Lubulellah & Associates Advocates v Gilbi Construction Limited (Miscellaneous Application E148 of 2023) [2024] KEELC 5764 (KLR) (9 August 2024) (Ruling)

Neutral citation: [2024] KEELC 5764 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS APPLICATION E148 OF 2023

JO MBOYA, J

AUGUST 9, 2024

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

BETWEEN

LUBULELLAH & ASSOCIATES ADVOCATES ..... APPLICANT

AND

GILBI CONSTRUCTION LIMITED ..... RESPONDENT

RULING

Introduction and Background

1. The instant ruling relates to two [2] applications, namely, the application dated the 3rd May 2024 and which is filed by the advocates and the application dated the 6th May 2024 which has been filed by the Client and wherein same [client] seeks to impugn the certificate of taxation issued on the 23rd April 2024.

2. In respect of the application dated the 3rd May 2024, the Advocate/Applicant has sought for the following reliefs;

    i. That the Court be pleased to enter Judgment and issue a Decree in favour of the Applicant against the Respondent on the amount of Kshs.444,953.60/-certified on the Certificate of Taxation herein, together with interest at the rate of 14% per annum from the 7th June 2023 being the date of lodgement of the Bill of Costs, until payment in full.

    ii. That the costs of this Application be provided for.

3. The application beforehand is premised on various grounds which have been highlighted at the foot thereof. Furthermore, the application is supported by the affidavit of Eugene Lubulellah sworn on even date [3rd May 2024] and to which the deponent has attached two documents.

4. Instructively, upon being served with the documents under reference, the Client/Respondent filed a Replying affidavit and in respect of which same contested the reliefs sought at the foot of the current application. In particular, the client/Respondent contended that there was a fee agreement between the advocates and the client and that the fees under reference was duly and fully paid.

5. The second application is the one dated the 6th May 2024 and wherein the Client/Respondent seeks for the following reliefs;

    i. That this Honourable Court be pleased to set aside the decision of the Honourable Vincent Kiplagat D.R., Taxing Officer delivered on 23rd April 2024 with respect to the Advocate's Bill of Costs dated 7th June 2023.

    ii. That this Honourable Court be pleased to remit the Bill of Costs dated 7th June 2023 for taxation before another Taxing Officer other than the Honourable Vincent Kiplagat D.R.

    iii. That the costs of this application be provided for.

6. For good measure, the Application vide Chamber Summons [Reference] is premised on the various grounds highlighted in the body thereof. Besides, the application is supported by the affidavit of Harris Gopal Vekaria sworn on the 6th May 2024.

7. Suffice it to point out that the application/reference by the client herein has been opposed by the advocate on various grounds inter-alia that same [reference] is incompetent for want of compliance with the provisions of Rule 11[1] of the Advocate Remuneration Order and thus same ought to be struck out in limine.

8. The matter came up for mention on the 12th June 2024 when it transpired that both the advocate/Applicant and the Client/Respondent had each filed an application. Consequently, the court ordered and directed that the two [2] applications be canvassed simultaneously vide written submissions.

9. Arising from the foregoing directions, the advocates for the Applicant proceeded to and filed two [2] sets of written submissions, namely, the maiden submissions dated the 24th May 2024 and the supplemental submissions dated the 15th July 2024. On her behalf, the Client/Respondent filed written submissions dated the 11th July 2024.

10. For coherence, the three [3] sets of written submissions [details in terms of the preceding paragraph] form part of the record of the court.

PARTIES'SUBMISSIONS:

a. APPLICANT'S SUBMISSIONS:

11. The Applicant herein filed two [2] sets of written submission dated the 22nd May 2024 and the 15th July 2024, respectively; and wherein same [Applicant] has reiterated the grounds contained at the foot of the application dated the 3rd May 2024, the contents of the supporting affidavit thereto as well as the contents of Replying affidavit filed in opposition to the application dated the 6th May 2024.

12. Furthermore, learned counsel for the Applicant has highlighted and canvassed four [4] pertinent issues for consideration by the court.

13. Firstly, learned counsel for the Applicant has submitted that the certificate of taxation which was issued by and on behalf of the taxing officer on the 23rd April 2024 has neither been reviewed, varied and/or rescinded. In this regard, learned counsel for the Applicant has thus implored the court to find and hold that the Applicant has complied with the provisions of Section 51[2] of the *Advocates Act* Cap 16.

14. Instructively, learned counsel for the Applicant has contended that insofar as the certificate of taxation has neither been invalidated nor rescinded, then it behooves the court to enter judgment on the basis of the certificate of taxation.

15. On the other hand, learned counsel for the Applicant has submitted that the reference by and on behalf of the client is premature, misconceived and legally untenable insofar as the client herein did not comply with and/or adhere to the provisions of Rule 11[1] of the Advocates Remuneration Order, which mandatorily requires the filling and service of a Notice of Objection to Taxation containing the items of taxation being objected to.

16. Further and at any rate, learned counsel for the Applicant has submitted that the Notice of Objection to Taxation which was filed by and on behalf of the client is vague and omnibus to the extent that same [Notice of Objection to Taxation] does not highlight the items of taxation that are being objected to, either in the manner stipulated under the law or at all.

17. Premised on the basis that the Notice of Objection to taxation does not highlight the items being objected to, counsel for the Applicant has thus invited the court to strike out the reference beforehand.

18. In support of the foregoing submissions, learned counsel for the Applicant has cited and referenced inter-alia the holding in the case of Matiri Mburu & Chepkemboi Advocates v Occidental Insurance Company Ltd [2017]eKLR; Machira & Company Advocates v Arthur K Magugu & Another [2012]eKLR and Tranquility Development Ltd v Andrew Barney Kakula T/a JS Kakula & Co Advocates [2017]eKLR, respectively.

19. Thirdly, learned counsel for the Applicant has also submitted that the contention that there existed a fee agreement between the advocate and the client herein is mistaken and erroneous insofar as no retainer agreement was ever entered into and executed between the advocate and the client. In any event, counsel has contended that no such fee/retainer agreement has been exhibited by the client or at all.

20. Fourthly, learned counsel for the Applicant has also submitted that the doctrine of privity of contract cannot be inferred as between the advocate herein and the client on the basis of a sale agreement which was entered into between the client [as the vendor] and a third party, namely, the purchaser. Furthermore, learned counsel has submitted that the doctrine of privity of contract only binds the party to the designated contract/agreement and not otherwise.

21. To buttress the submissions pertaining to and concerning the extent and scope of the doctrine of privity of contract, learned counsel for the Applicant has cited and relied on various decisions inter-alia Agricultural Finance Corporation v Lengetia Ltd [1985]eKLR; Kenya Women Finance Trust v Bernerd Oyugi Jaoko [2018]eKLR, Kennendia Insurance Company Ltd v New Nyanza Wholesalers Ltd [2017]eKLR, Ineah Liquiyani Njiraa v Aga Khan Health Service [2013]eKLR and Chidhya K Ltd v Africa Equipment & Engineering Power S. A [Aee Power] [2020]eKLR.

22. Arising from the foregoing submissions, learned counsel for the Applicant has thus invited the court to find and hold that the application by and on behalf of the Applicant is meritorious whereas the application by the Client/ Respondent is not only premature and misconceived, but same is legally untenable.

b. RESPONDENT'S SUBMISSIONS:

23. The Respondent filed written submissions dated the 11th July 2024; and in respect of which the Respondent has adopted and reiterated the grounds contained at the foot of the reference as well as

the contents of the supporting affidavit thereto. Furthermore, the Respondent has also relied on the Replying affidavit to the application dated the 3rd May 2024.

24. On the other hand, learned counsel for the Respondent has thereafter raised and highlighted three[3] issues for due consideration by the court. Firstly, learned counsel for the Respondent has submitted that the learned taxing master fell in error when same [taxing officer] found and held that the preliminary objection which was raised and canvassed on behalf of the Respondent does not relate to a pure point of law capable of being canvassed and disposed of in limine.

25. Additionally, learned counsel for the Respondent has contended that the notice of preliminary objection which had been filed by and on behalf of the client indeed raised pure issues of law and same did not require any interrogation or inquiry of any factual issues and/or matters, either in the manner adverted to by the learned taxing officer or at all. Consequently and in this regard, learned counsel invited the court to find and hold that the decision by the learned taxing officer was erroneous.

26. In support of the foregoing submissions, learned counsel for the Client has cited and referenced Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd [1961] 1EA 66 and John Omolo Nyakongo T/a H.R Ganijee & Sons v Kenya power & Lighting Company Ltd [2022]eKLR, respectively.

27. Secondly, learned counsel for the Respondent/Client has also submitted that the learned taxing officer erred in law in proceeding to tax the advocate client bill of costs, yet there was a fee/ Retainer agreement in existence between the advocate and the client herein.

28. Other than the foregoing, learned counsel for the Client/Respondent has also submitted that the taxing officer proceeded to tax the advocate client bill of costs yet the client had fully paid the agreed fees as between the advocates and the client in terms of the letter dated the 8th October 2016. Consequently, learned counsel for the Client has posited that the taxation of the advocate client bill of costs and the subsequent certificate of taxation therefore constitute an error of principle.

29. Lastly and in respect of the application dated the 3rd May 2024, learned counsel for the Client has contended that same [application] ought not to be allowed for the reasons which have been highlighted at the foot of the Replying affidavit by Harris Gopal Vekaria.

30. Nevertheless, it is imperative to underscore that learned counsel for the Client/Respondent has not highlighted any of the ingredients underpinned by the provisions of Section 51[2] of the Advocates Ach Chapter 16 Laws of Kenya or otherwise.

31. Be that as it may, learned counsel for the Client/Respondent has invited the court to find and hold that the application by and on behalf of the Client/Respondent is meritorious and hence same [application] ought to be allowed.

32. On the contrary, learned counsel for the Client/Respondent has contended that the application by the advocate/applicant ought to be dismissed with costs to the client/Respondent.

ISSUES FOR DETEREMINATION:

33. Having reviewed the two [2] applications and the responses thereto and upon consideration of the written submissions filed on behalf of the respective parties, the following issues do arise [crystalize] and are therefore worthy of determination;

    i. Whether the learned taxing master's finding on the Respondent's preliminary objection was lawful and legally tenable.

ii. Whether the reference by and on behalf of the Client/Respondent is competent and legally tenable or otherwise.

iii. Whether the Client/Respondent has met the threshold for setting aside and/or impeaching a certificate of taxation or otherwise.

iv. Whether the application by the advocate/Applicant accords with the provisions of Section 51[2] of the *Advocates Act* Cap 16 and thus merited.

ANALYSIS AND DETERMINATION:

Issue Number 1 Whether the learned taxing master's finding on the Respondent's preliminary objection was lawful and legally tenable.

34. Learned counsel for the Client/Respondent has contended that the taxing officer was in error when same [taxing officer] proceeded and held that the preliminary objection filed by the client/Respondent did not raise a pure point of law, capable of being canvassed and disposed of without undertaking an inquiry on the factual controversy.

35. In particular, learned counsel for the Respondent/Client has submitted that the preliminary objection which was raised and canvassed by the client raised the issue of limitation of actions and that same [preliminary objection] therefore had the potential of disposing of the bill of costs that was filed by and on behalf of the Advocate/ Applicant.

36. Before venturing to consider on whether or not the preliminary objection raised by the Respondent/ Client could have been determined in limine, it suffices to underscore that a preliminary objection ought to be raised and canvassed on the basis that the pleadings and facts raised by the adverse party [in this case the Advocate/Applicant] are presumed to be correct and not disputed. For good measure, where the proponent of the preliminary objection disputes the contents of the pleadings and the facts raised by the adverse party then the preliminary objection is negated and cannot thus be canvassed on the basis of disputed facts/ Evidence.

37. Furthermore, there is no gainsaying that the proponent of the preliminary objection cannot also be allowed to canvass a preliminary objection on the basis of [sic] a replying affidavit filed by the said proponent. Instructively, where the proponent of a preliminary objection has to invoke and resort to the contents of a replying affidavit filed, then what is propagated to be a preliminary objection ceases to be such.

38. Simply put, the Client/Respondent herein could not agitate the preliminary objection based on the provisions of Section 4[1] of the Limitation Action Act, Chapter 22 Laws of Kenya, where the factual situation was not admitted and/or conceded.

39. Without belabouring the point, the circumstances where preliminary objection can be raised and canvassed have been elaborated upon and settled in various decisions. In this regard, it suffices to highlight and take cognizance of the decision in the case of Mukisa Biscuits Ltd versus West End Distributors Ltd [1969]EA 696, where the Court of Appeal for Eastern Africa stated and held thus;

> ....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page701 paragraph B-C Sir Charles Newbold, P. added the following:

> A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....

40. Additionally, the Supreme Court of Kenya [the apex court] has also had the occasion to address the circumstances under which a preliminary objection can be raised and/or canvassed. In this regard, it suffices to state and reiterate the holding in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others (Civil Application 36 of 2014)* [2015] KESC 2 (KLR) (15 December 2015) (Ruling), where the court held as hereunder;

> 14. As to whether a preliminary objection is one of merit, this Court has already pronounced itself on the threshold to be met. The Court endorsed the principle in Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696, in the case of Hassan Ali *Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013*, [2014] eKLR [paragraph 31]:
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> > "To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696:'a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion'."
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> 15. The Joho decision has been subsequently cited by this Court in *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014*, [2014] eKLR; and in *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014*, [2015] eKLR, in which the Court further stated [paragraph 15]:
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> > "Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."
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> 16. It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (see *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014*, [2014] eKLR).

41. Duly nourished by the decisions [supra], it is now appropriate to revert back to the subject matter and discern whether the preliminary objection based on the provisions of Section 4[1] of *Limitation of Actions Act*, in the manner canvassed by the Learned Counsel for the Client/ Respondent, could be determined in in limine or otherwise.

42. To start with, the determination of whether or not the Advocate/ Applicant's bill of costs was barred by the Limitation of Actions in the manner adverted to by the Client/Respondent would have required the ascertainment of when the instructions giving rise to the bill of costs were concluded and or terminated.

43. Suffice it to point out that the taxation of an Advocate client Bill of Costs, like the one beforehand, would only arise and/or ensue either at the conclusion of the retainer and when the fees has not been fully paid; or upon determination of the instructions by the Client. In this regard, the computation of timelines for purposes of filing the bill of costs would only commence upon ascertainment of the time when the cause of action accrues; and not when the Instructions, were given.

44. To my mind, the ascertainment of the timeline when the cause of action for purposes of lodgement of the bill of costs accrued, could only be undertaken and/or arrived at upon interrogating the facts and/ or evidence available and not otherwise. For coherence, the determination of the date of accrual of the Cause of action, would require evidence to ascertain, when the Retainer ended, or otherwise.

45. Arising from the foregoing, it is my finding and holding that the learned taxing officer arrived at and came to the correct conclusion that the preliminary objection raised by the Client/Respondent could not be determined without undertaking an Inquiry into the factual controversy with a view to determining whether the instructions issued to the advocate had determined either on the basis of conclusion of the assignment; or otherwise.

46. In short, I find and hold that the impugned decision by the taxing officer which found and held that the preliminary objection by and on behalf of the client Respondent was not legally tenable is sound and lawful.

47. At any rate, it is not lost on this court that whosoever wishes to canvass the preliminary objection must proceed on the basis of the pleadings and factual position adverted to by the adverse party. Notably, where the proponent of the preliminary objection wishes to bring forth evidence of his or her own, then such a scenario defeats a preliminary objection.

48. To this end, it suffices to reiterate the holding of the court in the case of Oraro versus Mbaja [2004]eKLR, where the court stated and held thus;

> From my analysis of submissions and of case law herein, I have to state clearly that the Applicant's "Notice of Preliminary Objection to Representation" dated 6th October and filed on 7th October, 2004 cannot pass muster as a procedurally-designed preliminary objection. As already noted, it is accompanied by affidavit evidence , which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy , as their factual foundations are the subject of dispute. As a preliminary objection, therefore, I find and determine that the "Notice of Preliminary Objectio n to Representation " must be dismissed.

49. Before departing from the issue herein, it is also appropriate to underscore that the Advocate/ Applicant herein also filed a list and bundle of documents dated the 14th September 2023, whose purport was to vindicate the various items charged at the foot of the bill of costs dated the 7th June 2023. Instructively, documents number 47, 48, 49 and 60 are letters touching on and concerning the dispute beforehand and same relates to the period up to and including the 21st March 2018.

50. Quite clearly, the Advocate Client Bill of Costs beforehand was filed timeously and within the prescribed six [6] year duration in accordance with the provisions of Section 4[1] of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

51. Arising from the foregoing, my answer to Issue Number one[1] is threefold. Firstly, the preliminary objection which was filed and canvassed by the client herein could not pass the requisite threshold, insofar as the determination of same would have required ascertainment of when the assignment was concluded or otherwise terminated, whichever was the case.

52. Secondly, the impugned preliminary objection could also not be argued by invocation of and resorting to the Replying affidavit which was filed by and on behalf of the Client. Simply put, such an endeavour would negate the known parameters and contours of what constitutes a preliminary objection.

53. Thirdly, that the learned taxing officer was correct in finding and holding that the issues raised at the foot of the preliminary objection could not be determined without undertaking an inquiry as pertains to various factual issues. In this regard, the learned taxing officer arrived at the correct determination as pertains to the impugned preliminary objection.

Issue Number 2 Whether the reference by and on behalf of the Client/Respondent is competent and legally tenable or otherwise.

54. Learned counsel for the Client/Respondent contended that upon the delivery of the ruling on taxation [dated the 23rd April 2024], the Client herein felt aggrieve and dissatisfied and thus same [client] proceeded to and lodged a notice of objection to taxation. Furthermore, it was contended that the notice of objection to taxation was lodged timeously and in accordance with the provisions of Rule 11[1] of the Advocates Remuneration Order.

55. On the other hand, learned counsel for the Advocate/Applicant has contended that though the Client/Respondent proceeded to and lodged a notice of objection to taxation, the said notice of objection to taxation does not comply with and/or adhere to the provisions of Rule 11[1] of the Advocates Remuneration Order which underpins the timelines for lodging of a notice of objection to taxation and by extension the contents thereof.

56. Additionally, learned counsel for the Advocate has contended that to the extent that the notice of objection to taxation does not highlight the items of taxation that are being objected to, the said notice of objection is therefore vague and hence invalid.

57. Having reviewed the rival submissions by and on behalf of both parties, I beg to take the following position.

58. Firstly, it is common ground that any party, the Applicant herein not excepted, who is desirous to object to taxation is called upon to lodge a notice of objection to taxation within 14 days from the date of rendition/delivery of the ruling on taxation.

59. Furthermore, it is also important to highlight that the notice of objection to taxation must also capture and/or stipulate the items of taxation which are being objected to and for which reasons are being sought for from the taxing officer. Instructively, the items which are being objected to must be specifically highlighted and adverted to.

60. Pertinently, it does not lie within the mandate and/or jurisdiction of any party, the Applicant herein not expected to generate and lodge an omnibus or ambiguous notice of objection to taxation. In any event, where such an omnibus and ambiguous notice of objection to taxation is lodged, same becomes invalid and incapable of underpinning a reference.

61. In my humble view, even though the Applicant herein filed and lodged the notice of objection to taxation dated the 23rd April 2024, same [notice of objection to taxation] did not highlight the items sought to be impugned and for which reasons was being sought. Consequently and in this regard, the notice of objection to taxation in question is vague.

62. As pertains to the necessity to file and serve a compliant notice of objection to taxation, it suffices to adopt and take cognizance of the holding of the Court of Appeal in the case of Machira & Co. Advocates versus Arthur K. Magugu & another [2012] eKLR, where the court held 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.
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> 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.

63. Furthermore, the significance of a Notice of objection to taxation in accordance with the provisions of Rule 11[1] of the Advocate Remuneration Order was also elaborated upon in the case of Matiri Mburu & Chepkemboi Advocates v Occidental Insurance Company Limited [2017] eKLR, where the court held thus;

> 6. In my own view the provisions of paragraph 11 of the Remuneration Order serve several purposes. Firstly the requirement that a party seeking reasons gives notice of items objected to, serves to narrow down the issues, and secondly, give notice to the adverse party and the taxing master of his objection. Thus the taxing master, adverse party and ultimately the reference court in their respective roles can focus on the specific matter objected to rather than entire bills of costs, which often run into several pages.
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> 7. The objective is obvious: the expeditious disposal of taxation disputes. Thus compliances with the requirements of paragraph 11 of the Remuneration Order is not a mere technicality that can be pushed aside peremptorily as the Applicant appears to suggest. The provisions of Article 159 (2) (d) of *the Constitution* were not intended to overthrow procedural or technical requirements, but to guard against "undue regard" to procedural technicalities in the administration of justice.
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> 8. In this instance the requirements of Paragraph 11 of the Remuneration Order serve a clear purpose and have an important place in taxation disputes as stated above.

64. Other than the foregoing decisions, it suffices to point out that this court has also had an occasion to discuss the contents of a notice of objection to taxation and the significance thereof in the case of MURGOR & MURGOR ADVOCATES v KENYA AIRPORTS AUTHORITY [2024]eKLR, where this court held thus;

> 46. Notably, the provisions of Rule 11(1) of The Advocate Remuneration Order, stipulates that any Notice of Objection to Taxation, irrespective of the form in which same is filed, no doubt,

the said notice must indicate and reflect the impugned items in respect of which reasons are being sought and by extension, which are intended to be challenged vide the anticipated Reference.

47. From the foregoing, there is no gainsaying that the provision/ identification of the impugned items, which are sought to be challenged, is critical and essential. In any event, it is the itemization, of the items that forms the foundation of the intended reference. Simply put, a proper and valid Notice of objection to Taxation anchors the Jurisdiction of the court while dealing with a Reference.

48. Taking cognizance of the foregoing, the question that does arise is ; can an omnibus Notice of objection to taxation, whether by Letter or otherwise suffice? I am afraid that an omnibus notice, like the ones exhibited at the foot of the Letters dated the 7th October 2022 and 14th October 2022, respectively, cannot be deemed to constitute the requisite Notice of objection to taxation, in the manner known to law.

65. In a nutshell, it is my finding and holding that the reference beforehand, which is anchored on the omnibus and vague notice of objection to taxation, is clearly premature, misconceived and thus legally untenable. In short, the reference beforehand is stillborn.

Issue Number 3 Whether the Client/Respondent has met the threshold for setting aside and/or impeaching a certificate of taxation or otherwise.

66. Other than the finding that the reference beforehand is premature and misconceived for want of compliance with the provisions of Rule 11[1] of the Advocates Remuneration Order, it is still appropriate and for the sake of completeness; to venture forward and ascertain whether the Respondent herein has satisfied the threshold for impeaching the certificate of taxation.

67. Firstly, it is important to underscore that the jurisdiction of the court to interfere with the certificate of taxation is circumscribed and fettered by the existence of either an error of principle, the taking into account of erroneous factors/circumstances; or better still, failure to take into account relevant material /circumstances.

68. To this end, it is worthy and apposite to cite and reference the holding of the Court of Appeal in the case of Kipkorir, Titoo & Kiara Advocates versus 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:
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> "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".
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> 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).

69. Taking into account the ratio decidendi in the decision [supra] the question that the court must ask itself is whether or not the Client/Respondent has espoused and established any of the ingredients highlighted in the decision beforehand.

70. To start with, the Client/Respondent contended that the Applicant's bill of costs was filed outside the prescribed timelines and thus same [bill of costs] was barred by the provisions of Section 4[1] of the *Limitation of Actions Act*.

71. Nevertheless, whilst discussing Issue Number one [1] herein before, this court has found and held that the instructions to and in favour of the Advocate/Applicant herein continued up to and including the conclusion of the sale transaction. In any event, there exists a plethora of correspondence at the foot of the list and bundle of documents filed by the advocate/Applicant, showing that the instructions were still existing up to and including the year 2018.

72. Consequently and in this regard, it is the finding of the court that the question of limitation was properly addressed and adjudicated upon by the taxing officer. Pertinently, there is no error of principle arising from and or attendant to the manner in which the Taxing Officer dealt with the issue of the limitation of actions.

73. On the other hand, learned counsel for the Respondent also sought to impugn the certificate of taxation, on the basis that the taxing officer proceeded to and undertook the impugned taxation on the face of an Existing fee/ Retainer agreement.

74. Be that as it may, I beg to point out that despite the contention by the Client/Respondent that there was a fee agreement between same [client] and the advocate, no such fee/retainer agreement was ever placed before the taxing officer or at all.

75. In any event, it is also common ground that no fee/retainer agreement has also been placed before this court. In this regard, the submissions pertaining to and concerning a fee agreement were made in vacuum and are thus legally untenable.

76. Lastly, learned counsel for the Client/Respondent has submitted that the taxation of the bill of costs and the resultant issuance of the certificate of taxation was undertaken even though the Advocate/Applicant had been fully paid his professional fees.

77. Notwithstanding the foregoing, it is important to underscore that it was incumbent upon the Client/Respondent to establish and demonstrate on a balance of probabilities that the advocates fees had been fully paid and/or satisfied. However, no such evidence was placed before the taxing officer.

78. Other than the foregoing, there was also the contention that the Advocate/Applicant herein had withheld some monies which were due and payable to the client with respect to the transaction giving rise to the bill of costs herein.

79. In this regard, the Client/Respondent seems to suggest that there is need for the Advocate/Applicant to render accounts as pertains to the monies retained and withheld by same.

80. Nevertheless, it is worth pointing out that where there is a claim pertaining to and concerning retention or withholding of monies due and payable to the client, then the client is obligated to either file a suit vide Originating Summons in accordance with the provisions of Order 52 Rule 4 of the Civil Procedure Rules 2010; or better still, to mount a complaint before the Advocates Disciplinary Tribunal in terms of Section 57, 58 and 59 of the *Advocates Act*, Chapter 16 Laws of Kenya.

81. Notably, the Client/Respondent herein has neither filed an Originating Summons nor mounted any complaint with the advocates disciplinary tribunal. Consequently, and in this regard, the averments and contention based on [sic] withheld monies arising out of the subject transaction are hollow and constitute a red herring.

82. In my humble view, the burden of proving the various averments, [whose details have been highlighted in the preceding paragraphs], lay at the door step of the client. Unfortunately, the Client has failed to discharge the burden of proof. [See Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya; see also Dr. Samson Gwer & Others v KEMRI [2020]eKLR, paragraph 49, 50 and 51 thereof].

83. In a nutshell, my answer to Issue Number three [3] is to the effect that the Client/Respondent herein has similarly failed to demonstrate and/or prove any error of principle to warrant the variation, review and/or rescission of the impugned certificate of taxation.

Issue Number 4 Whether the application by the advocate/Client accords with the provisions of Section 51[2] of the *Advocates Act* Cap 16 and thus merited.

84. As pertains to the application dated the 3rd May 2024, it is imperative to underscore that same seeks for entry of judgment in terms of the certificate of taxation issued on the 23rd April 2024.

85. Suffice it to point out that any Applicant seeking to procure and or obtain a judgment on the basis of a certificate of taxation, like the one beforehand, is called upon to meet and/or satisfy the ingredients stipulated vide Section 51[2] of the *Advocates Act*, Chapter 16 Laws of Kenya.

86. For ease of reference, the provisions of Section 51[2] of the *Advocates Act*, Chapter 16 Laws of Kenya are reproduced as hereunder;

> 51. General provisions as to taxation
>
> (1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.
>
> (2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.

87. Flowing from the provisions of Section 51[2] [supra], it is imperative to highlight that an Applicant desirous to obtain a judgment on the basis of a certificate of taxation must demonstrate that the certificate of taxation has neither been varied, reviewed and/or rescinded and that there is no dispute as to retainer.

88. Pertinently, in respect of the instant matter it suffices to underscore that the certificate of taxation issued on the 23rd April 2024 has neither been reviewed nor set aside. Furthermore, there is also no dispute as pertains to retainer or otherwise.

89. In short, it is my finding and holding that the application by and on behalf of the Advocates/Applicant meets and/or satisfies the requisite ingredients to warrant entry of judgment in terms of the certificate of taxation.

90. Put differently, the application by and on behalf of the Advocate/Applicant is indeed meritorious and thus deserving of the orders sought at the foot thereof.

FINAL DISPOSITION:

91. Flowing from the discussion [details highlighted in the body of the ruling] it must have become crystal clear that the application by the Advocate/Applicant is meritorious whereas the application by the Client/Respondent is bereft of merits.

92. In the premises, the final orders that commend themselves to the court are as hereunder;

    i. The Application dated the 3rd May 2024 be and is hereby allowed.

    ii. Consequently, Judgment be and is hereby entered on the basis of the certificate of taxation for the sum of Kes.444, 953.60/= only.

    iii. The award in terms of clause [ii] shall attract interests at 14% w e.f 17th of August 2023 till payment in full. For good measure, Interest is reckoned in accordance with the Provisions of Rule 7 of the Advocates Remuneration Order.

    iv. The Application dated 6th May 2024 be and is hereby dismissed.

    v. Costs of the two [2] applications be and are hereby awarded to the Advocate/Applicant.

    vi. To avoid the filing of supplemental bill of costs and to avert wastage of precious Judicial time, the costs of the applicantions are assessed and certified in the sum of Kes.25, 000/= only each.

93. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 9TH DAY OF AUGUST 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Wendoh h/b for Mr Eugene Lubulellah for the Advocate/Applicant.

Ms. Lilly Ngeresa for the Client/Respondent.