Benjamin v Magatta t/a Magatta & Njogu Advocates (Miscellaneous Application 41 of 2022) [2023] KEELRC 1951 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1951 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

MISCELLANEOUS APPLICATION 41 OF 2022

HS WASILWA, J

JULY 31, 2023

BETWEEN

DR MAGARE GIKENYI J BENJAMIN ..... APPLICANT

AND

OWEN N MAGATTA T/A MAGATTA & NJOGU ADVOCATES . RESPONDENT

RULING

1. Before me for determination is the Applicant's reference dated 5th June, 2023, filed in opposition of the Ruling issued on 23rd May, 2023 by the taxing master Hon M Kyalo arising from the Bill of costs dated 9th November, 2022 from Nakuru ELRC Cause No. 22 of 2019; Dr. Magare Gikenyi J Benjamin versus County Government of Nakuru and 4 others. The application is premised on Rule 11(1) & (2) of the Advocates Remuneration Ordered and sought for the following orders; -

    a. Spent.

    b. That pending the hearing & determination of the Application inter partes, the court do issue a temporary stay of execution of the Ruling/ Order on taxation delivered on 23rd May 2023 by the deputy registrar of this Honourable court Hon. Margaret Kyalo on this issue or such orders as the court may Issue.

    c. That the court do make an order to the effect that an advocate is NOT justified to tax the Bill as from 22/3/2019 or/and any period which he(advocate) was Not on record for the applicant.

    d. That this Honourable Court be pleased to allow this reference against the decision on taxation of the Taxing Master Hon. Margaret Kyalo made on 23rd May 2023.

    e. That ruling on taxation delivered by the Taxing Master on 23rd May 2023 with respect to item 1 on instruction fees of the Advocate's Bill of Costs dated 9th November 2022 and/or 10th February, 2022 be set aside;

f. That ruling on taxation delivered by the Taxing Master on 23rd May 2023 with respect to item 69 on getting up fees of the Advocate's Bill of Costs dated 9th November 2022 and/or 10th February 2022 be set aside;

g. That item 1 & 69 of the Advocates' Bill of Costs dated 9 November 2022 and/or 10th February 2022 be assessed by this Honourable Court in such other sums as may appear to be reasonable;

h. That in addition to (g) above, all Items in contention of the Advocates' Bill of Costs dated 9th November 2022 and/or 10th February 2022 be assessed by this Honourable Court in such other sums as may appear to be reasonable, rational and legal.

i. That in the alternative, this Honourable Court remits all items in contention of the Advocates' Bill of Costs dated 9th November 2022 and/or 10th February 2022 to another Taxing Officer for re-taxation.

j. That any other order and/or modification of my prayers in which this Honourable court may deem fit to grant for purposes of attaining Justice for all parties.

k. That, each party bears its own costs.

2. The application is supported by the grounds on the face of it and the affidavit of Applicant sworn on 5th June, 2023.

3. The Applicant states that the Hon Margaret Kyalo(DR) delivered her ruling on the Respondent's Bill of costs dated 9th November, 2022, on the 23rd May, 2023, taxing the Bill at Kshs 1,231,377.40. However, that the taxing master granted the Respondent costs for the period when the said advocate was not on record and never acted for the Applicant herein and therefore did not deserve to be awarded costs for the period between 22nd March, 2019 when the suit was filed to 10th July, 2019 when the Respondent herein came on record the Applicant.

4. It is averred that the primary suit subject of these proceeding was filed on 22nd March, 2019 by the firm of Nyachiro and Company Advocates. The County Government of Nakuru acknowledged owing the Applicant herein and confirmed that they are in the process of paying the arrears, leaving the issue of stoppage of salary which proceeded to full trial.

5. Before hearing the main suit, the Applicant relocated from Eldoret to Nakuru and changed his advocates from Nyachiro and company advocates to Magatta and Njogu advocates and at that point the firm of Nyachiro requested for the legal fees which he paid in full including drawings done by them. That he was the one that physically transferred his file from the firm of Nyachiro to the firm of Magatta and Njogu and they orally agreed to received Kshs 100,000 as full and final payment of legal fees because his Brother Magare Advocate, was a friend of the Owen Magatta Advocate. That he paid the said amount as agreed and the Respondent herein took over the conduct of the matter.

6. He stated that after the suit was heard and determined, his advocates changed tune and demanded a sum of Kshs 2,534,270 in a Bill dated 24th August, 2021. Later on, they amended the Bill and now demanded Kshs 6,146,046 being the Bill subject of this Reference.

7. That the Bill was initially filed at the High Court and mentioned before Hon. Nancy Makau(DR), however he raised jurisdictional question and the file was transferred to this Court.

8. He reiterated that Mr. Owen Magatta trading as Magatta & Njogu advocates took over the conduct of the matter from the firm of Nyachiro and Company advocates on 10th July, 2019 and the instruction fees sought herein cannot be from the date of filling the suit but from the date of taking over the

conduct of this matter. He added that the instructions fees in any case is not payable because he had paid their previous advocates in full and paid the current advocates Kshs 100,000 as agreed.

9. He avers that all items between item 1 and 37 were not done by the current Advocates and therefore should not form part of taxable costs by the Respondent's firm. That the advocates ought to have, at the very least, taxed costs from 10th July, 2019 when he filed a notice of change of advocates.

10. It is his case that the taxing master awarded the Respondent herein getting up fees of Kshs 833,000 being 80% of the entire Bill, which figure is exorbitant, was done in violation of the Rules that require getting up fees to be 1/3 of the instructions fees. Also that this getting up fees should not be paid at all because the advocate herein was not on record from the start of the case subject of the Bill of costs. Moreover, getting up fees should be 1/3 of the instruction fees and not as awarded by the taxing master. Also that since the getting up fees is sought as from 22nd March, 2019 and not at the time they received instructions, the same is erroneous and should not be awarded.

11. That the taxing master misdirected herself in awarded the instruction fees when the advocates herein was not on record for the party at the filling of the case herein.

12. The Applicant stated that the taxing master taxed an unknown item at Kshs 102,199,525 in her ruling of 23rd May, 2023, without indicating what item was being taxed and why the figure was exorbitant. Also that the cumulative figure was miscalculated.

13. He stated that the taxing master based his calculation on the arrears sought in the claim instead of compensation awarded, if any, in the judgement. Further that the issues of arrears had been agreed upon by his former Advocates Nyachiro advocates before the firm of Magatta came on record and before the matter proceeded for hearing.

14. It is averred that some items were erroneously allowed such as Item 67 which was awarded for costs of hearing when the Court was not sitting on that particular day. Also that the advocate sought for printing costs for item 76 when, the Applicant was the one that printed the items and that the folios therein are 38 not 76 as indicated in the Bill of costs. He maintained, therefore, that the Bill was not taxed to scale as per the Advocates Remuneration Order.

15. He stated that save for items numbers, 38, 39, 40, 41,44,45,46,47,48,54,55,56,57,58,59,6,62,63,64,65,77,78,86,87,88,89,97,98,99,100,101,102 and 103, all the other items of the Bill of costs are contested and urged this Court to re-tax the Bill of costs herein.

16. In response to the reference, the Respondent herein filed a replying affidavit sworn by Owen Magata Advocate stating that he indeed acted for the Applicant herein in ELRC Cause number 22 of 2019 and proceeded with the suit until conclusion by a judgment of 24th July, 2020 that was decided in favour of the Applicant.

17. That the Applicant herein was unhappy with part of the judgement and instructed him to file an appeal, which he did, however the Applicant was reluctant to pay the legal fees for both the trial court matter and the Appeal. It's on that premise that the Respondent herein resolved to file Advocate – Client Bill of costs to recover his fees, thus the genesis of this reference.

18. The advocate denied agreeing to payment of Kshs 100,000 as his final legal fees and stated that to agree to such an amount could be tantamount to undercutting which is an offense punishable in law. He stated that as per part III of the Advocates Remuneration Order, he is entitled to full fees of the whole matter and not as suggested by the Applicant.

19. He contends that the Reference herein is like an appeal to this Court and therefore should strictly adhere to the dictates of rule 11 (1) of the Advocates Remuneration Order 2009. Also, that the Applicant has not properly invoked the jurisdiction of this Court, because he has not requested for reasons for the objected items and secondly, that he is under obligation to canvass on points of law and not of fact. Therefore, the reference herein is incurably defective and tantamount to abuse of Court process.

20. He maintained that the taxing master's decision was well arrived as it relied on the appropriate principles of the law and thus the Application dated 5th June, 2023 is a nullity in law and urged this Court to dismiss it with costs.

21. In addition to the replying affidavit, the Respondent herein raised a preliminary Objection by the Notice dated 12th June, 2023, based on the following grounds;-

    1. That in absence of a compliant notice of objection to taxation, properly identifying the items objected to, the Reference before the Honourable Court has been lodged and or filed in a vacuum and therefore a nullify ab initio.

    2. That the Reference before the Honourable Court is incurably defective, improper and un-procedural, the same constitutes an abuse of Court process.

22. In response to the Preliminary Objection, the Applicant filed a replying affidavit sworn on 25th June, 2023 stating that as soon as the taxing master delivered her ruling on the Bill of costs, he wrote a letter dated 25th May, 2023 addressed to the Deputy registrar, requesting for a detailed ruling on her decision in order to file the reference herein. Therefore, that he followed due procedure before filling this Reference and this Court's jurisdiction has been rightly invoked. He however stated that reasons for taxation can be done away with in instances where the Ruling of the taxing master captures the reasons for the taxation as was held by Ochieng J in *Ahmednassir Abdikadir & Co advocates v National Bank of Kenya Limited* [2006] 1 EA 5.

23. The Applicant urged this Court to dismiss the Preliminary Objection and proceed to determine the Application on merit.

24. The Application and the Preliminary Objection were heard together through written submission with the Applicant filling two sets of submission on the 4th July, 2023 in response to the P.O and the Application, while the Respondent filed submission on 13th June, 2023 in support of its Preliminary Objection only.

Applicant Submissions.

25. The Applicant submitted on the Preliminary Objection that it does not raise an issue in the proper definition of what constitutes a preliminary objection as stated in the celebrated case of *Mukisa Biscuits Manufacturing Company Limited V West End Distributors Limited* [1969] EA 696. It was argued that the argument by the Respondent that the applicant has not identified items objected and renders the reference void is contested because the Applicant by the letter of 25th May, 2023 wrote to the Taxing master requesting for detailed ruling for her decision as such, reasons were obtained and due procedure was followed.

26. It was submitted that, failure to file notice of objection alone cannot be a ground to void a reference as was held in the case of *KCB Bank Limited &Another V Yeswa Antony Joseph* [2022] eklr where

the Court relied on the case of Ahmednassir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 1 EA 5, where Ochieng, J, 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 subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling...."

27. It was submitted that preliminary objection is normally raised on pure points of law and on matters that are not contested. This was was held in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR where the Court held that;-

> " Given that sparkling clear position in both the statute itself and authoritative pronouncements that this Court cannot, without an unlawful usurpation of jurisdiction, entertain questions of fact, we find it perplexing that the memorandum of appeal herein expressly purports to challenge factual findings. We think it is a case of artful dodging for an appellant to frame a complaint as comprising an "error of law and fact." We are quite clear in our minds that in electoral matters there is no such thing as "questions of mixed law and fact" and grounds of appeal that are a composite of both are clearly inappropriate and probably incompetent. We reiterate what this Court stated in M?irungu vs. R [1983] KLR 455 at p 466; "In conclusion, we would agree with the views expressed in the English case of Martin v. Glyneed Distributors Ltd that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law...unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We have resisted the temptation."

28. Accordingly, that the allegation that the reference is defective is a matter of fact that can be ascertained after hearing the reference on merit. He argued that the allegation that the application has been filed in a vacuum is not true because the Applicant has clearly identified items objected at paragraph 25 and 26 at page 13 of the Application. Further that the issue of merit of the Application is an issue of fact not law that need to be canvassed before this Court. Therefore, that the Preliminary objection has failed to raise pure points of law and should be struck out.

29. The Applicant submitted that *the constitution* of Kenya put more weight on hearing matters on merit as opposed to dismissing them on technically as stated in Article 159(2)(d) of *the Constitution*. He thus urged this Court to consider the reference on merit especially on the arithmetic errors made by the taxing master and the award given on getting up fees that is not a third of what was given for instructions fees. Also that some items were awarded as hearing attendance fees when the Court was not sitting, among other errors on the Bill of costs.

30. In support of the reference, the Applicant submitted on seven issues; whether there is an implied agreement of Kshs 100,000, whether an advocate is justified to tax items which he was not on record, whether the advocate is justified to tax instruction fees as at March, 2019 when he was not on record, whether the getting up fees awarded of Kshs. 833,000 was justified, whether the taxation was done

in accordance with the remuneration order, whether the Court should consider accounting for the money already paid to the advocate and what reliefs should be granted in this Application.

31. On the first issue, the applicant submitted that he paid his advocate, the Respondent herein Kshs 100,000 as legal fees to take over the matter herein and act on probono basis because the said advocate was a friend of his brother, Magare Advocate. He argued that, having agreed on the legal fees and paid it upfront, section 45 of the *Advocates Act* bars an advocate from pursuing any further legal fees. He added that since the advocate admitted in his Bill of costs having received the Kshs. 100,000, he should be estopped from denying agreeing to receiving the said money as final and full settlement legal fees. In support of this argument, he relied on the case of *Maimai Hamise v Peris Tobiko & Others* [2017] eklr where the Court opined that the correspondences between an advocate and their client can lead to an inference of existence of an agreement within the provisions of section 45 of the *Advocates Act*.

32. On the second issue, the Applicant submitted that an advocate is not justified to tax costs for the period in which it did not represent the client, therefore that all the taxed items which the advocate did not participate in such as items 1-37, 69,94,95 and 99 should be disregarded. He argued that the Respondent herein came on record after the above items had been acted upon by the previous advocate who were fully paid for the services rendered, therefore that the Respondent herein should have filed bill of costs from 10th July, 2019 when he came on record. To support this, he relied on the case of *Thomas K' Bahati t/a K'Bahati Advocates V Janendra Raichand Shah* [2020] eklr where the Court held that; -

> " Having not drawn the plaint in HCCC No. 233 of 2009, the respondent was not entitled to the instruction fees in respect of the suit. The advocate who draws the plaint is the one entitled to the full instructions fees notwithstanding the progress of the matter. The subsequent advocates can only be paid for the actual work done. In this case, it is not disputed that the respondent came into the matter on 28th January 2015. Indeed, a Notice of Change of Advocates dated 26th January, 2015 was filed by the respondent on 28th January, 2015. The respondent is therefore entitled to work done from 28th January 2015 onwards."

33. On the third issues, it was submitted that the Respondent herein erred in seeking for instructions fees from the date of filling suit in March, 2019 when he took over the matter in July, 2019. He argued that even if the said instruction fees were to be awarded, the taxing master erred in awarding instruction fees based on the claimed arrears instead of compensation awarded. Also that the arrears sought had already be negotiated and agreed upon before the Respondent herein was instructed as such the salary arrears was not an issue for litigation for the taxing master to base the award on. Additionally, that the former advocates on record had been paid instructions fees in full, therefore the current advocate should not be paid any instruction fees as held in *Republic V Medical Practitioners & Dentist Board and 2 others Ex parte: Mary A Omamo-Nyamogo*[2017] eklr where the Court relied on *Joreth Limited vs. Kigano & Associates* Civil Appeal No. 66 of 1999 [2002] 1 EA 92 in which it was held that:

> " The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle, the instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs."

34. Accordingly, that the taxing master was not justified in awarding instructions fees of March, 2019 when the advocate came on record in July, 2019. The Applicant urged this court to re-tax the Bill and correct the anomaly.

35. The Applicant also urged this Court to tax the getting fees and stated that while the taxing master reduced the instruction fees from 2.5 Million to Kshs 204,399.05, the getting up fees was not reduced to reflect the new changes, which is a fundamental error that cannot be brushed off. He urged this Court to consider the fact that the advocate took instruction mid-way and prayed for the getting up fees to be taxed off completely.

36. On item 1-37, the Applicant submitted that Nyachiro Advocates were on record when all these items were filed, and having paid their previous advocates in full, the Respondent herein is not entitled to any item listed between number 1-37 of the Bill of costs. He argued that he is not contesting item number 38, 39, 40, 41,44,45,46,47,48,54,55,56,57,58,59,6,62,63,64,65,77,78,86,87,88,89,97,98,99,100,101,102 and 103 . On item 42, he argued that the advocates herein talked on phone and the said letter was not served on Nyachiro advocates, in any case that there is no evidence of service, as such the items should be taxed off completely.

37. On items 43 of drawing amended statement of claim of 30 Folios, the Applicant submitted that there were 15 folios and not 30 folios as indicated in the Bill of costs, which should be taxed at Kshs 2,750 and not the Kshs 5,000 sought. Similarly, that the witness statement captured in item 49 are 18 folios not 36, which should be taxed at Kshs 3,200 and not Kshs 5,900 sought.

38. On item 50, it was submitted that the copies herein regard the 18 folios which should be taxed at Kshs 1,350 and not Kshs 2,700 sought. On drawing the list of documents at item 51, he stated that the folios herein are 4, that should be taxed at Kshs 1,100. On making copies at Item number 52, he argued that the folios are 4, which should be taxed at Kshs 300 and not 600 sought. He stated that item 53 should be taxed off completely because there is no evidence that the Respondent herein appeared before the Deputy Registrar to fix a mention date for the matter.

39. On items number 66, 67 for attendance, the Applicant submitted that item 66 should be taxed at Kshs. 1,100, while items 67 should be taxed off because the advocate did not attend Court on the said date. Moreover, that the advocate was not on record to attend Court as such should not be awarded attendance he did not participate in. Similarly, that items 68 and 69 of getting up fees should be taxed off.

40. On item 70 for hearing, he argued that the matter was slated for hearing but was mentioned and therefore the fees charges should be Kshs 1,100. On attendance at item number 72, he argued that the hearing took less than 1 hour before the zoom session timed out and the matter was adjourned as such the taxed costs should be Kshs 2,300. This amount is applicable for hearing at item 73 because the hearing took less than an hour to prosecute. Also that Item 74 hearing on cross examination took less than 30 minutes, therefore it should be taxed at Kshs 1,100.

41. On drawing submission at item 75, he argued that the folios were 38 not 76, therefore it should be taxed at Kshs. 6,200, while copies of the same as itemized at 76 should costs Kshs 2,850. On perusal of Respondent's submissions captured at item 79, he argued that the Submissions were 16 folios not 46 therefore, it costs Kshs 800.

42. It was submitted that the attendance for mention at item 80 was done in less than 30 minutes as such should be taxed at Kshs. 1,100 each, while Item 81 on attendance of judgement should be taxed off because the court was not sitting and the judgement delivered via email on 24.7.2020. On perusal of

the Judgement item 83, the applicant stated that it should be taxed at Kshs 1,450 because there were 29 folios and not 58 as indicated in the Bill of costs.

43. On item 84, drawing of Bill of costs, it was submitted that the folios were 8 not 15, that should be taxed at Kshs 1,700. On copies sought under item 85, he stated that since the folios are 8, it should be taxed at Kshs 600. He argued that items 90, 91,102 and 104 on service of the Bill of costs, attendance, judgement fees and fees on certificate of costs respectively should be taxed off because there is no evidence tabled before the taxing master showing any of these activities was done. He also prayed for item 94, 95 and 96 to be taxed off because the Respondent herein was not yet on record.

44. In conclusion, the Applicant urged this Court to tax the Bill afresh and factor in the Kshs 100,000 already paid to the Respondent as acknowledged and captured in the Bill of costs.

Respondent's Submissions.

45. The Respondent submitted on two issues; whether the instant reference ought to be struck out for being a nullity and whether the Advocate/ Respondent is entitled to costs.

46. On the first issues, it was submitted that its trite law that a preliminary objection is one that raises pure points of law which when argued, disposes of the suit as was held in the locus classicus case of Mukisa Biscuits Manufacturing Co. Limited V West End Distributors [1969] EA 696.

47. It was submitted that the Application before Court is expressed to be brought pursuant to Rule 11 (1) & (2) of the *Advocates Remuneration Order* which Sub-rule 1 provides that if a party is dissatisfied with the decision of the taxing master then they ought to give notice of objection itemizing the items they are objecting. He argued that the notice of objection is a compulsory procedure as was held in *Machira & Co Advocates V Arthur K Magugu & Another* [2012] eklr where the Court held that; -

> " 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."

48. The Respondent also cited the case of *Multiline Motors (Kenya) Ltd v Migori County Government* [2021] eklr where the Court held that; -

> " I need not rehash the provisions of Paragraph 11 (1) of the ARO which clearly provide that if a party is dissatisfied with the decision of the taxing officer then he has to give Notice of objection; itemisingthe items objected to. The applicant has not filed such Notice within fourteen (14) days as per the law. Learned Counsel Mr. Singei submitted that the provision is not couched in mandatory terms. In its application, the applicant annexed and marked "PO1" being a copy of the said ruling dated 28/10/2021. The aforementioned annexure is a copy of the handwritten ruling. On the face of it, there seems to be no reasons advanced on why the specific items in the bill of costs dated 13/8/2021 were taxed as so. In considering the provisions on Paragraph 11 (1) of the ARO, Odunga J in Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited [2012] eKLR had this to say:-

"In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles."

Even if no reasons are indicated on the face of the application, the applicant has the duty to notify the taxing officer to give the reasons, The only person who can give reasons for their decision is the taxing officer which should indicate whether they took into account irrelevant matters or applied wrong principles of law in reaching their findings. It is upon the grounds that the court would find good ground to refer the bill of costs for re-taxation before the same officer or a different taxing officer. If the ruling is without reasons, what the applicant is expecting this court to do, is to sit as if it is taxing the bill afresh which is not the proper procedure under the law. The applicant must comply with the due process under paragraph 11 of AMO."

49. To further reinforce, their argument on the need to have notice of objection as the basis of filling a reference, the Respondent cited the case of *Dennis K Magare & Ben Musundi t/a Magare Musundi & Co advocates v Parminder Singh Manku &Another* [2021] eklr where the Court stated as follows;-

" From the foregoing provisions, it is common ground that a party who is aggrieved by the Decision of a taxing master/mistress, is obliged to file and/or lodge a notice of objection to taxation against the decision of the taxing master and in any event the notice of objection to taxation must be filed within 14 days from the date of such taxation. In support of the foregoing findings, I take guidance from the decision in the case of Twiga Motor Limited v Hon. Dalmas Otieno Anyango (2015) eKLR, where the Court stated as hereunder;"The time limits in Rule 11 of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the said time lines would mean that the application would be rendered incompetent in the first instance." [own emphasis]19. On the other hand, it is important to note that the notice of objection to taxation must stipulate and/or contain the particular items, which the Applicant contends to be aggrieved and/or to be Disatisfied with. Upon the filing of the Notice of Objection, the taxing master/mistress is thereafter obliged to render and/or avail his/her reasons for arriving at the Decision in respect of the items, which are the basis of the objection. My reading of the provision of rule 11 (1) of the Advocates Remuneration Order, drives me to the conclusion that the lodgment of the notice of objection to taxation, is peremptory, mandatory and/or imperative. In any event, the Notice of Objection, must speak to specific items which are objected to. It is further my observation that where a Notice of objection to taxation is lodged, same must be specific and must not be omnibus. For clarity, an omnibus notice if any, would be incompetent and incapable of grounding a Reference before this Honourable Court.In support of the foregoing observation I take guidance from the Decision in the case of Machira & Company Advocates v Arthur K Magugu & Another (2012) eKLR, where the Honourable Court observed as hereunder; "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.". Be that as it may, the foregoing Decision considered the legal implications and consequences where an omnibus Notice of Objection to taxation was filed and/or lodged and proceeded to observe that a Non-compliant Notice of objection, can not anchor a valid Reference. However, in the instant case, No Notice of Objection to taxation was ever filed and the Applicant herein have not referred to the filing and/or lodgment of same .Besides, none has been annexed or otherwise, attached to the Affidavits filed Before the Honourable Court. On the other hand, I have perused the entire file as well as the Affidavits filed by the Applicants and, I have not been able to lay my hands on any. Simply put, no such Notice of Objection to taxation was ever filed and/or lodged. In my humble view, in the absence of compliant Notice of Objection to taxation, properly identifying the items objected to and filed within the statutory timeframe, the Refence before Court has been lodged and/or filed in vacuum. On this ground alone, the entire Application fails. However, because there are two other issues that have been enumerated, I am therefore enjoined to address and render determination on same."

50. Based on the above, the Respondent submitted that the provisions of Rule 11 require that the aggrieved party gives a Notice of Objection and further specify the particular items its seeking reasons for taxation. Therefore, that since no Objection is on record and being that no reasons for taxation have been indicated in the Ruling of the taxing master, the court's Jurisdiction is not properly invoked and the Reference is fatally defective and should be struck out and the Preliminary Objection upheld.

51. On costs, the Respondent submitted that costs follow event and rationale for allowing awarding costs was elaborated in the case of *Jasbir Singh Rai& 3 Others V Tarlochan Singh Rai & 4 Others* [2014] eklR. Accordingly, the Respondent urged this Court to award it costs of this Application.

52. I have considered the averments and submissions in this reference. The applicant has averred that the taxing master erred in taxing this bill charging for items or bills incurred when the respondent was not on record.

53. Indeed the respondent firm took over the conduct of this matter on 10/7/2019 when they filed a Notice of Appointment of Advocates.

54. Initially the firm of Nyachiro & Co. Advocates were on record. This cause was indeed filed by the firm of Nyachiro & Co. Advocates who were instructed by the applicant herein.

55. The applicant has indicated that he paid all instruction fees to the said firm and therefore the respondent herein is not entitled to instruction fees.

56. The applicants also aver that the taxing officer failed in awarding costs for a hearing that never took place and especially on item No. 67.

57. I do agree with the submissions made by the applicant that the respondents are not entitled to the instruction fees having not been on record when this cause was filed.

58. Having considered these submissions I find that the reference raises pertinent issues which need to be reconsidered by another taxing officer in order to address issues raised.

59. I refer this application for taxation back to the DR to be reconsidered by another taxing officer other than Hon. M. Kyalo SRM.

60. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 31ST DAY OF JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Magatta for Applicant – present

Dr. Magare for Respondent – absent

Court Assistant - Fred