Njeru Nyaga & Company Advocates LLP v Muiruri & another (Miscellaneous Civil Application E858 of 2023) [2025] KEHC 11401 (KLR) (Civ) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11401 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS CIVIL APPLICATION E858 OF 2023

JN MULWA, J

JULY 31, 2025

BETWEEN

NJERU NYAGA & COMPANY ADVOCATES LLP ..... APPLICANT

AND

ANNE WAMBUI MUIRURI ..... 1ST RESPONDENT

JAMES NJOROGE KARIUKI ..... 2ND RESPONDENT

RULING

1. For determination is the chamber summons application dated 31/10/2024 filed by Anne Wambui Muiruri and James Njoroge Kariuki (hereafter called the 1st & 2nd Applicants) filed against Njeru Nyaga & Co. Advocates LLP (hereafter called the Respondent) pursuant to Paragraph 11 of the Advocates Remuneration Order (ARO) seeking orders: -

    a. Spent.

    b. Spent.

    c. Spent.

    d. That the honourable Court be pleased to review, vary and or set aside the ruling of the taxing officer delivered on 15/08/2024 particularly Item 2 or in the alternative the Respondent's bill of costs be remitted before the same or another taxing officer with appropriate directions on the question of assessment.

    e. That the costs of the reference be borne by the Respondent.

2. The motion is premised on grounds found at the supporting affidavit sworn by Owuor Steve Gerry on even date. The kernel of his deposition is that the taxing officer erred in law and fact in taxing Item

2 on Instruction Fees, in the Respondent's bill of costs, at Kshs. 617,204/-, by erroneously assuming that there existed an Advocate-Client relationship between the Applicant and Respondent. That the taxing officer erred in law and in fact in failing to appreciate that the real subject matter of Item 2 related to enforcement of a professional undertaking which had nothing to do with the Applicant's, particularly as relates to the suit filed to enforce the professional undertaking. In summation he states that the reference ought to be allowed.

3. The Respondent opposes the reference by way grounds of opposition dated 02/12/2024. They take issue with reference on grounds that the reference was filed outside the mandatory timelines prescribed under Paragraph 11 of the ARO without leave of the Court rendering it incompetent, defective and fatally flawed; that the Applicants failed to make a formal application under the relevant provisions of the law to seek leave to file the reference out of time as required by procedural rules and judicial precedent; that the Applicants have provided no sufficient or plausible explanation for their inordinate delay in filing the reference; that the present application for reference is an abuse of the Court process; and that the reference application should be dismissed with costs.

4. The chamber summons application was canvassed by way of written submissions.

5. The Court has considered the rival material and postulates that the issues for determination concern: -

    a. Whether the Court can entertain the reference as filed?

    b. Whether the Applicant's reference is merited?

    c. Who ought to bear the costs of the application?

Whether the Court can entertain the reference as filed?

6. At the outset, in opposition to the motion, the Respondent preferred to file grounds of opposition. While Order 51 Rule 14 (1) of the CPR recognizes a preliminary objection (PO), replying affidavit and statement of grounds of opposition as modes that a party may apply to oppose an application, recently the Court of Appeal in Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR) observed that the effect of filing grounds of opposition in response to an application confines a party to issues of law and legal arguments only.

7. That said, by the Respondent's grounds of opposition, the jurisdiction of this Court to entertain the reference has been called to question on the backdrop of the fact that the reference was filed out of time and without leave of court. This Court gathers that the Respondent's objection concerns limitation as to time within which to lodge pleadings, hence jurisdiction and thus qualifies as a preliminary question in limine.

8. It is trite that a question of limitation of time goes to the root of the Court's jurisdiction to entertain the proceedings before it, as no Court has jurisdiction to hear a matter that is time barred. See the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1. The Court of Appeal in Thuranira Karauri v Agnes Ncheche [1997] eKLR observed that: -

> "We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit".

9. In determining the Respondent's objection, this Court must first identify when time began to run. The relevant facets of Paragraph 11 of the ARO provide as follows-:

> "(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
>
> (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
>
> (3) .....
>
> (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) far the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

10. Relevant to the issue at hand, it would be remiss not to mention that the Applicant's offered no response to the Respondent's objection by way of a further affidavit in an attempt to assail the said contestation however only canvassed the same through their submissions.

11. As is, the Court must satisfy itself of the Respondent's objection on the premise of the material and record before it. From the record before the Court, it can be gathered or rather it is not in dispute that the taxing officer delivered her ruling on 15/08/2024. There was no activity in the matter up until 29/08/2024 when the Applicants lodged a letter pursuant to Paragraph 11(2) of the ARO, requesting for reasons for the ruling despite acknowledging in the very same letter of being dissatisfied by the taxing officer's decision in respect of Items 2, 3, 4, 5, 6, 7 & 8. That said, it was not until 13/11/2024 that the Applicants lodged the instant reference without seeking any leave and or enlargement of time within which to lodge a reference.

12. This Court's understanding of Paragraph *11*(1) & (2) of the ARO, is that time begins running upon delivery of the taxing officer's ruling. Upon delivery, it is incumbent upon the Applicants to have complied with Paragraph 11(1) of the ARO, it appears that they did so. However, notwithstanding the wording in first limb of Paragraph 11(2) of the ARO and the contents of the Applicants letter lodged on 29/08/2024, firstly it would seem that the Applicants were alive to the contents of the impugned ruling and had sufficiently digested its constituent elements.

13. Secondly, a perfunctory review of the impugned ruling that is the subject of the reference reveals that the taxation ruling is substantive, complete and contains reasons for the taxing officers' decision on the taxed items. Thus, if the Applicants were alive to the aggrieving facets of the ruling they ought to have, within fourteen (14) days, applied to this Court by way of a reference setting out their grounds.

14. In the Court's view, it was unnecessary, in the circumstances, for the Applicants to request and or wait to receive written reasons from the taxing officer to enable them to lodge their reference, as the ruling by design or form provided the reasons for the taxing on the items in the Bill of Costs.

15. This reasoning was equally shared earlier by Odunga, J. (as he then was) in Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited [2012] KEHC 4274 (KLR) wherein it was stated that-;

> "……where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of *Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005*, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent."

16. Undoubtedly, if the Applicants were minded despite the elaborate ruling, to lodge the Notice of Objection as a matter of routine, the Applicant ought to have contemporaneously filed the reference to avert being caught up by limitation. At the risk of repetition, the Applicants filed their reference before seeking enlargement of time-eschewed filing a further affidavit to explain the delay whereas the decision in Evans Thiga Gaturu, Advocate (supra) that they relied on in their submissions, clearly had the opposite effect instead of aiding the Applicants cause.

17. I concur with Meoli, J. in Chege v Muiruri [2024] KEHC 8181 (KLR) wherein she succinctly observed-:

> "It has become a routine practice that taxing officers deliver written taxation rulings containing their reasons for such taxation, therefore obviating the need for requests for such reasons and curbing delay. The court cannot encourage a practice as evident here, where a party who has full reasons for taxation at the delivery of the ruling routinely and superfluously seeks written reasons for taxation and waits to file the reference when it best suits him."

18. I believe I have reasonably addressed myself to the Respondent's objection. The upshot is that the reference is incompetently before this Court for having been filed out of time without leave of court. It is struck out with attendant costs in favour of the Respondent capped at Kshs. 5,000/-.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025

……

JANET MULWA.

JUDGE