Ramuka Agencies Limited v Kirima (Environment & Land Case 1458 of 2014) [2024] KEELC 5378 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5378 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1458 OF 2014

JO MBOYA, J

JULY 18, 2024

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF A REFERENCE FROM THE DECISION OF THE TAXING MASTER DELIVERED ON 23RD FEBRUARY 2024 WITH RESPECT TO THE RESPONDENT'S PARTY & PARTY BILL OF COSTS DATED 19TH JUNE 2023

BETWEEN

RAMUKA AGENCIES LIMITED ..... APPLICANT

AND

STEPHEN KAMAU KIRIMA ..... RESPONDENT

RULING

Introduction And Background:

1. The Applicant herein approached the court vide Chamber Summons application dated the 7th March 2024 [Reference] and wherein the Applicant has sought to challenge/ impugne the Certificate of taxation issued at the foot of the Ruling rendered/delivered on the 23rd February 2024.

2. For coherence, the reliefs sought at the foot of the Reference are as hereunder;

    i. THAT the decision of the taxing master delivered on 23rd February 2024 as regards items Number 1,2 and 107 to 114 on the Respondent's Party and Party Bill of Cost dated 19th June 2023 be varied;

    ii. THAT this Honourable Court does proceed to tax Items 1, 2 and 107-114 of the Bill of costs dated 19th June 2023 or in the alternative the Respondent's Bill of Costs dated 19June 2023 be remitted back for taxation before another Taxing Officer.

iii. THAT pending the hearing and determination of this Application, there be a stay of all other proceedings in relation to or arising out of the Ruling delivered by the Taxing Master on 23rd February 2024.

iv. THAT this Honourable Court do make any additional orders as the demands of justice dictate.

v. THAT costs of this application be provided for.

3. Suffice it to point out that the Chamber Summons application [Reference] beforehand is premised on the grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of one Franklin Kamathi Kamau sworn on even date and to which the deponent has annexed a copy of the Ruling under reference.

4. Upon being served with the application, the Respondent herein filed a Replying affidavit sworn on the 26th march 2024 and in respect of which same [Respondent] has highlighted various issues inter-alia that the Reference before the court is premature, misconceived and thus legally untenable for want of compliance with the provisions of Rule 11[1] of the Advocates Remuneration Order.

5. The application beforehand came up for hearing on the 22nd May 2024 and whereupon the advocates for the respective parties covenanted to canvass the application by way of written submissions. Consequently and in this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

6. Pursuant to and in compliance with the directions of the court, the Applicant proceeded to and filed written submissions dated the 7th June 2024, whereas the Respondent filed written submissions dated the 18th June 2024.

7. For coherence, the written submissions [details in terms of the preceding paragraphs] form part of the record of the court.

Parties'submissions:

A. Applicant's Submissions:

8. The Applicant filed written submissions dated the 7th June 2024, and wherein same [Applicant] has adopted the grounds at the foot of the Reference as well as the averments contained in the body of the supporting affidavit. Furthermore, the Applicant has thereafter highlighted and canvassed two [2] salient issues for consideration.

9. Firstly, learned counsel for the Applicant has submitted that even though the Applicant did not file and serve the Notice of objection to taxation in accordance to the provisions of Rule 11[1] of the Advocates Remuneration Order, the failure and/or neglect to do so does not vitiate the Reference which was duly filed.

10. Additionally, learned counsel for the Applicant has submitted that Rule 11[1] of the Advocates Remuneration Order uses the word may and not shall; and thus, the Rule under reference is not mandatory in nature. In this regard, learned counsel for the Applicant has submitted that the failure to comply with the provisions of the said rule is therefore not fatal to the chamber summons application before the court.

11. In any event, learned counsel for the Applicant has further submitted that the ruling which was delivered by the taxing officer contained the reasons for taxation thereunder and hence it was not

necessary to seek for further reasons in the manner adverted to under Rule 11[1] of the Advocates Remuneration Order.

12. Consequently and in the premises, learned counsel for the Applicant has submitted that the failure to comply with Rule 11[1] therefore does not go to the root of the Reference, either as contended by learned counsel for the Respondent or otherwise.

13. To this end, learned counsel for the Applicant has cited and relied on inter-alia the holding in the case of Kenya Commercial Bank ltd & Another v Yeswa Antony Joseph [2022]eKLR and Republic v Capital Markets Authority [Ex-parte Solomon Muyeka Alubala] [2021]eKLR, respectively.

14. Secondly, learned counsel for the Applicant has submitted that the learned taxing officer erred in fact and in law in relying on the decision in the case of Lubulella & Associates v Baranyi Brokers Ltd, in ascertaining and taxing the instructions fees. In any event, learned counsel added that the value of the suit property was not discernible from the pleadings filed and hence the taxing officer improperly exercised his jurisdiction [discretion] in arriving at and assessing instructions fees in the sum of Kes.1, 500, 000/= only.

15. Other than the foregoing, learned counsel for the Applicant has also contended that the taxation and award of costs in terms of items 107 to 114, which essentially touched on attendances, was erroneous insofar as same did not take into account that most of the attendances were done virtually and not otherwise.

16. Premised on the foregoing, learned counsel for the Applicant has therefore implored the court to find and hold that the certificate of taxation is wrought with errors of commission and omission and hence same [certificate of taxation] ought to be quashed.

B. Respondent's Submissions:

17. The Respondent filed written submissions dated the 18th June 2024 and in respect of which same [Respondent] has highlighted and canvassed two [2] issues for due consideration by the court.

18. First and foremost, learned counsel for the Respondent has submitted that it was incumbent upon the Applicant herein to file and serve a Notice of objection to taxation highlighting the items being objected to in accordance with the prescription of Rule 11[1] of the Advocates Remuneration Order.

19. However, learned counsel for the Respondent ventured forward and contended that insofar as no such notice of objection to taxation was filed and served in accordance with the Law, the entire reference [Chamber Summons] before the court is premature and thus void ab initio.

20. In any event, learned counsel for the Respondent has submitted that the issuance and service of the notice of objection to taxation is critical and paramount insofar as same goes to the root of the jurisdiction of the court to entertain and/or adjudicate upon [sic] the Reference, if any filed.

21. In support of the foregoing submissions, learned counsel for the Respondent has relied on the holding in the case of Kisya v Lubulella & Associates Advocates [2022] KEHC 550 [KLR], where the court considered the import and tenure of Rule 11[1] of the Advocates Remuneration Order.

22. Secondly, learned counsel for the Respondent has submitted that the learned taxing officer exercised his discretion in accordance with the law and thereafter arrived at a reasonable award on instruction fees as well as the fees for Getting up. In this regard, learned counsel for the Respondent has underscored that the Applicant has failed to demonstrate any scintilla of improper or injudicious exercise of discretion, to warrant the setting aside of the Certificate of Taxation.

23. Furthermore, learned counsel for the Respondent has submitted that the jurisdiction of the court to interfere with the certificate of taxation is circumscribed and can only be exercised where it is demonstrated that the taxing officer committed an error of principle; took into account extraneous factors or better still, omitted to consider factors/issues which were material in respect of the matter beforehand.

24. Be that as it may, learned counsel pointed out that none of the circumstances, which can enable the court to interfere with the certificate of taxation, have established and or demonstrated by the Applicant herein or otherwise.

25. To buttress the submissions pertaining to and concerning the circumstances under which the court can interfere with the certificate of taxation, learned counsel for the Respondent has cited and relied on inter-alia Kipkorir, Tito & Kihara Advocates v Deposit Protection Fund Board [2005]eKLR; Otieno Ragot & Co Advocates v Kenya Airports Authority [2021]eKLR and Joreth Limited v Kigano & Associates [2002] 1 EA 252, respectively.

26. In a nutshell, learned counsel for the Respondent has submitted that the Reference beforehand is not only premature and misconceived, but same is similarly devoid of merits. In this regard, the Respondent has implored the court to dismiss the reference with costs.

Issues For Determination:

27. Having reviewed the Chamber Summons application [Reference] as well as the response thereto and upon taking into account the written submissions filed by and on behalf of the respective parties, the following issues do crystalize and are thus worthy of determination;

    i. Whether the Chamber Summons Application [Reference] is competent and legally tenable.

    ii. Whether the Applicant has demonstrated any error of principal and/or basis, whatsoever to warrant interference with the certificate of taxation.

Analysis And Determination:

Issue Number 1 Whether the Chamber Summons Application [Reference] is competent and legally tenable.

28. The Applicant herein contends that same is aggrieved and/or dissatisfied with the certificate of taxation arising from the ruling rendered on the 23rd February 2024. Consequently and in this regard, the Applicant proceeded to and filed the subject application.

29. Nevertheless, it is conceded by and on behalf of the Applicant herein that same did not extract, file and/or serve the requisite notice of objection to taxation highlighting the items, if any, that same is aggrieved with.

30. Furthermore, the Applicant herein has contended that though the provisions of Rule 11[1] of the Advocates Remuneration Order require the filing and service of the notice of objection to taxation within 14 days of the taxation, same [Applicant] however contents that the filing and service of the said notice is discretionary.

31. Put differently, learned counsel for the Applicant has submitted that the words deployed pursuant to Rule 11[1] of the Advocates Remuneration Order uses may, which is discretionary and not mandatory.

32. Premised on the foregoing, learned counsel for the Applicant has thus invited the court to find and hold that the failure to file and serve the notice of objection to taxation is thus a procedural lapse which does not go to the root of the reference and hence same [failure] ought to be excused.

33. On the other hand, learned counsel for the Respondent has posited that the notice of objection to taxation is a mandatory requirement prior to and before the filing of a reference. Furthermore, learned counsel for the Respondent has submitted that a failure to file and serve the notice of objection to taxation goes to the jurisdiction of the court and hence any reference filed is rendered incompetent.

34. Having considered the rival submissions by and on behalf of the parties, I beg to take the following position.

35. To start with, the provisions of Rule 11[1] of the Advocates Remuneration Order obliges any Applicant, the current Applicant not excepted to file and serve a notice of objection to taxation. Furthermore, the said rule prescribes the timeline within which the notice of objection to taxation must be filed and served.

36. Other than the timeline for the filing and serving of the notice of objection to taxation, it is also instructive to note that the said rule stipulates that the notice of objection to taxation must highlight and enumerate the items which are being disputed and for which reasons for taxation are being sought.

37. To my mind, the notice of objection to taxation, which is provided for under Rule 11[1] of the Advocates Remuneration Order is a critical and integral document, which provides the fulcrum/ foundation upon which the intended reference is to be anchored and/or premised.

38. Simply put, the notice of objection to taxation is fundamental and thus constitutes a jurisdictional prerequisite, which underpins the intended reference. Consequently and in this regard, the absence of a notice of objection to taxation renders any reference premature, misconceived and legally untenable.

39. To this end, it suffices to take cognizance of the decision of the Court of Appeal in the case of Machira & Co. Advocates v 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 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.

40. Other than the foregoing decision, this court has had an occasion to consider the import and tenor of Rule 11[1] of the Advocates Remuneration Order in a number of decisions.

41. Pertinently, this court considered the import of the said provisions in the case Murgor & Murgor Advocates vs 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 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.
> >
> > 14. 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.
>
> 50. 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.
>
> 51. 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.

42. Notwithstanding the foregoing, my attention has also been drawn to the decision in the case of *Kisia v Lubulella and Associates Advocates (Miscellaneous Application E1059 of 2020)* [2022] KEHC 550 (KLR) (Commercial and Tax) (5 May 2022) (Ruling), where the court had occasion to consider the same provisions, namely Rule 11[1] of the Advocates remuneration Order.

43. For coherence, the court stated and held thus;

> 17. From the above authorities, it is evident that the notice of objection required to be given to the Taxing Officer is not just a mere technicality but a mandatory/necessary step in challenging the decision of a taxing officer. In the premises, I hold and find without a doubt that the Client did not properly invoke this Court's jurisdiction to address or determine the issues raised in the Reference filed herein. The Reference is therefore incompetent, incurably defective and a

non-starter. For that reason, the court will not venture into the merits of the Reference as filed. It is hereby struck out.

44. Before departing from this issue, it is imperative to underscore that where the rules of procedure prescribe the manner of approaching the jurisdiction of the court, it behoves the parties to endeavour to and comply with the statutory requirements.

45. Nevertheless, where there is non-compliance like in the instance case, the party at fault is obligated to approach the court with a suitable application to remedy the default and/or non-compliance.

46. Furthermore, it also behoves the defaulting party, where appropriate to explain to the satisfaction of the court, the difficulty, if any, that was encountered in an endeavour to comply with the stipulation/ prescription of the law.

47. To the contrary and in my humble view, it does not lie in the mouth of any litigant, the Applicant herein not excepted, to disregard the rules of procedure and in particular the jurisdictional prerequisite ones and once the failure to comply with the procedure is pointed out same [defaulting party] behaves as if the rule in question was non-existent.

48. In my humble view, no litigant, the Applicant herein not excepted can be allowed to disregard and/ or ignore critical rules of procedure with licentious abandon and still imagine that a court of law will treat same [Applicant] with kid gloves.

49. Surely, the Applicant herein was obligated to abide by and comply with the obligatory rules of procedure as prescribed vide Rule 11[1] of the Advocates remuneration Order. Consequently and in my view, the failure to comply with the said rules vitiates the entire reference and renders same stillborn.

50. To this end, it is instructive to remind the Applicant and her learned counsel of the holding of the Supreme Court [the apex court] in the case of Patricia Cherotich Sawe v the IEBC & Others [2015]eKLR, where the court stated and held thus;

> (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.

51. Without belabouring the point, my answer to issue number one [1] is to the effect that the chamber summons application [reference] is premature, misconceived and thus legally untenable.

Issue Number 2 Whether the Applicant has demonstrated any error of principal and/or basis, whatsoever to warrant interference with the certificate of taxation.

52. Other than the question pertaining to the competence of the Chamber summons application beforehand [which has been discussed in terms of the preceding paragraphs], it is also imperative to underscore that the jurisdiction of this court to interfere with a certificate of taxation is circumscribed and thus fettered.

53. Notably, any Applicant, the Applicant herein not excepted, who desires to persuade the court to interfere with a certificate of taxation is obligated to establish and demonstrate five critical ingredients, namely;

i. That there is an error of principle which inflicts the certificate of taxation.

ii. The taxing officer took into account and/or considered extraneous factors/issues.

iii. The taxing officer failed to take into account and/or consider relevant factors/issues.

iv. That the award of costs is manifestly excessive; and

v. The award is inordinately low as to reflect an error.

54. To this end, it suffices to cite, restate and reiterate the holding of the Court of Appeal 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 Devshi 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 Devshi Dhanji v Kanji Naran Patel (No. 2) (supra).

55. Furthermore, the extent and scope of the jurisdiction of the court pertaining to a reference was also highlighted in the case of First American bank of Kenya v Shah & Others [2002] 1EA at page 64, where the court [Ringera J] stated as hereunder;

> I have considered the above submissions. First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle. (See STEEL & PETROLEUM (E.A) LTD VS. UGANDA SUGAR FACTORY (Supra). Of course. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.

56. Flowing from the decisions, which have been referenced in the preceding paragraph[s], it is common ground that the Applicant herein was obligated to establish and demonstrate that the taxing officer committed an error of principle in the course of the taxation; took into account erroneous factors or better still, failed to take into account the relevant factors.

57. Nevertheless, I have reviewed the entire reference as well as the submissions by the Applicant, but I have failed to discern/ decipher any evidence or scintilla of error of principle or at all.

58. On the contrary, it is evident that the learned taxing officer appreciated that the value of the subject property was neither discernible from the pleadings nor the judgment and thus ventured forward to ascertain and award instruction fees taking into account various factors inter-alia the complexity of the matter, the interests of the parties and the duration that was taken prior to and before the determination of the suit.

59. In my humble view, the learned taxing officer clearly addressed his judicial mind to and indeed took into account the relevant provisions of the Advocates Remuneration Order 2014, prior to and before arriving at the instruction fees. In any event, it suffices to point out that the fact that this Court would have arrived at a different figure on Instruction[s] fees, per se, does not found a basis o interfere with the Discretion of the Taxing Officer.

60. Other than the instruction fees, the Applicant herein has also complained about the amount that was awarded at the foot of getting up fees. Nevertheless, there is no gainsaying that getting up fees is circumscribed at 1 1/3 of instruction fees and which is the amount that was decreed by the taxing officer.

61. Finally, the Applicant herein has also sought to impeach the awards at the foot of items 107 to 114 of the bill of costs dated the 19th June 2023. However, it is worthy to point out and underscore that during the taxation of the Bill of Costs, the Applicant herein only disputed items 1, 2, 3, 4, 5 and 10 and not otherwise. [See paragraph 2 of the impugned ruling].

62. To the extent that the Applicant herein did not challenge items numbers 107 to 114 at the foot of the bill of costs dated the 19th June 2023, the Applicant herein cannot now seek to raise and/or canvass the said items at the foot of the reference herein. Quite clearly, the endeavour to canvass issues which were never raised before the taxing officer before this court is misconceived and not legally permissible.

63. Put differently, an Applicant can only canvass before this court via a reference, issues that were raised before the taxing officer and which were thereafter the subject of determination by the said taxing officer. Consequently, if an issue was not raised before the taxing officer same [such issues] cannot be canvassed for the first time vide reference. [See Wilfred Konosi T/a Konosi & Co Advocate v Flamco Ltd [2019]eKLR].

64. In a nutshell, my answer to issue number two [2] is twofold. Firstly, the Applicant herein has neither established nor demonstrated any error of principle or injudicious exercise of discretion by the taxing officer to warrant the impeachment of the certificate of taxation.

65. Secondly, the raising of the dispute pertaining to items numbers 107 to 114 of the bill of costs for the first time before this court [being matters which were not raised before the Taxing Officer], is misconceived and legally impermissible and must therefore be frowned upon.

Final Disposition:

66. From the discussion [details in terms of the preceding paragraphs hereof] it must have become crystal clear that the chamber summons application [reference] by the Applicant is not only premature and misconceived, but same is also devoid of merits.

67. Consequently and in the premises, the chamber summons application dated 7th March 2024, beforehand be and is hereby dismissed with costs to the Respondent. Nevertheless and to avoid the filing of supplementary bill of costs, the costs hereof are assessed and certified in the sum of kes.25, 000/= only.

68. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant.

Ms. Gikonyo h/b for Mr. Guandaru Thuita for the Plaintiff/Applicant.

Mr. Felix Muuo for the Respondent.