



Andrew & Steve Advocates v Gichu & another (Miscellaneous Criminal Application E331 of 2022) [2025] KEHC 7961 (KLR) (Crim) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 7961 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E331 OF 2022**

AB MWAMUYE, J

APRIL 30, 2025

BETWEEN

ANDREW & STEVE ADVOCATES RESPONDENT

AND

CATHERINE WAMBUGU GICHU 1ST APPLICANT

CECILIA BRIDGE NAFULA RAGUE 2ND APPLICANT

RULING

(On the Applicants' Chamber Summons Application dated 17th January, 2024)

1. The Genesis of this matter is that the Respondent was retained by the Applicants to represent them in criminal investigations and interrogations for complaints made against them by Mwangi Kariuki for conspiracy to defraud and making a false document without authority, which actions exposed Underwriting Africa Insurance & Reinsurance Brokers Ltd to insolvency to the tune of Kes. 46,422,600.00.
2. The Respondent allegedly issued a Deposit Request Note dated 7th June 2019 to the Applicants seeking the payment of Kes. 324,210.00 to which the Applicants made payments of only Kes. 290,000.00.
3. The Respondent proceeded to file a Bill of Costs dated 9th November 2022 and on 25th July 2023, the Taxing Officer, Hon. Mwicigi SPM taxed the Advocates' Bill of Costs at Kes. 802,203.00.
4. It is that Ruling on taxation which gave rise to this application dated 17th January, 2024 wherein the Applicant clients seeks orders for setting aside of the taxation and certificate of costs dated 2nd August 2023.



5. The grounds upon which the application is predicated are that the taxation was excessive, unjustifiable and was based on grave errors in principle including:
 - i. The Taxing Officer erred in applying the provisions of paragraph 49(A) of the Advocates Remuneration Order yet the Advocate did not handle any actual criminal case.
 - ii. The Taxing Officer erred in holding that a charge of Kes. 250,000.00 instruction fees for each Applicant was fair and justified as the Applicants are legally separate entities yet the Applicants are not entities, neither were they represented separately.
 - iii. The Taxing Officer erred in upholding the items of drawing and perusals, correspondences, disbursements yet the same are not allowable for non-contentious matters.
 - iv. The Taxing Officer erred in failing to consider the Applicants' submissions in opposition to the Advocate's Bill of Costs.
 - v. The Taxing Officer erred in failing to consider the correspondences between the Advocate and the clients indicating that the Advocate did not actually fully execute his instructions.
 - vi. The Taxing Officer erred in failing to consider and hold that the Advocate did not actually prepare or file any pleadings in the criminal case.
 - vii. The Taxing Officer erred in allowing fees for attendances yet none of them related to court attendances.
 - viii. The Taxing Officer erred in allowing items on drawings yet none of them related to drawing any court pleadings.
 - ix. The Taxing Officer erred in failing to consider that the Advocate admittedly billed the Applicants a joint and all-inclusive sum of Kes. 324,210.00 out of which Kes. 290,000.00 was duly paid by the Respondents, thus a balance of Kes.34,210.00
6. The Advocates for the Applicants swore an affidavit dated and the clients swore a further affidavit dated 21st November, 2024 in which they aver that the Applicants had difficulties accessing the detailed ruling showing the reasons for taxation thus delayed in filing the instant reference. The same was only availed to them on 9th November 2023.
7. The Respondent responded to the Reference Application vide Replying Affidavit sworn by Steve Kimathi Mutiso dated 5th November, 2024. In the Respondent/Advocate's Replying Affidavit, he deposed that under Rule 11 of the Advocates Remuneration Order, the Applicants were mandated to give notice in writing to the Taxing Officer of the items they were objecting to within 14 days after the ruling by the taxing officer. No evidence was submitted to show that a notice was issued.
8. The Advocate/ Respondent further avers that the Applicants were still required to file a reference application within 14 days of receipt of the ruling yet they filed this application 71 days from the date they obtained the Ruling.
9. According to the Respondent, the Reference Application has been filed by Moses Onyango, who has also sworn the Affidavit in support but lacks capacity to file the Application and swear an affidavit on contested issues, since the Application can only be filed by the Applicants.
10. In view of the above reasons, the Respondent prayed that the Application be dismissed with costs to the Respondent.



11. Parties filed written submissions in support of their respective pleaded positions and relied on various authorities which I have read and considered in reaching my findings herein and decisions.
12. In brief, the Applicants' counsel in their submissions dated 25th November 2024 supported by various statutory and judicial authorities submitted reiterating the prayers, grounds and supporting as well as further affidavit. Counsel relied on the case of Turea Limited t/a Dr. Matress v Mohamed (Civil Application E030 of 2022) [2022] KECA 1271 (KLR) on whether an Advocate can swear an affidavit. They submitted that the supporting affidavit sworn by Counsel Moses Onyango deponed on legal principles on which the taxing master erred and the arguability of the intended Reference are arguments of law which cannot be said to be contentious.
13. Counsel for the Applicants further submitted that the instant Reference Application should be determined on its merit for justice to prevail and for the same not to suffer at the altar of procedural technicalities based on counsel's excusable mistakes. They relied on Article 159 of *the Constitution* and also referred to the following cases in support; Tom Ojienda & Associates v Nairobi City County [2021] eKLR, Lucy Bosire v Kehancha Dv. Land Dispute Tribunal & 2 Others (2013) eKLR and finally the Supreme Court case of Kidero & 4 others v Waititu & 4 others (Petition 18 7 20 of 2014 (Consolidated)) [2014] KESC 11 (KLR).
14. On assertion that there was an error of principle, it was submitted that the Advocate had a fee agreement with the Applicants thus the Advocate/ Respondent should have sued for the balance of the fees and not to file he Bill of costs. Reliance was placed in the case of Corporate Insurance Company Limited v Kangethe and Mola Advocates (Miscellaneous Civil Application E1220 of 2020) KEHC 5650 (KLR)
15. Finally, counsel for the Applicants urged the court to allows the Reference grant the orders sought with costs to be borne by the Respondent/ Advocate. They relied on the case of Republic vs Rosemary Wairimu Munene, Ex- Parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2014.
16. On the part of the Advocate/ Respondent, it was submitted that it is a well-established principle of law that an advocate is prohibited from swearing an affidavit of its clients in contested matters thus the Respondents' Application is fatally defective on account that it has been sworn by an advocate who has deponed the contentious matters of fact.
17. Reliance was placed on Rule 8 of the Advocates (Practice) Rules, Order 19 Rule (3)(1) of the Civil Procedure Rules, 2010 together with the following cases; Turea Limited t/a Dr. Mattress v Mohamed (Civil Application E030 of 2022) [2022] KECA 1271 (KLR), Regina Waithira Mwangi Gitau vs Boniface Nthenge [2015] eKLR, Agricultural Development Corporation v Container Freighters Co. Ltd [1992] eKLR and Gerphas Alphonse Odhiambo v Felix Adiego [2006] eKLR.
18. The Advocate/ Respondent further submitted that the Applicants' Reference lacks merit as it has been filed out of time and without leave of court since it has been filed more than 5 months from the date the Taxing master delivered his Ruling on the Bill of Costs.
19. They relied on Paragraph 11 (1) & (4) of the Advocates Remuneration Order and the cases of Ahmednadir Abdikadir & Co. Advocates vs National Bank of Kenya Limited (2) [2006] 1EA 5, Evans Thiga Gaturu, Advocate V Kenya Commercial Bank Limited [2012] eKLR and Twiga Motor Limited v Hon. Dalmas Otieno Omyango [2015] eKLR.
20. The Advocate/ Respondent argued that it is a general rule that the High Court should not interfere with the Ruling of a Taxing Officer unless there exists an error in law or principle and in the present case



the Taxing Officer correctly analysed the facts and by applying the law arrived at the correct conclusion. They referred to the case of *D. Njogu & Company Advocates v Panafcon Engineering Ltd* (2006) eKLR and Rule 62 of the Advocates Remuneration Order in support of the same.

21. They further submitted that an award of costs is discretionary but this Honourable Court should be guided by the case of *Levben Products v Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) and the case of *Hewitt & Co. v Joseph Air* 1918 Cal 717. They prayed that this Honourable Court be guided by the above analysis of statute and cited precedents should dismiss the Respondents Application for being incompetent and allow the Advocates Application dated 12th October 2023.

Determination

22. I have considered the Chamber Summons filed by the Applicants, the grounds, supporting and further affidavit as well as the Replying Affidavit and the respective parties written submissions. The main issue for determination is whether the application herein has merit.
23. To begin with, the procedure for challenging the decision of a Taxing Officer is provided for under Section 51 of the *Advocates Act* and Rule 11 of the Advocates (Remuneration) Order.
24. Rule 11 (2) thereof provides that a person who objects (Objector) to a decision of a Taxing Officer may within 14 days of the receipt of the reasons of the Taxing Officer (Ruling on Taxation) apply to the Judge in chambers setting out the grounds of his objection. This is done by way of Reference filed vide chamber summons under Rule 11 of the Advocates (Remuneration) Order.
25. It is noted that the Applicant herein vide a letter dated 3rd August 2023 wrote to the Deputy Registrar at Milimani High Court, Criminal division requesting for a typed copy of the ruling by Hon. A. Mwigigi dated 25th July 2023.
26. The Applicants did not indicate their objection to taxation nor did they seek to be supplied with a certificate of written reasons for the said ruling to enable it file a reference to that effect as required. It is my view that even though the requirement of giving notice to the Taxing Officer of items objected to is not couched in mandatory terms, it is necessary for purposes of ensuring the necessary timelines are observed, and as such references are filed and heard timeously.
27. Be it as it may, the Applicants admit to receiving a copy of the ruling on 9th November 2023 but opted not to file the Reference Application within 14 days as per the requirements of Rule 11 of the Advocates (Remuneration) Order and instead filed the same on 19th January 2024, 71 days later.
28. The Applicants and their counsel are deemed to have been aware of Rule 11 of the Advocates (Remuneration) Order expressly provided a specific procedure for addressing a grievance and ought therefore to have followed it. Despite the delay, the Applicants did not seek leave to file the Reference out of time but instead proceed to assume that the Reference Application has been properly filed.
29. This court notes that no good reason was shown by the Applicants for non-compliance with procedure set out in Rule 11 of the Advocates Remuneration Order, and that extending time for the Applicants to comply with the provisions of Rule 11 is likely to cause further delay which is prejudicial to the Respondent.



30. The Supreme Court of Kenya had occasion to consider the adherence to the laid down procedure of approaching a court of law in the case of *Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR where the court stated as follows:

“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of *the Constitution*, which proclaims that, “...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope of discretion devolves to the courts.”

31. In the case of *Speaker of the National Assembly vs James Njenga Karume* Civil Application No. 92 of 1992 the Court of Appeal held as follows:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed...”

32. In the case of *Machira & Co. Advocates vs Magugu* [2000] 2 EA 428 Justice Ringera (as he then was) stated as follows:

“As I understand the practice relating to taxation of bill of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item within the bill of costs is ventilated by way of a Reference to a Judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

33. A similar view to which I agree with was held by Odunga J in the case of *Gacau Kariuki & Co. Advocates vs Allan Mbugua Nganga* Misc. Appl. No. 2011 as follows: -

“I must make it very clear that what is before me is not a reference from taxation, but an application seeking to set aside the orders made on the 29th day of September, 2011 and 27th day of October, 2011. The orders, which were made on 29th September, 2011 were made by the Deputy Registrar when in her capacity as the Taxing Master taxed the Bill as presented. What is the procedure for challenging such a decision; in my view the only available recourse to a person aggrieved by the decision of a Taxation Officer is to lodge a reference. Where a person discovers the fact of taxation after the time stipulated as it is alleged herein paragraph 11 (4) of the Advocates Remuneration Order empowers the court to extend time. It has been said time and again that where there is a specific procedure provided for addressing a grievance that procedure should be strictly complied with.”



- 34. Guided by the above decisions, I am satisfied that the instant Application is in violation of the Provisions of Rule 11 of the Advocates (Remuneration) Order as the same was filed out of time and without leave. To this extent the notice of objection required to be given to the Taxing Officer together with the leave to be sought by a party to file a reference application out of time is thus not mere technicality as alleged by the Applicants and the present application is therefore incurably defective, improper, unprocedural and an abuse of the court's due process.
- 35. This Court is thus not in a position to address the outstanding issues and arguments made thereon, which are predicted on the instant application having been incompetently filed before this Court.
- 36. Consequently, this court finds that the Application dated 17th January, 2024 lacks merit. The same is ordered as dismissed for failure to comply with Rule 11 of the Advocates Remuneration Order, the Applicants will thus pay the costs of this Application of Kes.30,000.00 to the Respondent.

DATED, SIGNED, AND DELIVERED ON THIS 30TH DAY OF APRIL, 2025

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BAHATI MWAMUYE.
JUDGE.

