



**Bruce Odeny & Co Advocates v Pride Kings Security Services (Miscellaneous Application E126 of 2023) [2024] KEHC 13749 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13749 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS APPLICATION E126 OF 2023  
MS SHARIFF, J  
OCTOBER 25, 2024**

**BETWEEN**

**BRUCE ODENY & CO ADVOCATES ..... APPLICANT**

**AND**

**PRIDE KINGS SECURITY SERVICES ..... RESPONDENT**

**RULING**

1. The genesis of this suit is the bill of costs dated 14<sup>th</sup> August 2023 by the Advocate/Applicant in respect of Kisumu MCCC NO. E215 of 2022 taxed at Kshs 98,996/=.
2. Pursuant to this taxation the Client/ Respondent filed an application dated 24<sup>th</sup> January 2024 seeking to have the taxation ruling set aside and the bill taxed afresh on account of the taxed costs having already been settled.
3. Following closely via an application dated 8<sup>th</sup> of February 2024 the Applicant/Advocate sought to have the certificate of costs dated 6<sup>th</sup> December 2023 converted into a judgment of this court. The Applicant based its application on the fact that the certificate of costs had neither been challenged nor set aside.
4. In opposition to the application of the 8<sup>th</sup> of February 2024 the Client/Respondent contended that they did not take part in taxation of the bill as their accountant was on leave and he hadn't completed reconciliation of accounts.
5. In light of the two pending applications this court shall deal with the application of the 24<sup>th</sup> January 2024 first as its disposal will have a bearing on the whether the certificate will be adopted or not.
6. In the application dated 24<sup>th</sup> January 2024 the Client/Respondent seeks the following orders: -
  - i. Spent
  - ii. Spent



- iii. That this honourable court be pleased to review and/or set aside its ruling and the orders issued on 26<sup>th</sup> October 2023 and the bill of costs dated 14<sup>th</sup> August 2023 be taxed afresh.
  - iv. That costs of this application be provided.
7. The application is premised on the grounds that: -
- i. The Honourable Court on 26<sup>th</sup> of October 2023 taxed the bill of costs dated 14<sup>th</sup> August 2023 in the sum of Kshs.96,996/-in favour of the Respondent against the Applicant.
  - ii. At the time of filing and taxation of the said bill the Applicant herein had already paid all the fees to the Respondent an issue which was not disclosed by the Respondent and the Applicant could not avail the evidence in time since the accountant who was in charge of all the documents pertaining to account was on leave.
  - iii. The Applicant has now got all the evidence to show that fee that the Respondent herein is demanding for was paid in full and the said evidence was not considered during taxation yet they are very crucial and the same could have made the Court to rule otherwise.
  - iv. By not producing the said evidence the Honourable Court delivered a ruling against the Applicant in Favour of the Respondent on a belief that the fee owed to the Respondent by the Applicant was not paid.
  - v. The orders issued by this Honourable Court are Highly prejudicial to the Applicant who will be condemned to pay the fees twice.
  - vi. The said ruling goes contrary to the provision of Article 159 (2) (d) of *the Constitution* which enjoins the Court to administer substantive justice without undue regard to technicalities.
  - vii. The Applicant has now found new evidence that they could not find at the time of taxation evidence that is very crucial that if the same is considered the court would have ruled otherwise.
8. The application is further buttressed by a supporting affidavit sworn by Fredrick Mashuke in which he rehashes the grounds in support of the Application.
9. In opposition to the application the Respondent filed a replying affidavit sworn by Bruce Odeny in which he deponed that his law firm had reached an agreement with the applicant for: a monthly fee of Kshs 50,000/= for debt collection and: fees under the Advocates Remuneration Order for matters that proceeded to court.
10. The Respondent avows that sometime in 2022 the Applicant failed to honour its part of the bargain forcing it to cease acting and file bills of costs for taxation.
11. In further opposition to the application the Respondent affirms that the cheques purportedly availed as evidence of payment were with regard to other reasons such as filing fees and settlement of decrees. He references: -
1. Cheque number 1392 made towards filing fees
  2. Cheques number 1441, 1474, 1475, 1508, 1532, 1585, 1233, 1426 and 1495 made in satisfaction of the monthly flat fee for debt collection.
  3. Cheque number 1141 dated 12<sup>th</sup> February as initial payment for Tamu PMCC No's 5,6,8,9 and 10 all of 2018.



4. Cheque numbers 1594 and 1595 deposited in a joint interest earning account as a precondition for stay of execution in Kisumu Elrc No. E35 of 2020
5. Cheque numbers 1114 and 1115 in satisfaction of legal fees in Pride Kings v Migori County Government.
6. Cheque number 0866 dated 29<sup>th</sup> May 2020 in respect of Civil case No. 69 of 2017.
7. Cheque No's 1138 and 1139 dated 16/6/2020 as legal fees in Civil case No. 3 of 2020.
8. Cheque No 892 applied towards Kisumu Hccc No. 3 of 2020.
9. Cheque No 0870 dated 4<sup>th</sup> September 2019 in respect of the case before the National Public Procure Administrative Review Board.
10. Cheque No xxxxx towards a demand letter against Kisumu County Government.
12. In calling for dismissal of the application and terming it an attempt at denying them its hard-earned fees, the Respondent contends that the applicant unexplainedly failed to defend the bill of costs.
13. The matter proceeded for hearing on 12/6/2024 with both parties making oral submissions. Counsel for the Advocate/Applicant submitted first in support of adoption of the taxed costs and in opposition to setting aside and retaxing of the bill.

#### **Applicant/advocate's Submissions**

14. It is submitted on behalf of the Applicant that a review can only be granted for correction of a patent error of law or fact. It cites the case of Wakenya Moses v UON (MISC A 226/2016)(2019)eKLR to the extent that a review can only be exercised on discovery of new and important evidence that even after due diligence was not available or within the knowledge of the parties.
15. It further submits that a review is not an avenue for a fresh hearing or an opportunity for a party to correct views taken earlier. On this it draws the court's attention to the fact that the Client/Respondent never responded to the bill of costs. The Applicant/Advocate avows that the contention that the Client's accountant was on leave does not hold any water and is an afterthought.
16. Moreover, the Advocate submits that from the evidence of payment it is clear that the Client has not settled the bill of costs. It references the cheques and their attendant letters attached to its replying affidavit. On the strength of the foregoing the Advocate prays for the certificate of costs to be adopted as this court's judgment and the Client's application of 24/1/2024 be dismissed with costs.

#### **Client/respondent's Submissions**

17. The Client submits that it has met the threshold for review on the basis of discovery of new and important evidence not within their knowledge at the time of the taxation. It avows that at the time of taxation they couldn't put in a reply or participate for the dual reasons that their accountant was on leave and they had not reconciled their books.
18. They assert that had the reconciled cheques been placed before the Deputy Registrar she would have reached a different outcome. The Client further submits that the Advocate had not proven a retainer or that the cheques were in settlement of the reasons advanced in the Replying Affidavit.
19. Additionally, the Client submits that the bill was irregular having been taxed without calling of the lower court file. For this reason, it strongly opposes adoption of the certificate of costs as an order of this cost.



### **Applicant/advocate's Rejoinder**

20. In a brief rejoinder the Applicant/ Advocate submits that evidence of payment would have been the perfect defence at the taxation of the bill. It avows that at this point it is too late and the horse has already bolted. It draws this court's attention to the fact that the Client ignored two taxation notices.
21. Additionally, it affirms that the cheques allegedly used in settlement of the decree herein are not new evidence but were in the possession of the Client at the time of taxation.
22. In final rejoinder the Advocate submits that the contention that the bill was taxed without the lower court file is unfounded as the Client did not take part in the taxation.

### **Determination**

23. After careful analysis of both motions, supporting affidavits and replying affidavits thereto the issues that crystallize for determination are: -
  - i. Whether there is sufficient reason to warrant setting aside or reviewing of the ruling of the 26<sup>th</sup> of October 2023. And if not
  - ii. Whether the certificate of costs dated 6<sup>th</sup> December 2023 should be adopted as the judgment of this court.

Whether there is sufficient reason to warrant review or setting aside of the taxation ruling of the 26<sup>th</sup> of October 2023

24. The reason advanced by the Client in support of review and setting aside is the discovery of new and important evidence not within their knowledge at the time of taxation. The Client asserts that they only realised that they had made the payment after reconciling their accounts. The application of the 24/1/2024 is brought under the provisions of order 45 Rule 1(b) of the Civil Procedure Rules and section 80 of the *Civil Procedure Act*.
25. Order 45 Rule 1(b) of the Civil Procedure Rules provides as follows: -
  1. Any person considering himself aggrieved—
  - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
26. Section 80 of the *Civil Procedure Act* provides as follows: -

“ Any person who considers himself aggrieved—

  - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”



27. In view of the foregoing provisions the question that arises therefore is whether there was discovery of new evidence that could not be unearthed even with due diligence at the time of passing of the decree. My answer to this is no. The Client alluded to having not reconciled its accounts due to a lengthy leave by its accountant. This statement in and of itself indicates that the payment information was in their possession but they had just not done their due diligence to unearth it. For the foregoing reasons the cheques do not fall in the category of new evidence not within the knowledge of the Client.
28. Additionally, the import of Order 45 and section 80 above is that a review should be filed in the court that rendered the decision. In the circumstances of this case the ruling was rendered by the Deputy Registrar. If the Client was in any way aggrieved or dissatisfied by the ruling the only way it could invoke this court's jurisdiction is through filing of a reference. Otherwise, the Client should have approached the Deputy Registrar for review.
29. In my view, the Client/Respondent has failed to satisfy the conditions upon which an order for review can issue. The application of the 24th January 2024 is dismissed with costs to the Advocate/Applicant. Whether the certificate of costs dated 6<sup>th</sup> December 2023 should be adopted as the judgment of this court.
30. In the application dated 8<sup>th</sup> of February 2024 the Applicant/Advocate sought to have the certificate of costs dated 6<sup>th</sup> December 2023 converted into a judgment of this court. The Advocate contends that the certificate of costs has neither been challenged or set aside.
31. The Client opposes the application on grounds similar to those of seeking review through a Replying Affidavit by Fredrick Mashuke sworn on 15th March 2024. Having considered those grounds in the application for review there is no need to reconsider them again. The application of the 8th February is meritorious.
32. The upshot of the foregoing is that the application seeking review is dismissed with costs while the application of the 8th of February 2024 is allowed. I proceed to grant the following orders: -
1. Review application is disallowed.
  2. Certificate of costs adopted as judgment of the court.
  3. Judgment sum to attract interest at 14% from date of certificate of costs until payment in full.
  4. Costs awarded to the advocate/applicant and are assessed cumulatively for the two applications at Kshs.30,000.
  5. This file is marked as closed.

**DELIVERED, SIGNED AND DATED AT KISUMU THIS 25TH DAY OF OCTOBER, 2024.**

**M. S. SHARIFF**

**JUDGE**

