



**Komen v Kiplenge & Kurgat Advocates (Anti Corruption and Economics
Crime Miscellaneous Application E038 of 2021) [2023] KEHC 2913 (KLR)
(Anti-Corruption and Economic Crimes) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI CORRUPTION AND ECONOMICS CRIME
MISCELLANEOUS APPLICATION E038 OF 2021**

**EN MAINA, J
MARCH 30, 2023**

BETWEEN

EZEKIEL KIPKULEI KOMEN APPLICANT

AND

KIPLENGE & KURGAT ADVOCATES RESPONDENT

RULING

1. By the Chamber Summons dated November 22, 2022 which is supported by an affidavit sworn by Ezekiel Komen on even date and which is brought under Rule 11 of the [Advocates Remuneration Order](#), Section 3A of the [Civil Procedure Act](#) and Article 50 of the [Constitution](#) of Kenya, the Applicant seeks orders as follows: -
 1. Spent
 2. That the execution of the Certificate of Costs and Ruling delivered on February 28, 2022 thereto emanating from taxation of the Advocates-Client Bill of Costs dated November 19, 2021 be stayed pending the hearing and determination of this Application
 3. That the Honourable Court be pleased to enlarge time for the Client/ Applicant to file a Notice of objection to the taxation proceedings herein together with the reference to this Honourable Court against the Certificate of Costs and the Ruling of the taxing officer given on February 28, 2022.
 4. That the Application herein be admitted as a reference against the taxation proceedings and the Honourable court be pleased to vary, review and/or set aside the Certificate of Costs and



Ruling of the taxing master given on February 28, 2022 and in its place make an order for re-taxation

5. That the costs of this Application be provided for.
2. The Application is made on the grounds that:- that the Applicant is aggrieved by the Ruling on the Advocate-Client Bill of costs dated November 19, 2021, delivered by the taxing master on February 28, 2022; that the Applicant was never served with the said Bill of Costs and notice of the taxation hence denied the opportunity to be heard; that the Bill of Costs is irregular and unlawful as it was heard *ex parte* and thereafter a Certificate of Costs issued, which the Respondents are currently in the process of executing; that the Certificate of Costs was obtained upon non-disclosure of material facts, to the extent that the Applicant had fully paid the Advocate-Client legal fees in relation to ACC No 5 of 2010 as mutually agreed; that a sum of Kshs 1,000,000 being the Applicant's cash bail in ACC No 5 of 2010 was released to the Respondents upon the Applicant's acquittal pursuant to an order of the court, thereby fully settling the outstanding legal fees; that the delay in the filing of the Notice of Objection as well as the reference was due to the fact that the Advocate/ Respondent did not notify the Applicant of the taxation and the Ruling in respect of the Bill of Costs. Further that the Applicant was only made aware of the taxation through a Notice to Show Cause for a sum of Kshs 5,223,495 served upon his daughter through email; that he stands to suffer prejudice should this application be declined and also that it is in the interest of justice and fairness that the Ruling, Certificate of Costs and execution thereof be set aside and the Applicant be granted leave to file a reference.

Response by the Respondent/Applicant

3. The Respondent opposed the Application through the replying affidavit of Chetalam C Purity sworn on January 20, 2023. The Respondent contends that the application is bad in law and incurably defective as it offends the provisions of paragraph 11 of the Advocates Remuneration Order; That the Application is statute barred for having been filed out of time and without leave and that the Applicant was duly served with the Advocate Client Bill of Costs, Mention Notice, Ruling Notice, Ruling and the Certificate of Costs through his wife's number and that the Applicant never appeared in court. Further, that this Application is a ploy to deny the law firm its hard-earned legal fees, having represented the Applicant in ACC No 5 of 2010 in which he was acquitted. The Respondents however concede that the notice to show cause was served upon the Applicant's daughter's email address charity.kipkulei@kpc.co.ke. They however contend that the allegation that the Applicant had fully paid his legal fees was unsubstantiated; that there was no written agreement on legal fees and that the fees were charged as per the Advocates Remuneration Order. Lastly, they assert that the Applicant has not provided a satisfactory explanation for the delay in filing the reference.

Issue for determination:

Whether this court should enlarge time for the Applicant to file a Notice of Objection to and a reference against the taxation proceedings

Analysis and determination

Whether the execution of the Certificate of Costs should be stayed

4. Rule 11(4) of the Advocates (Remuneration) Order grants this court the discretion to enlarge the time for filing a reference against a ruling by the taxing master as follows:

“ 11. Objection to decision on taxation and appeal to Court of Appeal



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 subsection (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 the 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 clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.” (Emphasis mine)
5. The Applicant contends that he was not served with the Bill of Costs and the mention or hearing notices for the taxation. He also disputes having been served with the Certificate of Costs and states that he became aware of the taxation after his daughter received an email to that effect. On the other hand, the Respondent contends that the Applicant was served with the Bill of Costs and notices through his wife. However, the Respondent does not give details on the date, name, contact and place where the service was effected.
 6. It is trite that the best service is personal service. Order 5, Rule 8 provides that service ought to be on the defendant personally or on his agent: The Rule states:-

“Order 5, rule 8 (1): Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”
 7. Should a party be unreachable after several attempts, service may be effected upon the party’s agent or an adult member of the family under Order 5 Rule 12.

“Order 5, rule 12 : Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.”
 8. The Respondent has not given any reasons or explanation for why the Bill of Costs and notices were not served personally upon the Applicant. This despite that he was their Client throughout the proceedings in Chief Magistrates ACC No 5 of 2010. The Respondents do not allege that they made several attempts to serve him but failed. Further they have not given sufficient details on the date and manner of the purported service upon the Respondent’s wife and daughter respectively. It is my finding therefore, there is no evidence of proper service of the Taxation Notice, Bill of Costs and ruling and certificate of Costs.



9. On the delay in filing a reference, the Applicant has averred that that he only became aware of the taxation proceedings through the Notice to Show Cause served upon his daughter through email. It is my finding therefore that the delay was not deliberate. Accordingly, I am satisfied that the Applicant has demonstrate sufficient cause to justify the grant of a stay of execution of the Certificate of costs. Further, it is my finding that the Applicant has raised pertinent issues against the taxed costs which require that the Applicant be granted an opportunity to canvass. In the case of *Miller & Company Advocates v China Road Bridge Corporation* [2021] eKLR the court held and I agree:

“ 20. Having regard to the findings and observations that I have made in this ruling and having found that the gist of the application was that the applicant was not served with the hearing notice for the taxation, I find that the applicant has made out a case for the granting of the orders sought in the application. I note that the applicant has raised a number of pertinent questions regarding the Advocates Bill of Costs including the claim that it amounts to double taxation of costs that had already been paid. My take is that the issues raised by the applicant can only unpacked by the Taxing Master during a fresh taxation.”

10. The upshot is that the Chamber Summons Application dated November 22, 2022 is allowed in terms of prayers 2 and 3. The Applicant shall file and serve a reference against the taxation within fourteen (14) days of this ruling in compliance with the provisions of Rule 11(b) of the Advocates Remuneration Order.

11. The Applicant shall bear the costs of the Application.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF MARCH 2023.

E N MAINA

JUDGE

