



**James Aggrey Mwamu t/a Mwamu & Company Advocates v Were (Miscellaneous Application E034 of 2023) [2024] KEHC 16467 (KLR) (30 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16467 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS APPLICATION E034 OF 2023  
RE ABURILI, J  
DECEMBER 30, 2024**

**BETWEEN**

**JAMES AGGREY MWAMU T/A MWAMU & COMPANY  
ADVOCATES ..... ADVOCATE**

**AND**

**PAUL ODHIAMBO WERE ..... CLIENT**

**RULING**

1. This Ruling determines the Advocate's application dated 3<sup>rd</sup> July 2024 brought under section 51(2) of the *Advocates Act* and Rule 7 of the *Advocates Remuneration Order*.
2. The Advocate seeks orders that this Court converts the Certificate of Costs in the sum of Kshs 105,220 into a judgment plus interest accruing at the rate of 14% per annum from 27<sup>th</sup> April, 2023 until payment in full. He also prays for costs of the application.
3. The application is premised on the grounds that the Deputy Registrar on 27<sup>th</sup> April, 2023 and certificate of costs issued in the sum stated above. That the certificate of costs has not been reviewed or set aside or varied. That the taxed costs remain unsettled.
4. The application is supported by an affidavit sworn by James Aggrey Mwamu Advocate on 3<sup>rd</sup> July, 2024 reiterating the grounds above stated.
5. The application is opposed by the Respondent client who swore an affidavit in reply dated 11<sup>th</sup> November, 2024 contending in essence that the legal fees was paid in full and in excess and that the matter is settled hence there is nothing left for execution by the Advocate.
6. Further, that the application and bill of costs did not take care of or give credit to the sums already disbursed to the advocate Mr. Aggrey Mwamu as well as his associate advocate Mr. Teddy Omondi via mpesa statements annexed all totaling to Kshs 520, 450 and finally, that the agreed legal fees between



him and the advocate was Kshs 50,000 for each of the two files namely, the Children's matter *Kisumu MC Child Case No. E 017 Of 2020* and the Divorce Cause-Kisumu Mc Divorce Cause No. E 021 Of 2020 which he paid in December 2020 via mpesa and thereafter he continued to make payments for court attendances until the matters were concluded.

7. The application was argued orally with Mr. Omondi T. Advocate applicant submitting and reiterating the prayers and the grounds in support as well as the supporting affidavit while the Respondent's counsel submitted contending that the fees was settled as shown by the annexed mpesa payments annexed.
8. In a rejoinder, the Advocate's counsel submitted that the same allegation was made before the Deputy Registrar during taxation but that because there was no proof of settlement of the fees, costs were assessed and the certificate of taxation drawn. Further, that there is no reference filed challenging the taxation and that the certificate of costs has not been challenged or varied. Finally, that this is an administrative process which must be concluded.

### **Determination**

9. I have considered the application for conversion of the certificate of costs dated 27<sup>th</sup> April 2023 into judgment and decree of this court for execution purposes. I have also considered the grounds in support and the supporting affidavit sworn by Mr. James Aggrey Mwamu advocate. I have given equal consideration to the replying affidavit filed by the Respondent contesting the application.
10. It is true that there is a certificate of costs drawn by the taxing master on 27<sup>th</sup> April, 2023. The certificate of costs has not been set aside or varied. There is also no reference filed by the Respondent challenging that certificate of costs or the taxation of advocate/ client bill of costs dated 23<sup>rd</sup> March, 2023 and taxed on 27<sup>th</sup> April, 2023. There is also no challenge to retainer by the client of the Advocate's legal services.
11. Where there is no reference pending or challenge to the certificate of costs or retainer, this court will enter judgment on the certificate of costs and issue decree in favour of the Advocate for execution.
12. However, I have perused the ruling on taxation of the bill of costs as taxed by the Deputy Registrar and the parties' affidavits and submissions as filed in this matter and in the sister file *HC Misc Appl E054 of 2023*. I observe that the client filed a replying affidavit and submissions opposing the bill of costs. In the said affidavit and submissions, the client annexed mpesa statements showing that he had paid money as legal fees to the advocates in the law firm of Mwamu & Co. Advocates. The mpesa statements are attached and the payments were made to Aggrey Mwamu and Teddy Omondi Advocates respectively. The same documents are annexed to the client/respondent's replying affidavit in opposition to the application herein seeking to adopt the certificates of costs as judgment of the court and decree drawn.
13. Regrettably, in the taxation Rulings, there is nowhere the Taxing master has mentioned or taken into account the said payments. She did not refer at all to the said payments and neither did she give any credit for what the client had claimed and annexed evidence of payments, to the advocate.
14. I have also perused HC Misc Application No. E054 of 2023 which is related to this matter save that it arises from divorce proceedings unlike this matter which arises from Children's Case Proceedings. I observe that in the former matter, the Advocate/applicant herein stated that the legal fees allegedly paid by the client in final settlement was in respect of the Children's matter which is *Children's Case No. E017 of 2020* and not in respect of the Divorce case. However, the taxing master never alluded to that in her taxation ruling and calculations.
15. I reiterate that the above revelations notwithstanding, the taxing master who exercises jurisdiction on behalf of the High Court, being delegated jurisdiction, did not find it necessary to make any reference



to the documents filed by the client in either of the two matters, which payments have not been denied. Had she taken into account the contentions and submissions by the client, I am sure that the figures that she arrived at would not be the same, now that the advocate conceded that the fees that the client had allegedly paid in the divorce case were in respect of the children's case.

16. This is a court of justice and not a rubber stamp of what the taxing master has done. Article 165 of the Constitution confers on this court supervisory jurisdiction over subordinate courts. The Article at sub articles 6 and 7 stipulates that:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice. [emphasis added]

17. From my examination of the record of proceedings and ruling on taxation by the taxing master, I find a serious error of omission which this court cannot ignore. This court is mandated by the Constitution to ensure the fair administration of justice and in exercising judicial authority, to be guided the principles espoused in Article 159 among others that-

(2) (a) justice shall be done to all, irrespective of status;

(b) ...

(c) ...

(d) justice shall be administered without undue regard to procedural technicalities.

18. I am alive to the very fact that the client did not file a reference, yes, and neither has the certificate of taxation been set aside or varied. Nonetheless, this court cannot preside over and adopt an injustice being visited on any party in proceedings before it.

19. It is obvious that the taxing master did not even refer to the mpesa statements filed by the client which in my humble view was wrong and that did occasion a miscarriage of justice and oppressive to the client.

20. Courts exist to should not aid parties who are hell bent to oppress the other parties and should not aid or abet such oppression of parties who may be ignorant of the legal procedures or their advocates being negligent in the manner of handling issues before the court.

21. Every judge or judicial officer derives judicial authority from the people of Kenya who expect him or her to set their faces against injustice. Furthermore, Equity delights to do justice, and not by halves and therefore, Courts should not be grudging in remedying injustice. See *Jeffers v Clinton*, 756 F. Supp. 1195 (E.D. Ark. 1990).

22. In the *First American bank of Kenya Limited v Shah & Others* [2002] EALR 64 at 69, Ringera J (as he then was) stated as follows and I agree that:

“This Court cannot interfere with the taxing Officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle ....it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors...”



23. This court is very much aware that this is not a reference and that the court is therefore not making these observations in a reference. The court is also aware that it is dealing with the application under section 51(2) of the Advocates Act. However, the court is a court of law, of justice of equity and of good conscience. That good conscience does not permit this court to allow and administer injustice to any party appearing before it.
24. I must therefore do justice and the justice of this case demands that discretion be exercised to remedy an injustice already occasioned by the failure to consider the question of whether the client had paid any money to the advocate as legal fees, prior to the filing of the bill of costs as per the mpesa statements annexed to the replying affidavit of the client.
25. Justice is not just a rhetoric. Article 48 of the Constitution guarantees every person the right to access justice. The *Holy Bible* in Amos 5: 24 restates that “let justice run like water...”
26. Accordingly, and in the interest of justice, I hereby set aside the ruling on taxation and certificate of taxation dated 27<sup>th</sup> April 2023 and refer the matter back to the taxing master Hon. Gloria Barassah to reconsider the opposition and submissions filed by the client in opposing the bill of costs and in her reconsideration, take into account the material placed before her by the client and determine whether the client had paid the Advocate the legal fees which was being demanded by the advocate in the bill of costs.
27. Only then can this court be seen to have done justice and be just in its exercise of judicial authority for those who appear before it seeking for justice.
28. To do otherwise will be to perpetuate and breed an injustice to one party and in this case, that party is the client.
29. I therefore decline to enter judgment for the Advocate on the certificate of costs dated 27<sup>th</sup> April, 2023 and direct that this matter be placed before the Deputy Registrar, Hon Gloria Barasah, directing her to consider the material placed before her that the client had paid to the Advocate legal fees in the matter that the Advocate was representing the client before the trial court in *Kisumu CM Children’s Case No. E017 of 2020*, before issuing a certificate of costs for conversion into judgment and decree of this court.
30. Mention before the Deputy Registrar shall be on 20<sup>th</sup> January, 2025.
31. This ruling and orders to apply to Kisumu HC *Miscellaneous Application No. E054 of 2023* with necessary modifications, noting that in the latter matter, the Taxing master equally did not make any reference to the allegations that the client had paid legal fees to the advocate, as per the annexed mpesa statements.
32. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF DECEMBER, 2024**

**(VIRTUALLY)**

**R.E. ABURILI**

**JUDGE**

