[1] of the *Advocates Remuneration Order* do not allow for the lodgement of an omnibus notice of objection to taxation, which is devoid of particularity and specificity, as pertains to the items for which reasons for taxation is being sought.
28. Despite the clear provisions of Rule 11[1] of the *Advocates Remuneration Order*, the Applicant herein proceeded to and filed an omnibus notice of objection to taxation, which does not highlight and/or enlist the items sought to be challenged. For good measure, what is adverted to is the contested items on the said bill.
29. Arising from the foregoing, the question that comes to the fore is how the taxing officer and by extension this court would be able to discern what are this [sic] contested items/. Quite clearly, the notice of objection to taxation beforehand, which is a critical document underpinning the filling of a reference, is ambiguous and hence fatally incompetent.
30. To underscore the foregoing explication of the law, it suffices to adopt and reiterate the holding of the Court of Appeal in the case of *Machira & Co. Advocates versus Arthur K. Magugu & another* [2012] eKLR, where the court stated and held 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 1<sup>st</sup> 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 1<sup>st</sup> 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.
31. Likewise, this court also considered and addressed the import of the said provisions in the case *Murgor & Murgor Advocates v Kenya Airports Authority* [2023]eKLR, where this court held thus:
  49. In this regard and to underscore the importance of a Notice of objection to taxation, it is imperative to take cognizance of and reiterate the holding of the Court of Appeal in the case of *Machira & Co Advocates versus Arthur K Magugu & Another* (2012)eKLR, where the Court of Appeal stated and observed as hereunder:
    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 1<sup>st</sup> 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.



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13. Having not given a proper notice specifying the items objected to and seeking the reasons for their taxation at the figures they were taxed, the issue of when the taxing master's decision was received is immaterial and does not avail the Respondents. Under sub-rule (2), time stops running from the date a proper notice is filed, which of course must be within 14 days of taxation, until receipt of the taxing master's reasons for his decision.
49. Having found that the impugned Letters, which were issued by the Applicant do not constitute and/ or amount to the requisite Notice of objection to taxation, the other question that does arise is whether the failure to comply with the statutory requirements of Rule 11(1) of The *Advocate Remuneration Order*, can be circumvented and/or evaded.
49. To my mind, where there exist express statutory provision to deal with and address a particular situation, then it behooves the Parties to comply with and adhere to such provisions, more particularly where the provisions go to the root of the Jurisdiction of the court.
32. Flowing from the discussion [details highlighted herein before], I come to the conclusion that the notice of objection to taxation dated the 21st May 2024 and which underpins the reference beforehand is fatally incompetent and thus void.
33. Furthermore, it is imperative to underscore that the notice of objection to taxation is a critical document and same constitutes a jurisdictional pre-requisite which thus goes to the root/jurisdiction of the court in entertaining and adjudicating upon the intended reference, if any filed.

**Issue Number 2: Whether the Applicant has established and or demonstrated any scintilla of error of principle or at all to warrant the impeachment of the certificate of taxation.**

34. Having found and held that the notice of objection to taxation which was filed by and on behalf of the Applicant is incompetent, this court would be disposed to strike out the reference and to terminate the ruling. Nevertheless and for the sake of completeness, I shall endeavour to discuss the merits or otherwise, of the reference.
35. First and foremost, it is imperative to underscore that an Applicant desirous to impeach and/or impugn the certificate of taxation is obligated to demonstrate inter-alia that the taxing officer committed an error of principle or took into account irrelevant/extraneous factors or better still, failed to take into account relevant and material factors, in the course of taxation.
36. To this end, it suffices to re-state and reiterate the hackneyed position highlighted/ elucidated in the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, where the court held thus;

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing



officer, erred in principle in assessing the costs. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:

“where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases”.

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see *Arthur v Nyeri Electricity Undertaking* (*supra*) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see *Devhi Dhanji v Kanji Naran Patel* (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - *D’Souza v Ferrao* [1960] EA 602.

The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devhi Dhanji v Kanji Naran Patel* (No. 2) (*supra*).

37. Guided by the decision [*supra*], I am minded to venture forward and interrogate whether or not the Applicant herein has been able to highlight, demonstrate and prove any aspect of error of law or principle, if any, that was committed by the taxing officer.
38. To start with, the Applicant herein contends that the learned taxing officer proceeded to reckon and compute instruction fees on the basis that the subject property was valued at Kes.30 Million only, which is contended to be erroneous. In any event, learned counsel for the Applicant has posited that the value of the suit property was Kes.1, 800, 000/= only.
39. Based on the foregoing contention, learned counsel for the Applicant has therefore invited the court to find and hold that the award of instruction fees was erroneous and in any event, was predicated upon a value higher than the value of the suit property.
40. Notwithstanding the submissions by and on behalf of the Applicant, it suffices to underscore that the value of the suit property which was in dispute vide ELC No 367 of 2012, was/is evident on the face of the Further amended Plaintiff dated the 22nd June 2017, and wherein prayer [d] thereof states as hereunder;
  - (d) a declaration that the Plaintiffs are entitled to compensation by the Defendants for the current value of the suit property being Kes. 30 Million only.
41. Quite clearly, the learned taxing officer appreciated the value of the suit property and thereafter proceeded to utilize same [monetary value of the suit property] in computing and/or ascertaining the instruction fees that was payable to and in favour of the Advocate/Respondent.
42. To my mind, the learned taxing officer correctly understood the parameters that were relevant and thereafter applied same [ parameters] in the course of computing, reckoning and/or ascertaining instruction fees. Consequently and in this regard, I am unable to discern and/or decipher any error of principle or at all.



43. At any rate, I beg to highlight that the learned taxing officer appears to have been conversant with and knowledgeable of the ratio decidendi in the case of *Peter Muthoka v Ochieng & 3 Others* [2018]eKLR, where the Court of Appeal state and held thus;

“Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three.

It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.

What we have said is in direct harmony with what this Court stated in *Joreth Limited -v- Kigano & Associates (Supra)*,

“We would at this stage, point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess Instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, and direction by the trial judge and all other relevant circumstances.”

44. Simply put, the computation and award of instruction fees was correctly ascertained. In this regard, the contention by and on behalf of the Applicant has been made in vacuum and thus same is devoid of merits.
45. Other than the contention challenging the computation and award of instruction fees, the Applicant herein threw unto the face of the court omnibus allegation[s] that the rest of the items were also improperly taxed. Be that as it may, the same Applicant ventured forward and stated that no reasons for the taxation have since been availed unto same [Applicant].
46. In my humble view, if no reasons for the taxation have been availed to the Applicant, then it behooved the Applicant to await the reasons and thereafter discern whether the reasons availed justify the taxation of [sic] the impugned items, or otherwise.
47. However, having filed the reference without the reasons, in the manner adverted to at paragraph 5 of the supporting affidavit, it suffices to state that the reference beforehand is misconceived and hollow. In any event, it was the obligation of the Applicant to point out how the taxation was erroneous, which the Applicant has failed to establish.



48. Arising from the foregoing, my answer to issue number two [2] is to the effect that the Applicant herein has similarly failed to prove any iota of error of principle or injudicious exercise of discretion by the taxing officer to warrant the intervention of the court. [See *First American bank of Kenya v Shah & Others* [2002] 1EA at page 64].

### **Final Disposition**

49. Flowing from the discussion and the reasoning highlighted in the body of the Ruling, I come to the conclusion that the chamber summons application [Reference] beforehand is not only premature and misconceived but same [Reference], is also devoid of merits.

50. In a nutshell, the chamber summons application [Reference] dated the 21st May 2024; be and is hereby dismissed with costs to the Advocate/Respondent. Furthermore, the costs herein be and are hereby certified in the sum of Kes.25, 000/= only.

51. It is so ordered.

**DATED, SIGNED AND DELIVERED ON THE 29<sup>TH</sup> DAY OF JULY 2024.**

**OGUTTU MBOYA**

**JUDGE.**

**In the presence of:**

Benson – Court Assistant

Mr. R. O Nyamweya for the Client/Applicant.

Mr. Mwendwa Mwinzi for the Advocate/Respondent.

