



REPUBLIC OF KENYA



**Kamau & 13 others v Muga Developers Limited & 7 others (Civil Case E052 of 2020)
[2022] KEHC 15075 (KLR) (Commercial and Tax) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15075 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E052 OF 2020
DO CHEPKWONY, J
NOVEMBER 3, 2022**

BETWEEN

**LUCY WANGARI KAMAU 1ST PLAINTIFF
ELIUD NGUGI NDEGWA 2ND PLAINTIFF
LILIAN ANYANGO OWITI NDEGWA 3RD PLAINTIFF
ALICIA WANGECI NDEGWA 4TH PLAINTIFF
MARGARET WACHEKE 5TH PLAINTIFF
YVONNE NJERI KIANDUMA 6TH PLAINTIFF
JAMES NGUGI NJUGUDA 7TH PLAINTIFF
NKATHA GITONGA 8TH PLAINTIFF
JAQUILYN NJOKI NYAGA 9TH PLAINTIFF
DOREEN WANJIKU KAMAU 10TH PLAINTIFF
RUTH WANJIKU KAMAU 11TH PLAINTIFF
SUSAN WANJIRU KIIRU 12TH PLAINTIFF
GLADWELL NJOROGE 13TH PLAINTIFF
WINNIE WANJIRU 14TH PLAINTIFF**

AND

**MUGA DEVELOPERS LIMITED 1ST DEFENDANT
SUSAN WACHEKE MURAYA 2ND DEFENDANT
PETER KIARIE MURAYA 3RD DEFENDANT**



TRANSNATIONAL BANK LIMITED	4 TH DEFENDANT
SURAYA SALES LIMITED	5 TH DEFENDANT
SURAYA PROPERTY GROUP LTD	6 TH DEFENDANT
EQUITY BANK LTD	7 TH DEFENDANT
CLASSIX AT FOURWAYS LTD	8 TH DEFENDANT

RULING

1. Equity Bank Limited was the 7th defendant in this suit and being aggrieved by the taxing master's assessment of costs on its bill of costs dated December 15, 2020, it has approached this court vide a chamber summons application dated February 4, 2022 seeking for the following orders: -
 - a) The court be pleased to review and/or set aside the assessment of the Taxing Officer on instruction fees(item No 1) with respect to the 7th defendant's bill of costs dated December 15, 2020.
 - b) The court be pleased to assess instruction fees due to the 7th defendant at Kshs 750,000/= or at such sum as it deems reasonable and just.
 - c) In the alternative to prayer No 2 above, this Honourable Court be pleased to remit the 7th defendants bill of costs dated December 15, 2020 to the Taxing Officer for the instructions to be taxed afresh.
 - d) The costs of this application be provided for.

2. The application is expressed to be brought under the provisions of rule 11(2) of the *Advocates Remuneration Order* and is supported by among other grounds that, the Taxing Master assessed instruction fees at Kshs 75,000/= and taxed of Kshs 675,000/= thereby failing to take into account the complexity of the matter and voluminous pages of the plaint, and the seriousness of the allegation made against the 7th defendant, that it aided in fraudulent acts of the 2nd and 3rd defendants. According to the applicant, its reputation was tarnished, and the assessment of the Taxing Master was inordinately low to warrant the interference by this court.

3. The application was further supported by the affidavit of Moses Ndirangu, the applicant's Director corporate banking. The affidavit reiterates the ground on face of the application save for annexing the Taxing Master's decision.

4. In opposing the application, the plaintiffs filed a notice of preliminary objection dated April 22, 2022, adducing the following grounds: -
 - (a) That the application brought by the 7th defendant herein is a gross abuse of the due process of law.
 - (b) That the said application is fatally defective as it is in gross violation of section 11(1) of the *Advocates Remuneration Order*.
 - (c) That aggrieved by the assessment of the Taxing Officer with respect to its bill of costs dated December 15, 2020, the 7th defendant ought to have given notice



in writing to the Taxing Officer of the items of taxation to which it objects to in conformity section 11 (1) and (2) of the *Advocates Remuneration Order*.

- (d) That Equity Bank Ltd has neither abbeared any notice contemplated under section 11(1) nor the reasons in writing in reply to such notice by the Taxing Officer in consonance with section 11(2) of the *Advocates Remuneration Order*.
- (e) That the application by the applicant is ill-advised, misinformed, bad in law and same ought to be dismissed with aggravated costs.
- (f) That the application is instigated by ulterior motives, geared towards oppressing the plaintiffs, lodge and prosecuted in bad faith, is vexatious and a gross abuse of the due process of law.

Based on those grounds, the plaintiffs craved for the court to dismiss the application.

5. Directions were then issued that the application and the notice of preliminary objection be canvassed by way of written submissions and as the record reflects, both sides complied with those directions. The 7th defendant/applicant filed two sets of submissions dated March 25, 2022 and August 15, 2022 respectively whilst those of the plaintiffs are dated July 20, 2022. I have read through those submission and will highlight them in my analysis.

Analysis and Determination

6. Having considered the pleadings filed by the parties as well as the submission and the authorities relied on, I am of the view that the issues which do crystalize for determination are as follows: -
- (a) Whether the reference is defective for having been filed prior to giving notice under rule 11(1) of the *advocates Remuneration Order* and for being filed out of time; if not,
 - (b) Whether the reference is merited from the standpoint of paragraph 11 of the *Advocates Remuneration Order*.
7. On the first issue, whereas the plaintiffs/respondents submitted that the reference is fatally defective for having been filed outside the prescribed timelines and for not giving prior notice to the Taxing Officer. The 7th defendant/applicant submitted that it received a copy of the ruling on January 24, 2022, and it was well within the 14 days timelines to file the reference on February 4, 2022. The applicant further submitted that its letter dated the January 19, 2022 was sufficient notice to the Taxing Master.
8. It is noteworthy that the impugned decision by the Taxing Master was delivered on January 14, 2022 and the court record shows that the 7th defendant wrote to the Deputy Registrar vide a letter dated January 19, 2022 seeking to be furnished with a copy of the decision/Taxing Master's reasons for taxation. No evidence was introduced to rebut the representation that the reasons for taxation were availed to the 7th defendant on February 24, 2022. Without prove to the contrary, while counting the fourteen (14) days from February 24, 2022 for which the reference ought to have been filed, it is indisputable that the reference dated February 4, 2022 was filed within the 14-days window stipulated in paragraph 11 of the *Advocates Remuneration Order*.



9. As for whether the reference is defective for failing to give notice as required under rule 11(1) of the *Advocates Remuneration Order*, the plaintiff/respondents submitted that the substratum of the application is pegged on such notice and without it, the court ought to strike out the taxation. The 7th defendant on the other submitted that its letter dated January 19, 2022 suffices the notice contemplated under rule 11(1). They buttressed the position in reliance on the case of *Lubulellah & Associates Advocates v Kenyatta National Hospital* [2010] eKLR.

10. I have read through the letter dated January 19, 2022 and its verbatim account is reproduced as follows:
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“We would be grateful if you would let us have a copy of the ruling delivered by Hon Stephany Githogori on January 14, 2022
Yours Faithfully”

11. Paragraph 11 (1) of the *Advocates Remuneration Order* states as follows:-

“Any party who objects to the decision of the taxing officer may within 14 days after the decision give notice in writing to the taxing officer of the item of taxation to which he objects.

12. In as much as I agree with the applicants that the above provision does not prescribe the form of the notice to be given, the purport of the provision makes it mandatory for the aggrieved party to give a notification in writing specifying the items of taxation to which such party objects to and it is expected that only those items objected to as specified in the notification would find their way into the reference.

13. I have also read through the *Lubulellah & Associates Advocates v Kenyatta National Hospital* case that has been relied on by the applicant and find that the court held as follows: -

“The applicant herein wrote a letter dated January 6, 2010. The letter refers to regulation 11 of the Advocates (Remuneration) Order and says it is giving notice thereunder. They asked for reasons for the taxation to enable them file a reference to the High Court, and the reference is the subject of this ruling. I have carefully considered rule 11(1) of the Advocates (Remuneration) Order. Whilst it requires a party objecting to a decision of the Taxing Master to do so within 14 days, the sub-rule does not specify the format of such a notice. In my view therefore, the letter of January 6, 2010 was compliant with the subrule. The letter also clearly indicated that the applicant intended to file reference to the High Court”.

14. What I have gathered from the above decision is that, in as much as a letter addressed to the Taxing Master may suffice as a notice under rule 11(1) of the *Advocates (Remuneration) Order*, such a letter must clearly indicate the intention to file a reference, ask for reasons of taxation (if not provided in the ruling) and should specify the items which the applicant wishes to object to. In the instant case, the letter dated January 19, 2022 did not comply with rule 11(1) (*supra*) since it did not specify the items objected to so that the taxing officer could give his reasons on them.

15. In the case of *Machira & Co Advocates v Arthur K Magugu & Margaret Wairimu Magugu* CA 199/2002 [2012]eKLR, while emphasizing on the need to give proper notices for reference, the Court of Appeal held that:-

“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 respondent's notice of August 1, 2001 was fatally defective. It follows that the respondent's reference based on it was incompetent and we agree with counsel for the appellant that it should have been struck out."

16. In a more recent decision, this court while appreciating the need for compliance with rule 11(1) in the case of *Mohamed & Another v SBM Bank Kenya Limited* [2019]eKLR thus stated: -

"My finding is that the applicant's failure to follow the clearly laid down procedure under paragraph 11 renders the Chamber Summons to be incompetent. The said paragraph required the Applicant to identify, specifically, the items of the bill of costs it objected to their taxation. Having failed to follow that procedure the chamber summons fails."

17. The above having been said and having established that the 7th defendant's letter dated January 19, 2022 is vague to be said to comply with rule 11(1) of the *Advocates Remuneration Order*, it then follows that the chamber summons dated February 4, 2022 is incompetent and the 7th defendant/applicant cannot be availed the orders sought. On the same wavelength, I find ground No (3) of the notice of preliminary objection merited.
18. For the above-stated reasons, this court declines to grant the orders sought in the chamber summons dated February 4, 2022 and I proceed to strike it out with costs to the plaintiffs/respondents.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI THIS 3RD DAY OF NOVEMBER 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Mwangi for Plaintiff

M/S Mwangi holding brief for Kiragu Kimani (SC) for 7th Defendant

Court Assistant - Sakina

