



**Kisia & another v Wamaitha, Kang’ethe & Company Advocates (Environment & Land
Miscellaneous Case 16 of 2020) [2022] KEELC 134 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 134 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE 16 OF 2020**

EK WABWOTO, J

JUNE 9, 2022

BETWEEN

PATRICK SAGWA KISIA 1ST APPLICANT

QUAKER VENTURES LIMITED 2ND APPLICANT

AND

WAMAITHA, KANG’ETHE & COMPANY ADVOCATES RESPONDENT

RULING

1. This Ruling is in respect to two applications by the Applicants both dated August 26, 2021. The first application seeks for stay of execution against the ruling of the taxing officer delivered on June 15, 2021 and also seeks for enlargement of the time within which to file the reference against the said decision. The second application seeks to vary and set aside the decision of the taxing officer delivered on June 15, 2021. Both applications are supported by the grounds on the face of the applications and the affidavits sworn by Jackson Chiteri Ondieki and Patrick Sagwa Kisia sworn on August 26, 2021.
2. The applications were opposed vide grounds of opposition dated March 18, 2022 and Replying Affidavit sworn on March 15, 2022 by Wamaitha Kang’ethe.
3. The application was canvassed through written submissions. The Applicants filed written submissions dated April 7, 2022 while the Respondent filed written submissions dated April 15, 2022.
4. The Applicants in their submissions urged the Court to issue the prayers sought in their applications. It was their contention that time should be enlarged to allow their reference to be deemed as properly filed.
5. Counsel for the Applicants submitted that through their supporting affidavits they had narrated the events and timelines that led to the delay in filing of the reference.



6. Specifically, it was submitted that the delay in filing the reference was occasioned by the part of Mr. Ondieki Advocate who had filed a notice of appeal instead of lodging an objection to this court. Counsel submitted that such an error was excusable and pleaded with the court to enlarge time.
7. In addition, it was also submitted that the Taxing Master misdirected herself in item 1 which was manifestly excessive. The Applicant further urged the Court to set aside the Taxing Master's decision and remit it back for taxation as prayed in the application.
8. On the issue of stay of execution, Counsel submitted that Section 89 of the *Civil Procedure Act* applies to this proceeding and hence stay of execution ought to be granted.
9. The Respondent filed grounds of opposition dated 18th March 2022 and Replying Affidavit sworn on March 15, 2022. It was submitted that the Taxing Master's decision was correct and impeachable and that no error could be discerned from the said decision.
10. The grounds of opposition filed by the Advocate objected to the reference for the reasons that the same was incompetent and a non-starter. It was also stated that the Application was an affront to clear provisions of Rule 16 of the Advocates Remuneration Order which grants the taxing officer the discretion in taxing the bill.
11. On the prayer sought for stay of execution, the Respondent submitted that the Applicants had not satisfied the requirements for stay of execution and as such the same could not be granted. No substantial loss had been demonstrated.
12. The Advocate also submitted that the reference focussed on quantum which in their view could not be a reason to upset the Taxing Master's decision. They relied on the following case to advance their position, *Green Hills Investments Ltd v China National Complete Plant Export Corporation t/a Covec* [2004] eKLR.
13. In respect to item 1, the Advocate submitted that the decision of the Taxing Master was correct since the same were properly taxed off or disallowed as applicable.
14. I have considered both Applications, the response and submissions by parties. I have also considered the decisions relied on by parties. The issues which in my opinion arise for determination are as follows:
 - i. Whether this court should enlarge time for filing the reference.
 - ii. Whether a stay of execution ought to issue herein.
 - iii. Whether the Taxing Officer erred in law and principle while taxing the Advocate - Client Bill of Costs herein and thereby reached a wrong assessment.

Issue No. I

Whether this court should enlarge time for filing the reference.

15. The procedure by an aggrieved party to challenge a taxation ruling is set out in the Advocates Remuneration Order Paragraph 11 and is very specific on what an aggrieved party should do. "A party who intends to challenge a ruling on taxation must first write to the taxing officer within 14 days from the date of ruling of taxation, giving a notice of objection specifying the items in the bill of costs in respect of which he is aggrieved of and requesting the taxing master/officer to give reasons for allowing them as shown in the ruling"



16. Paragraph 11 of the *Advocates Remuneration Order* stipulates-

- “ 11(1) should any party object to the decision of the taxing officer, he may within 14 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 14 days from the receipt of the reasons apply to the judge in chambers which shall be served on all parties concerned, setting out the grounds of his objection.
- 3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under sub paragraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- 4) The High Court shall have power in its discretion by order enlarge the time fixed by subparagraph (1) or subparagraph (2) of the taking of any step.
- 5) Applications for such an order may be made by chamber summons upon giving every other interested party not less than 3 clear days’ notice in writing or as the court may direct, and may so made notwithstanding that the time sought to be enlarged may have already expired.”

17. It is therefore apparent from the law that the above provision provides for the filing of a reference within 14 days from the date of receiving the reasons for the decision. This continues to apply despite the fact the Taxing Master would often indicate that the reasons are contained in the decision.

18. In the instant case the reasons given by the Applicant is that the delay was occasioned when they erroneously filed a notice of appeal instead of filing an objection to this court. It is a principle of law that the applicant must demonstrate good and sufficient reasons why such a party should be allowed to file the reference out of time.

19. The Supreme Court in a case pertinent to what is before this court had an occasion to consider the importance of adherence to the laid down procedure in approaching a court of law. This was in an appeal of an election petition that is the case of *Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR where the court stated thus:

“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 for discretion devolves to the courts.”



20. The importance of following procedure of paragraph 11 of the *Order*, was underscored by Justice R. E. Aburili in the case *Vishisht Talwar v Anthony Thuo Kanai T/a A. Thuo Kanai Advocates* [2014] eKLR where the learned judge stated:

“The Learned Judge referring to a decision in the Court of Appeal in *Machira & Co. Advocates – vs- Arthur K. Magugu & Another CA 199/2002*[2012] eKLR stated that:

“Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the *Civil Procedure Act* of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate’s bill of costs through references under Rule 11 to a Judge in chambers.”

21. On this aspect, I am not convinced that the Applicants have offered sufficient reasons for enlargement of time in respect to filing of their reference.

Issue No. ii

Whether a stay of execution ought to issue herein.

22. Having found that the Applicants have not offered sufficient reasons for enlargement of time herein, it automatically follows that a stay of execution against the decision of the taxing master delivered herein on 15th June 2021 cannot be granted in the circumstances.

Issue No. iii

Whether the Taxing Officer erred in law and principle while taxing the Advocate - Client Bill of Costs herein and thereby reached a wrong assessment.

23. The Principles of taxation were aptly stated in *Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and Others No.3* (1972 EA 162) where the court noted as follows on the principles on taxation:

“(a) successful litigant ought to be fairly reimbursed for costs he has had to incur (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy. (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and (d) that as far as practicable there should be consistency in the awards made. (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically (g) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”



24. The circumstances under which a Judge interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in *First American Bank of Kenya v Shah and Others* [2002] 1 EA 64.
25. The Applicants principal argument is that the Taxing Master misdirected herself in taxing the bill at Ksh 819,520/= while the Respondent on the other hand maintained that the Taxing Master correctly taxed the bill as per scale and exercised her discretion properly.
26. I have keenly perused the ruling of the taxing master delivered on 15th June 2021 and I note that in determining instruction fee, the Taxing Master went ahead to give her reasons indicating that she had considered the work that was done by the Advocate in relation to the extension of the leases, the draft agreements prepared and the draft transfers and all the documents that were perused and for those reasons, she taxed the instruction fees as per scale for Ksh 800,000/=
27. I have also considered the Applicants' grievances and supporting arguments. I have further considered the principles upon which this court exercises jurisdiction to interfere with the Taxing officer's exercise of discretion in the taxation of bills as outlined earlier and I do not find merit in the reference.
28. The taxing officer in my view did not misapprehend the applicable principles and law in arriving at her decision. It is therefore not open for this court to interfere with the same.
29. As was stated by the [Supreme Court of Uganda (Mulenga, JSC) in *Bank of Uganda v Banco Arabe Espaniol*, Civil Application No. 29 of 2019];
- ...[S]ave in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount...Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the



decision on quantum and that upholding the amount allowed would cause injustice to one of the parties. (Emphasis added).

30. Flowing from what I have stated above, I am unable to uphold the Applicants' argument that the taxing officer committed an error of principle or law in her decision. Consequently, the reference is declined and dismissed.

31. Each party shall meet their respective costs of both Applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF JUNE 2022

E. K. WABWOTO

JUDGE

In the presence of: -

N/A for the Applicants.

N/A for the Respondent.

Court Assistant; Caroline Nafuna.

