



**Raymond Olendo t/a Ogejo Olendo & Company, Advocates v
Kenindia Assurance Company Limited (Miscellaneous Application
212 of 2021) [2023] KEHC 3569 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3569 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS APPLICATION 212 OF 2021
WM MUSYOKA, J
APRIL 28, 2023**

BETWEEN

**RAYMOND OLENDO T/A OGEJO OLENDO & COMPANY,
ADVOCATES APPLICANT**

AND

KENINDIA ASSURANCE COMPANY LIMITED RESPONDENT

RULING

1. The applicant filed an advocate/client bill of costs, dated December 10, 2021, against the respondent. There is an affidavit of service, sworn on December 14, 2021, by the applicant, indicating that a taxation notice, for a taxation scheduled for January 26, 2022, was served. The record before me reflects that on January 25, 2022, a notice of appointment of advocates, dated January 22, 2022, was filed, appointing Okong'o Wandago & Company, Advocates for the respondent.
2. The record is not clear on what transpired on January 26, 2022. The coram is drawn, indicating that the matter was before Hon J Maragia, Deputy Registrar, DR, assisted by Polycap, but there is no indication as to whether there were any appearances for the parties, and no indication of the business that was transacted that day. What follows is the record for February 23, 2022, when the matter was again before Hon Maragia, DR, assisted by Polycap, when a ruling was delivered in open court, in the presence of Ms Nyabuto and J Oduor, for the respondent, and Mr Samba, for the applicant. The order made was for stay of execution for 30 days.
3. Anyhow, there is a replying affidavit, sworn on July 8, 2021, by Josephine Onyambu, and filed herein on February 7, 2022, drawn by the firm of Okong'o Wandago & Company, Advocates. It is averred, in that affidavit, that the respondent never instructed the applicant to represent West Kenya Sugar Company Limited, in Butali SRMCCC No 12 of 2014. It is asserted that there was no Advocate/client relationship between the applicant and the respondent, which could give rise to a claim for professional



fees, entitling the applicant to commence these taxation proceedings. It is averred that the applicant was instructed directly by West Kenya Sugar Company Limited, whereupon a notice of change of advocates was filed and served on JB Shilenje & Company, Advocates, who had been instructed by the respondent, and who had been handling the matter diligently, and the respondent had not found reason to withdraw instructions from that firm. A letter dated August 18, 2014 is attached, from West Kenya Company Limited to the respondent, saying that the applicant had been instructed by West Kenya Company Limited to take over conduct of the matter. It is stated that the respondent had instructed JB Shilenje & Company, Advocates to handle the matters, and upon conduct of the matter being taken over by the applicant, the respondent settled the fees for JB Shilenje & Company, Advocates.

4. Filed contemporaneously with the replying affidavit are written submissions. In the submissions, the respondent argues that the retainer was disputed, hence the bill ought to be placed before the High Court for determination of the question of retainer. It is further submitted, in the event the taxing officer finds that there was a retainer, that she should call for the parent file, to help her ascertain the work that the applicant handled in the matter that was before the trial court. The respondent goes on to make detailed submissions on instruction fees, drawings and photocopying, disbursement, court attendances, service of documents, futuristic and speculative amounts, VAT and increase by half, among other issues.
5. The ruling on record in this matter, is dated February 16, 2021, and says that it was delivered on February 23, 2021, by JN Maragia, SRM, standing for Senior Resident Magistrate. It relates to a matter between the applicant herein, and APA Insurance Company & Company Ltd, in Kakamega HC Misc Cause No E212 of 2021. I cannot tell whether the ruling in the court file relates to these proceedings, for the handwritten notes indicate that a ruling was delivered on February 23, 2022, and not February 23, 2021. Secondly, the proceedings herein are between the applicant and Kenindia Assurance Company Limited, and not with APA Insurance Company & Company Ltd. Thirdly, the designation of the officer who delivered the ruling is indicated as SRM, rather than Deputy Registrar or taxing officer, and one would wonder whether bills for taxation at the High Court are handled by Senior Resident Magistrates or by Deputy Registrars as taxing officers.
6. Anyhow, in that ruling dated, February 16, 2021, and delivered on February 23, 2021, the Senior Resident Magistrate expressed herself to be delivering a ruling on a bill dated December 10, 2021, and to have had considered the bill, the replying affidavit and the submissions, she then proceeded to tax the bill. I note that although the replying affidavit had indicated that the retainer was disputed, the Senior Resident Magistrate did not address that issue one way or the other.
7. A notice of objection, dated March 2, 2022, was lodged herein on March 7, 2022, objecting to a number of items, and inviting the taxing officer to give reasons, in accordance with paragraph 11(2) of the [*Advocates Remuneration Order, 2014*](#). The Deputy Registrar responded to the notice, by a letter, dated March 3, 2022, stating that the reasons for taxing the items objected to, in the manner that she did, was captured in the ruling.
8. The respondent then filed an application herein, on March 7, 2022, of even date, principally seeking stay of execution of the orders made by the Senior Resident Magistrate in the ruling delivered on February 23, 2021, the setting aside of that decision, and consideration of the bill afresh on the issues of retainer and the disputed items. The grounds in support of that application, largely reiterated the arguments made in the written submissions, dated January 26, 2022, except that the Senior Resident Magistrate had not considered its submissions, and more so on the issue of retainer and the disputed items, with regard to services that were allegedly not provided at all.



9. The application, dated March 7, 2022, was placed before F. Amin J, on March 8, 2022, who dismissed the prayer for stay of execution, and directed service of the application, on the other prayers, on the applicant. Further directions were given on March 29, 2022, for the canvassing of the application, dated March 7, 2022, by way of written submissions.
10. The applicant filed a replying affidavit to the application, dated March 7, 2022, sworn on March 16, 2022. It is averred that when the matter came up on January 26, 2022, the respondent had not filed a response to the bill of costs, and the matter was reserved for ruling on February 16, 2022. It is averred that the respondent filed a replying affidavit while the matter was pending ruling, and the file was with the Deputy Registrar. It is asserted that the bill of costs was not opposed as at January 26, 2022, when the matter was before the Deputy Registrar, as no response had been filed by then. The applicant has pointed at rulings by JN Maragia, SRM, in other matters, where similar issues arose, and where it was ruled that there was retainer.
11. The parties subsequently filed written submissions.
12. I have difficulty determining this matter, for the record before me is not tidy. When the bill of costs was filed at the registry on December 10, 2021, the registry staff allocated it a date for hearing on January 26, 2022. Come January 26, 2022, nothing happened, according to the court record, but on February 23, 2022, a ruling was delivered. How could a ruling be delivered, on the subject application, when the court did not sit and give directions on its disposal?
13. For avoidance of doubt, the record for January 16, 2022 and February 23, 2022 reads as follows:

“

“26. 1.22
Before Hon J Maragia – DR
CA Polycap”
February 23, 2022
Before Hon JN Maragia
C/A: Polycap
Ruling delivered in open court in the presence Ms Nyabuto and J Oduor for the respondent and Mr Samba for the applicant.
Stay of 30 days execution days.”
14. The affidavit that Raymond Olendo swore on March 16, 2022, indicates that the court did sit on January 26, 2022, and there was a hearing, after which the matter was fixed for ruling on February 16, 2022, although ruling was subsequently delivered on February 23, 2022. What Mr Olendo says in his affidavit is not in the court record. I am not saying that Mr Olendo is telling a lie. He is an advocate of the High Court of Kenya. His statements are made on oath, and I believe him. What I believe is the problem is the sloppy manner in which the court record was kept or maintained by Hon Maragia, the judicial officer handling the matter. If she conducted court proceedings on January 26, 2022, then she should have kept a clean record of what transpired that day. Her court assistant, Polycap, did the proper and correct thing, by writing down the Coram. Hon Maragia should have done the rest, in terms of indicating the appearances by the parties, keeping a record of what was said by who, and the directions given by the court. That was not done, which, going by the record, means that the court did not sit, and did not do the things that Mr Olendo deposed in his affidavit of March 16, 2022. This is very unfair



- to Mr Olendo, for it suggests that he has told a lie on oath, when the problem in fact lies elsewhere. It would also mean that there was no basis or foundation for the proceedings of February 23, 2022, when the ruling was purportedly delivered. What ruling was the court delivering on February 23, 2022, if it did not conduct any proceedings on January 26, 2022?
15. I have ploughed through the papers contained in the court file before me, and I have not come across a ruling by Hon Maragia, delivered on February 23, 2022. The only ruling in this court file, signed by Hon Maragia, is dated February 16, 2021, and it purports, on its face, to have been delivered on February 23, 2021. I have no way of knowing whether this is the ruling that Hon Maragia delivered on February 23, 2022, as there were no subsequent proceedings to correct the dates, if indeed the ruling on record, of February 16, 2021, delivered on February 23, 2021, was meant to be the ruling that she delivered on February 23, 2022.
 16. Fundamentally, Hon Maragia signed the ruling of February 16, 2021, as SRM. I presume SRM is the acronym for Senior Resident Magistrate. Senior Resident Magistrate was her designation at the material time. SRMs have no jurisdiction over matters filed at the High Court. SRMs preside over courts that fall under the Chief Magistrate. They cannot purport to handle any matter at the High Court, and to make any order or give directions in such a file. They cannot, as SRM, be seized of any matter at the High Court. Some SRMs, are, however, Deputy Registrars of the High Court, and given responsibility over High Court matters. An Senior Resident Magistrate can only handle a High Court matter upon appointment as such. However, such an SRM, handles the High Court matters in his or her capacity as Deputy Registrar, and not SRM. An Senior Resident Magistrate has no jurisdiction over a High Court matter, unless sitting as a Deputy Registrar. It is in that capacity, as Deputy Registrar, that she taxes bills filed at the High Court. A Senior Resident Magistrate has no capacity or jurisdiction to tax a bill filed at the High Court. There is a jurisdictional issue when a ruling is delivered and signed by an Senior Resident Magistrate over a bill of taxation filed at the High Court, instead of Deputy Registrar. If the Senior Resident Magistrate doubles up as Deputy Registrar, they ought to take remedial action, before the said ruling is rendered invalid on account of lack of jurisdiction. By signing the ruling of February 16, 2021 as SRM, Hon Maragia rendered the orders made in that ruling invalid, as she had no jurisdiction, sitting as an SRM, to tax any bill at the High Court.
 17. The other concern about the said ruling is that it relates to a dispute between the applicant herein and APA Insurance Company Limited. The bill that is purported to be taxed is dated December 10, 2021, similar to the date on the bill herein, and the applicant in that ruling is the same as the applicant in this case. However, that is not enough. It is possible that the applicant has a similar dispute with APA Insurance Company Limited, and there could be a bill in court of even date between the 2 of them, in respect of which a ruling was delivered on February 23, 2021, dated February 16, 2021. All this makes us swim in the sea of uncertainties and presumptions.
 18. Courts of law operate on the basis of certainty. Where proceedings are clouded in grave uncertainty, as is the case here, then the authenticity of the proceedings is thrown into question. The record before me bears serious integrity questions. It would be unjust to continue these proceedings, on the basis of the presumption or pretence that they are regular or proper or correct, when the reality is that they are not.
 19. I believe that the best course of action should be to nullify all the proceedings that were conducted in this matter after December 10, 2021, and to revert the matter to Hon Maragia, as Deputy Registrar, to conduct the proceedings afresh, ensuring that a proper record of the proceedings is kept, and that she exercises jurisdiction properly as a Deputy Registrar of the High Court, and not as an SRM. The proceedings conducted in Kakamega HC miscellaneous civil application Nos 214 and 215 of 2021 are a replica of what happened here. The orders above shall, accordingly, apply, with equal force, to Kakamega HC miscellaneous civil applications Nos 214 and 215 of 2021.



20. It is so ordered.

**RULING IS DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS
28TH DAY OF APRIL 2023**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Mulama, instructed by Ogejo Orare & Samba, Advocates for the applicant.

Mr. Okong'o, instructed by Okong'o Wandago & Company Advocates, for the respondent.

