**Kwengu & Company Advocates v Raja (Miscellaneous Application 94 of 2017) [2023] KEELC 16625 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16625 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MISCELLANEOUS APPLICATION 94 OF 2017**

**MD MWANGI, J**

**MARCH 23, 2023**

**BETWEEN**

**KWENGU & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**HITENKUMAR A RAJA ..... RESPONDENT**

***(In respect of the client/Respondent's application dated 1/2/2023 and the Advocates Preliminary Objection dated 7.2.2023)***

**RULING**

## Background

1. The Client/Respondent's application prays for orders as here-below:

    a. Spent

    b. Spent

    c. That this Hounourable court be pleased to set aside and or vacate ex debito justitiae the exparte proceedings before the Taxing Master together with the ruling dated 21st August 2017 and the subsequent certificate of costs dated 4th November 2022.

    d. That this Honourable Court be pleased to order that the taxation of the Applicant's bill of costs commence denovo and the Respondent be granted unconditional leave to file his response in opposition to the said bill of costs.

    e. That alternatively, time within which to file an objection to the proceedings on taxation of the bill of costs and or a reference to the taxation of the bill of costs be extended by such period of time as the court may deem fit and just to grant.

2. The application is based on the grounds on the Supporting Affidavit of Hitenkumar A. Raja sworn on the 1st February 2023.

3. The client's application is premised on the grounds on the face of the application which the client summarized in his submissions as follows:

    a. The Respondent has never been served/properly served with notice of the pendency of these proceedings and, prior to 16th January 2023, was unaware of the subsistence of this matter. The Respondent notes that the court record also does not disclose any conclusive proof of service upon the Respondent of any notice in this matter. The Advocate has also failed to furnish any proof of service of any notices, process or pleadings pertaining to these proceedings, thereby corroborating the Respondent's assertions of non-service.

    b. For reason that proceedings before the taxing master proceeded ex-parte, the Respondent was not heard on his grounds in opposition to the Bill of Costs, which grounds are meritorious and ought to be ventilated before the Taxing Master in order to ensure that justice is truly served between the parties. The Respondent's objections to the Bill of costs include that:The Respondent disputes the existence of a retainer between himself and the Advocate in respect of Nairobi ELCC 312 of 2009, and notes that no conclusive proof of the existence of such retainer has been furnished by the Advocate in rebuttal thereof.Without prejudice to the foregoing, any fees that would be due to the Advocate in respect of Nairobi ELCC 312 of 2009 were settled in full as recorded in the Deed of Settlement dated 22nd July 2017 and, therefore, the Advocate's application dated 7th November 2022 constitutes an attempt at the unjust enrichment of the Advocate. (We refer to the Court to annexure HKR 3 at page 14 of the Respondent's application.)

    * This matter is an abuse of the process of this court, as the Advocate has filed two other duplicate Bills of Costs in respect of his claim for fees arising out of his alleged representation of the Respondent in Nairobi ELCC 312 of 2009 being Nairobi ELC Misc/ 200/2014: Kwengu & Company Advocates V Hiten Kumar Raja; and Nairobi ELC MISC/ E233/2022: Kwengu & Company Advocates V Hiten Kumar Raja (We refer the court to annexure HKR4 and HKR 5 at page 19 and page 23 of the Respondent's Application.)

4. The response by the Advocate was by way of a lengthy notice of Preliminary Objection with 25 grounds stated as follows:

    i. The Application dated 1st February 2023 is caught with the doctrine of Res- Judicata, issue estoppel and latches and hence frivolous and incompetent.

    ii. Vide a ruling dated 21st August 2017 pursuant to Rule 76 of the *Advocates Remuneration Order*, the Taxing Master L.N Barasa held that both the Applicant and the Respondent were duly served hence the issue of service is Res-Judicata.

    iii. The said Application is defective, bad in law and an abuse of the court process misconceived and brought in bad faith and the orders which the same is relied upon are non-existent.

    iv. The application is incompetent and grossly in breach of the provisions of the *Advocates Remuneration Order*.

    v. The respondent failed to object to the taxing officer's decision in the manner and within the time stipulated.

vi. The respondent's objection to the Taxing Officer's decision without requesting for and being provided with the reasons for such decision as provided by law is premature.

vii. No Notice of Objection of the decision of the Taxing Master was given under paragraph 11 (1) of the *Advocates Remuneration Order* nor was an application filed as provided for in sub paragraph 2 of the said order and the application should be struck out in limine.

viii. A party is not entitled to an indefinite period within which to prefer a reference and under sub-rule (2) time stops running from the date a proper notice is filed which of course must be within 14 days of taxation until receipt of the Taxing Master's reasons for his decision.

ix. The respondent has not filed a reference within the 14 days of the delivery of the decision of the Taxing Master and there is no reference hence the instant application is ex-facie incompetent, premature and an abuse of the court process.

x. The application contravenes Rule 11 & 2 and Section 51 (2) of the *Advocates Act* Cap 16.

xi. The Advocates Remuneration Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules and as it does not provide for an appeal from any sort of decision by the taxing office, it is a basic principle of procedural law that appeals to the High Court lie only where a right of appeal has been conferred by statute. Any complaint about any decision of the taxing master whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the judge in accordance with Rule 11 of the Advocates Remuneration Order.

xii. Review of the decision of the Taxing Master 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 and in the instant case there is none and no application for review.

xiii. The mode of dealing with decisions on Advocates Bill of costs is through reference under Rule 11 to a judge in chambers hence the instant application lacks merit.

xiv. Rule 11 (1) & (2) and Section 51 (2) of the *Advocates Act* Cap 16 clearly provides that no application to review an order made on an application for review of a decree or order passed or made on a review shall be entertained.

xv. For the avoidance of doubt, a compliant Notice of Objection to taxation is paramount and forms the foundation or the sine Quo non of any Reference and/or intended Reference.

xvi. There has never been any compromise whatsoever in this matter nor has there been any Consent filed pursuant to Order 25 Rule 5 (1) of the *Civil Procedure Rules* 2010 and we rely in the case of *Mohamed Bare & 48 others v Kenya Rural Roads Authority* [2016] eKLR.

xvii. It is worthy of note that the purported deed of settlement refers to a matter not known to the Advocate being Misc 200 of 2014 whilst this matter is Miscellaneous Application No. 94 of 2017.

xviii. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory. Ordinarily the words 'shall' and 'must' are mandatory and the word 'may' is directory.

xix. The import of the above provision is that unless a Certificate of Taxation is set aside, it is final. In Lubulellah & Associates Advocates v N K Brothers Limited, the court observed that the law is very clear that once a taxing master has taxed the costs, issued a Certificate of Costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent for the taxed sum indicated in the Certificate of Taxation.

xx. In *Musyoka & Wambua Advocates v Rust-am Hira Advocate*, it was held that section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has discretion to enter Judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This is a mode of recovery of taxed costs provided by law, in addition to filing of suit.

xxi. As a general rule, agreements and understandings made or entered into by parties to a suit are acceptable by courts pursuant to Order 25 Rule 5 (1) of the *Civil Procedure Rules* 2010 which provide as follows;

> "5 (1) where it is proved to the satisfaction of the court and the court after hearing the parties, directs that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be rendered and enter judgement in accordance therewith".

xxii. It is therefore a fundamental practice that even where parties have negotiated, agreed and filed a consent agreement with the court, such agreement by consent must be legally accepted by the court. The duty executed in written consent of parties, only becomes a court order, the moment it is domesticated and approved by the court.

xxiii. There is no Notice of objection expressly setting out the contested items of taxation and inviting the jurisdiction of the court for review in accordance with Rule 11 (1) of the order.

xxiv. The Application is defective in law as it fails to set out brief and concrete grounds and points of law on claims for infringed principles of taxation.

xxv. The grounds whereupon the application is anchored are vague, prolix, unsubstantiated and unnecessarily argumentative without at all setting out specific grounds as points of law

**Courts Directions**

5. The courts directions in this matter were that the application dated 1.2.2023 be heard alongside the Preliminary Objection. The Preliminary Objection was to be treated as the response to the application. The application was to be canvassed by way of written submissions. Both parties complied and I thank them for their comprehensive submission with numerous authorities in support of their respective positions. I have had the opportunity to read through the submissions by both parties.

**Issues for Determination.**

6. Having considered the application dated 1st February 2023 and the response by the Advocate & the respective submissions of the parties, the court is of the view that the issues for determination in this matter are two fold, namely: -

   A. Whether the court has the jurisdiction to issue the orders prayed for by the Client/Applicant in the application dated 1st February 2023.

   B. Whether the Client/Applicant has sufficiently explained the delay to entitle it to an order of enlargement of time to file an objection/reference out of the stipulated time.

**Analysis and Determination**

**A. Whether the court has jurisdiction to issue the orders sought by the Client/Applicant.**

7. Mativo J (as he then was) in the case of *Republic v Magistrate's Court, Mombasa: Absin Synergy Ltd (I.P)* (Judicial Review E033 of 2021) (2022 KEHC 10 (KLR) 24th January 2022 (Judgment) defined the term jurisdiction in the following words: -

   > " By jurisdiction is meant the authority, which a court has to decide matters that are litigated before it or to take congnizance of matters presented in a formal way for its decision. The statute, charter, or commission under which the court is constituted imposes the limit of this authority. The authority may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited."

8. The Supreme Court of Kenya in the case of *Benson Ambuti Adega & 2 others v Kibos Distillers Ltd & 5 others* (2020) eKLR categorically stated that a court's jurisdiction 'flows from either the *Constitution* or Legislation or both'. A court of law can therefore only exercise jurisdiction as conferred by the *Constitution* or other written Law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by the law.

9. The jurisdiction of this court and the High Court for that matter in respect of matters Advocate - Client costs is provided for under the provisions of the *Advocates Act* and the Advocates Remuneration (Amendment) Order.

10. In the case of *Kenya Commercial Bank Ltd v John Benjamin Wanyama* (2016) eKLR, Njoki Mwangi J, while determining a question whether the High Court has jurisdiction to review taxed costs by the Deputy Registrar, cited Article 165 (6) of the *Constitution* which provides for the supervisory jurisdiction of the High Court over subordinate courts. The Learned Judge stated that, in exercising its supervisory jurisdiction, the High Court must ensure that due process is followed as provided in law. She cited the Court of Appeal decision in the case of *Kimani Wanyoike v Electoral Commission of Kenya* (1995) eKLR.

11. The Learned Judge went further and stated that the procedure to be followed in filing of objections to issues of taxation is found in paragraph 11 of the *Advocates Remuneration (Amendment) Order* 2009. In the absence of a Reference as contemplated under Paragraph 11 of the *Advocates Remuneration (Amendment) Order* challenging the decision of the Taxing Officer, the court lacks jurisdiction to interfere with or vary the decision of a Taxing Officer.

12. The Judge stated that 'an applicant will have devised his own procedure in an attempt to draw from the well of justice. The well will however yield nought for want of compliance.'

13. The Learned Judge further cited the case of *Machira & Company Advocate v Arthur K. Magugu* (2012) eKLR, where the Court of Appeal stated that "..... the rules committee intended to avoid all that and provide for simple and expeditious mode of dealing with the decisions an advocates bill of costs through references under Rule 11 to a Judge in chambers."

14. The Court of Appeal continued to state that: -

> " with regard to the Advocates' Bill of costs, we agree with the decision of Ringera J (as he then was) referred in *Machira & Co. Advocates v Aruthur Magugu & Another*, HCC Misc. Application No. 358 of 2001 that the Advocates Remuneration Order is a complete code which does not provide for appeals from the taxing masters' decisions. Rule 11 thereof provides for ventilation of grievances 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...."

15. I fully agree with the decision of my sister Judge in the above cited case. The Advocate/Respondent in his submissions has submitted numerous authorities on this issue. I am well guided.

16. I have read the extensive submissions of the Client/Applicant too invoking the inherent jurisdiction of the court to set aside an irregular judgment. The applicant made reference to this court's decision in the case of *Nyakundi & Another v Embakasi Ranching Co Ltd & Another* (2022) KEEL 3833 (KLR) where the court resorted to its residual powers, for the sake of ensuring that the ends of justice were met. That was in a general civil case prosecuted under the provisions of the *Civil Procedure Act*. The Provisions of the *Civil Procedure Act* including sections 3 and 3A are not applicable in the proceedings before this court. The only applicable laws in this matter are the *Advocates Act* and the *Advocates Remuneration (Amendment) Order* of 2009.

17. In the case of the *National Union of Metal Workers of South Africa & others v Fry's Metat (property) Ltd*, the court stated that: -

> " While it's true that the court's inherent power to protect and regulate its own process is not limited, it does not extend to the assumption of jurisdiction not conferred upon it by statute."

18. The Court of Appeal in the case of *Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR affirmed the issue above and stated that;-

> " It is settled that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the oxygen principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same."

19. I find that this court lacks the jurisdiction to grant the prayers number (c ) and (d) in the application under consideration.

**B. Enlargement of time to file an objection and or reference.**

20. Having found that the Court lacks jurisdiction to grant prayers c and d, the only prayer that the court may lawfully consider on its merits is the alternative prayer where the Client/Applicant prays for enlargement/extension of time within which to file an objection and or reference against the ruling of the taxing Master delivered on 21st August 2017.

21. The basis upon which the said prayer is grounded is that the Client/Applicant was not aware of the taxation proceedings since they were not served and or notified at any time.

22. Justice F. Gikonyo in the case of *Mwangi S. Kimenyi v Attorney General and another* [2014] eKLR correctly observed that what constitutes 'inordinate delay' is dependent on the particular circumstances of each case. He stated that:

> " There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however advised (sic) for the courts not to take the word "inordinate" in its ordinary dictionary meaning but to apply it in the sense of excessive as compared to normality.....see case of *Allen v Alfred McAlphine & Sons* [1968]1 All ER 543 where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of *Agip (Kenya) Limited v Highlands Tyres Limited* [2001] KLR 630 and *Sagoo v Bahari* [1990] KLR 456 where delays of eight months and five months respectively was not considered to be inordinate and also ELC Case No. 2058 of 2007 where delay of about 1½ years was considered not to be inordinate."

23. In the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR the Supreme Court defined the principles that a Court should consider in exercising its discretion to extend time as follows:

    a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

    b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

    c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

    d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

    e. Whether there will be any prejudice suffered by the respondents if the extension is granted;"

24. The earlier case of *Mugo and others v Wanjiru and another* [1970] EA 484 had also discussed the considerations to be made in extension of time where President Duff stated that:

> " Each application must be decided in the particular circumstances of each case but as a general rule, the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal of granting the application."

25. The Court of Appeal of Tanzania on the other hand had considered what would constitute 'sufficient cause' when it rendered its decision in the case of The *Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & others*:

> "It is difficult to attempt to define the meaning of words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice when no negligence or inaction or want of bona fides is imputed to the appellant."

26. I have keenly perused the record of the court. On the date that the matter was set down for taxation 18/7/2017, none of the parties appeared. The taxing master however noted and stated that,

> "I am satisfied that the application served. Ruling on 21.8.2017."

27. There was however no Affidavit of Service filed to prove service. The only document that is on record is a Taxation Notice stamped, 'Received by Kwengu & Co. Advocates'. It was received by the said Law firm on 21.6.2017. There is nothing on it to show that it was served upon the Client/Applicant who was the Respondent in the matter before the Taxing Master.

28. The ruling was delivered on 21.8.2017. Again on that date, no party was present. Nothing indicates that the client was notified about the delivery of the ruling thereafter.

29. Where a party was not served or made aware of the filing of the proceedings, however long the delay, it is sufficient cause warranting the extension of time or such other necessary action especialy where no negligence or inaction or want of bona fides is imputed to the Applicant. There was no way that the applicant would have been expected to take action on the suit or court proceedings whose existence he knew not.

30. I am persuaded that the Client/Applicant was not served with the taxation notice nor notified about the ruling by the taxing master. From the record, I have not seen the evidence of the service of the bill of costs too upon the Client/Applicant.

31. That being the position, and irrespective of the fact that the ruling sought to be challenged by way of a reference was delivered over five years ago, I find it necessary to rise to the higher calling of this court to do justice. The Client/Applicant was denied the opportunity to participate in the proceedings by the failure of the Advocate to serve the notice of taxation upon him and or inform him of the delivery of the ruling on taxation.

32. In this case, the only way to do justice and uphold the constitutional right of the Client/Applicant to a fair hearing is by extending the time which I hereby do, within which the Client/Applicant shall file an objection and or reference to the ruling by the taxing master dated 21.8.2017 by twenty-one (21 days) from the date of this ruling. The costs of the application shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH 2023.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Ms. Kimani for the Client/Applicant.

Mr. Nyangayo holding brief for Cliff Oduk Advocate.

Court Assistant- Yvette.

**M.D. MWANGI**

**JUDGE**