



**HLDO v TFDO (Miscellaneous Application E277 of 2023)
[2024] KEHC 16822 (KLR) (Family) (12 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 16822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E277 OF 2023
BM MUSYOKI, J
AUGUST 12, 2024**

BETWEEN

HLDO APPLICANT

AND

TFDO RESPONDENT

RULING

1. By chamber summons dated 18th December 2023 the applicant has prayed this court for the following orders;
 1. Spent.
 2. Spent.
 3. This Honourable Court be pleased to set aside the certificate of costs issued on 29-11-2023 by Hon. A.N. Makau in Nairobi Divorce cause no. 954 of 2018 *HLDO v TFDO*.
 4. This Honourable Court be pleased to assess the costs awarded to the respondent in Nairobi Divorce cause no. 954 of 2018 *HLDO v TFDO* or order for the same to be assessed afresh by a different judicial officer or the Deputy Registrar.
 5. The costs of the application be provided for.
2. The application is supported by affidavit of the applicant sworn on 15th December 2023. The applicant is challenging assessment of costs made by the subordinate court after she lost her application for provision of maintenance in the above stated divorce cause. The applicant has challenged the costs on two main grounds; that is, the assessed costs are extremely excessive and that the certificate of costs is irregular and fraudulent. However, in her supporting affidavit, the applicant does not come



clearly on why she holds the opinion that the assessed costs were extremely excessive. Her affidavit has concentrated on giving the sequence of events which in her opinion, makes the certificate of costs fraudulent and irregular.

3. The respondent has raised an issue of jurisdiction. He avers that the applicant did not follow the statutory procedure for filing proceedings challenging a decision of a taxing officer. The respondent avers that the application was filed out of time and as such this court has no jurisdiction to entertain or consider the application. This being an issue of jurisdiction, I should handle it first because if I were to find that I lacked jurisdiction, I should down my tools instantly. It is trite that jurisdiction is everything and the court has no business in considering the substantive part of a cause or matter over which it has no jurisdiction. Where an issue of jurisdiction is raised, the court must start with considering that issue. In *Phoenix of EA . Assurance Company Limited v S.M. Thiga t/a Newspaper Service* (20190 eKLR it was held that;

‘Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed without jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the court cannot confer jurisdiction to itself.’

4. Although the application is expressed to be brought under the Advocates Remuneration Order, Section 11 of the *Advocates Act*, Section 3A of the *Civil Procedure Act* and Article 159 of the Constitution, I believe that the applicant meant to cite rule 11 of the *Advocates Remuneration Order*. Section 11 of the *Advocates Act* deals with practice of foreign advocates in Kenya and I do believe that the citation was affected by wrong placing of a punctuation mark. Rule 11 of the Advocates Remuneration Order Provides that;

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. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsections (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 to enlarge the time fixed by subparagraph (1) or subparagraph (2) for 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 days’ notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged has already expired.
5. The respondent has submitted that this court lacks jurisdiction because the applicant did not write to the taxing officer asking for reasons of the taxation in compliance with rule 11(1) of the Advocates Remuneration Order which in his opinion would open the doors for the applicant to exercise her right of reference to this court. That position may be true but it has been held that where the ruling of the



taxing officer contains the reasons for taxation, the applicant does not need to write to the officer asking for his reasons. I hold this position as held in *Ahmed Nassir v National Bank of Kenya* (2006) EA ;

‘Although Rule 11 (1) of the *Advocates Remuneration Order* stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because the unfortunate wording of sub-rule (2) of Rule 11 of the *Advocates Remuneration Order* demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.’

6. In this matter, I may not know whether the applicant was made aware of the reasons for the taxing officer’s decision because the proceedings and the ruling of the lower court matter have not been exhibited in this file. The sequence of events leading to this application are as follows;
 - a. On 12-09-2022, the respondent’s advocates sent a draft certificate of costs to the applicant’s advocates for their comments which letter went unanswered. The applicant proceeded to file the draft certificate of costs for purposes of assessment of the costs by the court.
 - b. On 16-09-2022, the applicant’s advocates wrote to the court expressing its objection to 24 items. Thereafter the costs were assessed on a date which is subject of the second ground of this application.
 - c. It may not be clear when the taxing officer’s decision was made but the latest date on the certificate of costs is 29-11-2023 which obviously means that the costs were assessed either on the said date or earlier.
 - d. The applicant filed this application 20-12-2023.
7. From the above sequence, it is indisputable that the applicant had 14 days from 29-11-2023 to file an objection and request for reasons for the decision. This would mean that the time to do so lapsed on 12-12-2023. Assuming that there was no need to ask for the reasons in tandem with the court’s position in *Ahmed Nassir v National Bank of Kenya* (*supra*) which position I hold, the applicant had up to the same date of 12-12-2023 to file this application. This application was filed on 20-12-2023 which was clearly out of statutory time. Where a claim has been filed out of time, there is no other recourse for the court other than to strike out the same for lack of jurisdiction.
8. Rule 11(4) of the *Advocates Remuneration Order* gives a party a right to apply for extension of time which has not been done in this application and in the circumstances, I have no alternative but to find that the prayer challenging the decision of the taxing officer is time barred and this court has no jurisdiction to entertain it. In *Monata Matiko v John Marwa Chabaro* (2021) eKLR, it was held that;

‘Jurisdiction of a court is conferred by a statute or the constitution and it is no doubt that the issue of limitation of time goes to the root of the jurisdiction of a court.’
9. Further in *Anaclet Kalia Musau v Attorney General & 2 Others* (2020) eKLR, the Court of Appeal stated that;

‘The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-time barred a court has no jurisdiction to entertain it, we cite the decision



of the Supreme Court in the case of *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 Others*, supreme Court petition number 19 of 2018’.

10. Prayer 3 of the application asks this court to strike out the certificate of taxation since the same is irregular in that the dates appearing thereon as the date of issue came before the costs were assessed. Apparently, this is the position. The respondent has not refuted the version of events leading to the assessment of the costs as narrated by the applicant. Decree nisi in the divorce cause was issued on 22nd June 2019 and costs were assessed thereafter. Obviously, the certificate of costs was not given on 22nd June 2019 but must have come later.
11. It is clear from the parties’ correspondence and affidavits that as at September 2022, the parties were still in the process of assessment of costs. In that case, the certificate of costs must have come much later. To that extent, the certificate of costs was irregularly drawn but I do not see any evidence of fraud in it. The question of who signed the certificate is a matter of correction although the applicant has not shown me evidence that Hon A.N. Makau who is said to have signed it had been transferred to Ngong as at the time of signing. Be that as it may, the certificate has obvious errors and by supervisory powers bestowed on this court by Article 165(6) of the *Constitution*, I hereby strike out the certificate of costs shown to have been given on 22-6-2019 and issued on 29-11-2023.
12. It should however be understood and made clear to parties that this ruling has not set aside the assessment of costs by the taxing officer. I have simply struck out the erroneous certificate of costs. The assessment of costs should remain untouched and a fresh correctly dated certificate issued.
13. The upshot of the above is that this court make the following orders;
 - a. Prayer 3 of the application dated 18-12-2023 seeking to set aside certificate of costs in Nairobi divorce cause number 954 of 2018 *HLDO v TFDO* is allowed to the extent that the said certificate is struck out.
 - b. The chief magistrate shall issue a fresh certificate of costs with proper and correct dates on which the assessment of costs was done.
 - c. Prayer 4 of the application dated 18-12-2023 seeking re-assessment of costs is dismissed.
 - d. There will be no orders as to costs of this matter.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Wambugu for the applicant and in absence of Counsel for the Respondent.

