



**Musyoki Benson and Associates v Rudufu Limited (Miscellaneous Application E718 of 2022)  
[2024] KEHC 16832 (KLR) (Commercial and Tax) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16832 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E718 OF 2022  
BM MUSYOKI, J  
NOVEMBER 29, 2024**

**BETWEEN**

**MUSYOKI BENSON AND ASSOCIATES ..... APPLICANT**

**AND**

**RUDUFU LIMITED ..... RESPONDENT**

**RULING**

1. Before this court for ruling is the respondent's application dated 15-04-2024 which seeks the following orders;
  1. The application be certified as urgent to be heard exparte and service be dispensed with in the first instance.
  2. This honourable court be pleased to grant orders of stay of execution pending the hearing and determination of this application.
  3. This honourable court be pleased to set aside all taxation proceedings.
  4. The honourable court be pleased to allow this case be heard on merit.
2. The ground upon which the application is based is mainly that the respondent was not properly served with notices and the bill of costs. The respondent has claimed that the only hearing notice served upon it was dated 31-10-2023 for hearing on 14-11-2023 on which date there were no proceedings in this matter. The applicant has deponed through supporting affidavit of Simon Ngigi Kimani who describes himself as its director that the hearing notice served upon it was deliberately misleading and as a result it was denied the right to be heard.



3. The applicant has opposed the application vide his grounds of opposition dated 21-08-2024 in which he asserts that the application is vexatious and frivolous. The applicant maintains that there are various affidavits of service in the court's record which show that the respondent was served with all necessary notices and the application has been brought with a purpose of delaying execution and avoiding payment of the decretal sum. He also avers that the application does not comply with procedural and statutory requirements for setting aside taxation proceedings.
4. The application was heard by way of written submissions. I have read the applicant's and the respondent's submissions dated 30-09-2024 and 9-10-2024 respectively. Although the respondent has not disclosed in the body of its application which of two proceedings between the taxation and the application for entry of judgement dated 5-10-2023 he claims not to have been served with, it is clear to me that the respondent seeks to set aside the entire taxation proceedings.
5. To my mind, this is an application for challenging the taxation officer's ruling dated 11-08-2023 on the applicant's bill of costs dated 3-10-2022. Such proceedings are in law known as a references. The applicant has urged this court to find that the respondent has approached the court through the wrong statutory procedure. He has referred this court to paragraph 11 of the Advocates Remuneration Order which provides as follows;
  1. Should a 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.
6. The ruling on the bill of costs was delivered on 11-08-2023. This means that the respondent had up to 25-08-2023 to request for reasons for taxation although the same were contained in the taxation officer's ruling and thereafter another fourteen days to file a reference if it was objecting to the taxation. Where a party was prevented from filing the reference in time by reasons beyond their control, they can file an application for extension of time. The respondent admits that he was served with a notice on 31-10-2023 obviously meaning that it became aware of the proceedings on that date. This application was filed on 15-04-2024 which was a period of six months after he was served with the hearing notice dated 5-10-2023. The respondent has not bothered to tell the court what prevented it from filing an application immediately after it was served with the acknowledged notice. In any event, such an explanation would have been useful to the respondent if the application before this court was for extension of time. No such application has been filed and in the circumstances, I hold that the procedure adopted by the respondent is untenable and irregular and this court will not bend the statutory rules of procedure. I am in agreement with the holding of Justice David Onyancha as he then was in *Soundd Entrainment Limited v Anthony Burungu & Co. Advocates (2014) KEHC 6566 (KLR)* which has been cited by the applicant. The Judge in declining to grant leave to appeal out of time held that;

'In this case, the application is brought under Sections 79(a), 95, 1A and 3A of the [Civil Procedure Act](#) and Order 51 of the Advocates Remuneration Order. Clearly, the applicant approached the court through inapplicable provisions of the law. The correct provision is Order 11 of the Advocates (Remuneration) Order.'

7. Even if I were to find that the application before me was competent and regularly filed, the respondent would still have to clear the hurdle of convincing me that it had not been made aware of these



proceedings. I have gone through the court record especially the affidavits of service filed in this matter which has revealed that;

- a. By affidavit of service dated 5-10-2022, the applicant had deponed that he had served the respondent with the bill of costs through email info@rudufu.co.ke.
  - b. By affidavit dated 29-03-2023, it is deponed by one Henry Muli Nzuki that he personally served the respondent with a mention notice, the bill of costs and notice of taxation at its offices at Wilson Airport BLD 48. The notice served was for 11-04-2023.
  - c. On 19-05-2023, the applicant deponed that he served the respondent with a mention notice for 18-05-2023.
8. The respondent did not participate in the taxation despite the above services. The deponent of the applicant's supporting affidavit claims that the respondent was not served but does not give its correct email. In any event the allegations of the email being wrong are in the submissions and not in the affidavit. The respondent has also not denied the physical address as contained in the affidavit of Henry Mulli Nzuki mentioned above.
9. The respondent has admitted that it was served with a hearing notice for an application which was coming for hearing on 14-11-2023 then goes on to claim that there were no proceedings on 14-11-2023. The court record shows that on 14-11-2023, the matter was placed before Honourable Justice J.W.W. Mongare when the applicant's application dated 5-10-2023 was allowed. The affidavit of service for the application was filed in this court on 6-11-2023 and shows that the respondent was served through the same email address as the previous services. It is therefore my finding that the respondent was all through served with the court processes and chose to stay away.
10. In view of my above analysis and holding, I find no merit in this application and I proceed to dismiss it with costs to the Advocate/Applicant.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of;

Miss Arura for Musyoki Nzakyo for the applicant; and

Mr. Ongoto for the respondent.

