



**Kiptoon & Co. Advocates v Kirui (Miscellaneous Application  
E001 of 2020) [2023] KEHC 3523 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3523 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
MISCELLANEOUS APPLICATION E001 OF 2020**

**RB NGETICH, J**

**APRIL 27, 2023**

**BETWEEN**

**KIPTOON & CO. ADVOCATES ..... APPLICANT**

**AND**

**JANE KIRUI ..... RESPONDENT**

**RULING**

1. Before court for determination is notice of motion dated April 1, 2022 filed by The Applicant/ Respondent (Jane Kirui) under Order 22 Rule 22(1), Order 40 Rule 1 & 4(1), Order 51 Rule 1 & 4 of the *Civil Procedure Rules*, Sections 1A, 1B & 3A of the *Civil Procedure Act* seeking the following orders:
  - a. Spent
  - b. That pending inter parties hearing and determination of this application and reference filed on March 23, 2022, the court be pleased to stay recovery/execution of the costs taxed herein/ or any other consequential orders and/or proceedings.
  - c. That the warrants of attachment and warrant of sale dated March 14, 2022 and issued herein be quashed/set aside.
  - d. The costs of this application and any other ancillary proceedings be awarded to the Respondent/Applicant.
2. The application is premised on the grounds that the Applicant/Respondent filed an advocate-client Bill of costs dated October 29, 2020 herein against the Respondent/Applicant seeking a sum in excess of Kshs 150,000/= on account of services in respect of Eldama Ravine Principal Magistrate's court Environment & Land Case No 9 of 2020- Ezekiel M Kimeli & 4 Others Versus Jane Kirui & Eldama Ravine Sub- County Administrator (primary matter).



3. The Applicant's argument is that she has never retained, appointed or instructed the Applicant/Respondent to act for her in the said matter and there being no retainer between her and the Respondent/applicant in the primary matter, the issue of the Advocate-Client costs as comprised in the said Bill of costs does not arise as between her and the Respondent/Applicant.
4. That Ruling on the taxation of the said Bill of Costs was delivered on February 01, 2022 in favour of the Applicant/Respondent to the tune of Kshs 94, 880/= yet the issue of lack of a retainer was raised before the Honourable Deputy Registrar but the taxation proceeded without notice to the Respondent/Applicant or her counsel on record.
5. That aggrieved by the decision of the Honourable Deputy Registrar, the Respondent/Applicant upon complying with the requisite procedure, filed the Reference herein dated March 23, 2022 which is yet to be heard and on March 30, 2022 before a date was fixed for the reference, the Applicant was served with a Notice of Attachment/proclamation dated March 28, 2022, a warrant of attachment and a warrant of sale purportedly in respect of a decree passed on October 29, 2020 a process culminating in the said warrants being replete with irregularities, procedural flaws and fundamental disregard of due process
6. In support of the application, the Applicant filed affidavit sworn on April 1, restating the grounds of the application.
7. In response, the respondent filed affidavit sworn by Vincent Kiptoon Advocate on May 06, 2022. He stated that they filed their bill of costs on October 29, 2020 arising from Eldama Ravine Elc Case No 09 of 2020 having represented the Respondent in the said matter successfully and thereafter she refused to pay their legal fees.
8. He avers that the Respondent had firm instructions from the Applicant to represent her in the matter and that she executed the affidavits drafted and filed on her behalf by the Law firm.
9. He stated that upon filing their advocate client Bill of costs, a mention notice dated November 19, 2020 was issued for taxation on November 24, 2020 and the Applicant was duly served and she instructed her advocates on record who filed their Notice of Appointment dated November 11, 2020 on even date.
10. The Applicant/Respondent proceeds to state that due to Covid 19 restrictions, the Taxation file Miscellaneous E001 of 2020 was mentioned severally without their notice and on November 20, 2020, they received a mention dated November 11, 2020 scheduling the Taxation cause for a mention on November 24, 2020 and on November 24, 2020, Kiptoo Advocate held his brief while Chepkilot Advocate held brief for Mr Gatonye counsel for the Respondent and the court directed parties to file their respective documents for consideration and a mention date was scheduled for December 2, 2020 to confirm compliance and for further directions.
11. He further stated that the applicant participated throughout the proceedings in the taxation process and it is not true that taxation proceeded without Notice as her counsel was fully aware of the dates; and on September 15, 2021, they send an advocate to court with full instructions to represent them and were given time to file their papers and the matter was fixed for October 19, 2021 by consent of Advocates to confirm whether they had filed any document.
12. That the Respondent/Applicant did not appear on October 19, 2021 and had not filed any document; the court was left with the option of proceeding to tax the bill and gave a ruling date for December 1, 2021 but since the ruling was not ready on the said date, the court issued a notice dated January 11, 2022 indicating that the ruling would be delivered on February 1, 2022 when it was delivered taxing the bill at Kshs 94,880/=.



13. The respondent states that a certificate of costs was issued on February 7, 2022 and they subsequently engaged auctioneers on March 18, 2022 to execute the certificate of costs and after the proclamation, the Applicant took the initiative of rushing to court to file the incomplete and defective application before court.
14. The Respondent further states that at no point did the Applicant raise retainer issue nor file formal application and the bill of costs was taxed as presented to court.
15. The Respondent argued that the procedure for challenging a decision of a taxing master is provided under Section 51 of the [Advocates Act](#), and Rule 11 of the Advocates Remuneration order.
16. That the Applicant filed Notice of objection dated February 8, 2022 and the taxing master vide a letter dated February 15, 2022 informed the Respondent/Applicant reasons for taxation are in the ruling and it was incumbent upon the Respondent/Applicant's counsel to take the option of filing the reference without expecting to be furnished with the further reasons of the Ruling.
17. In conclusion, the Respondent stated that there is no proper reference known in Law before court as the 14 days within which the Respondent/applicant was to file reference lapsed on March 4, 2022. That the application herein is unmerited and ought to be dismissed.
18. The application dated April 1, 2022 proceeded by way of written submissions

### **Submissions By The Applicant**

19. Counsel for the Applicant filed submissions dated July 26, 2022 and argues that issues for determination in respect of the subject application is whether the certificate of costs herein was executed/enforceable without a judgement being entered in that respect, whether the warrant of attachment of sale are irregular and/or defective and if so, what order should issue and who should bear the costs of the subject application.
20. The Respondent/applicant cited provisions of section 51 of the [Advocates Act](#), cap 16 Laws of Kenya and cited the case of [Muiruri & Wachira Advocates v Nicola Farms Limited](#) [2021] eKLR where the court stated as follows:
  - 1 it is worth to note that the certificate of taxation, issued after taxation of advocate client bill of cost, cannot be the subject of execution. For clarity, such certificate can only be executed after judgment has been entered and not otherwise...
 

“When is a decision on taxation enforceable? Section 51 (2) of the [Advocates Act](#) Provides ...

The Provision tells me that a decision of the taxing master on taxation is not a final judgment capable of execution and the court, as defined by the Act, must be resorted to pronounce a judgment. I further read and understand the statute to say that a judgment would only be entered by the court where there is no contention as to retainer of the advocate. Where there is dispute as to retainer, the recourse is a suit in which retainer is to be proved.”
21. Counsel submitted that in light of Section 51(2) of the [Advocates Act](#) and the judicial pronouncements, a certificate of costs issued after taxation of an Advocate –Client Bill of costs cannot be executed unless and until judgment is entered in that respect.
22. Counsel further argues that there is neither doubt nor contention as to whether the certificate of costs herein was adopted as a judgment before the impugned execution began and consequently, the entire



execution process is unlawful and in contravention of an express provision of the law and cannot therefore stand, not executable/enforceable for being irregular.

23. Further that the warrants refer to and seek to facilitate execution of a decree dated October 29, 2020 and command the auctioneers to attach the movable property of the Decree-holder whereas no decree exist; defects which render the warrant of attachment and warrant of sale null and void.
24. The Applicant urged this court to quash/set aside the warrants issued herein for being defective, grant orders sought and award costs.

### **Submissions By The Respondent**

25. The Applicant/Respondent filed submissions dated February 8, 2023 and submitted that the Respondent herein filed an application dated April 1, 2022 and prayer 2 refers to a reference purportedly filed on March 23, 2022 whereas the application is dated March 23, 2022.
26. The Respondent's argues that it is not in dispute that the taxing officer in the matter delivered a written ruling on February 1, 2022 with reasons thereon and therefore counsel for the Applicant was well aware of the same and if dissatisfied with that decision of the taxing officer, it was incumbent upon her to invoke Rule 11 of the *Advocates (Remuneration) Order* which sets out the procedure that should be followed by an aggrieved party to a decision of a taxing master.
27. That since the ruling was delivered on February 1, 2022 with the reasons thereon and pursuant to rule 11(1) of the *Advocates Remuneration Order*, the Respondent was expected to have a filed reference within 14 days, which is by February 14, 2022 but the purported reference was allegedly filed on March 23, 2022 way after stipulated 14 days.
28. Further that the Respondent failed to give a written notice to the Taxing master by February 14, 2022 by close of business on February 14, 2022 and if she expected further reasons in order to file a refence, she ought to have sought within 14 days and give written notice within the same 14 days but she failed the test stipulated under Rule 11(1) of Advocates Remuneration Order.
29. The Respondent further submitted that the Applicant has not furnished the court with the date the letter dated February 8, 2022 was delivered and received in court or by the taxing master to ascertain the actual date the request for further reasons was made.
30. Counsel submitted that it is presumed that the countdown of the 14 days commences from the date the taxing master clarified to the Respondent the reasons for the taxation, lapsing on March 4, 2022 but no reference had been filed and no plausible explanation given.
31. Counsel cited the case of *Muchiri Wa Gathoni & Co. Advocates vs Richard Mithamo Mugambi* [2020] eKLR where the court held as follows: -
  24. From the provisions of Rule 11(1) such notice was within the stipulated time however upon considering the fact that the taxing master had captured the reasons of the taxations on item no. 1 in the written ruling, it was incumbent upon the applicant to exercise the option of filing reference, without waiting for reasons from the taxing officer as contemplated by paragraph 11(1) of the Advocates Remuneration Order as it would have been futile to expect the Taxing officer to furnish further reasons. I therefore find that between the date of the filing of the notice and the present reference there was inordinate delay of more than 50 days which delay ran a foul the provisions of Rule 11 of the Advocates Remuneration Order.



25. The court in the case of *Abmed Nasir Abdikadir & company Advocates Vs National Bank of Kenya* (2) {2006} 1 EA held as follows;
- “.....although Rule (1) of the Advocate Remuneration order stipulates that any party who wishes to object to the decision of the Taxing Officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where reasons for taxation on disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reason simply because of unfortunate wording of sub rule 92 of Rule 11 of the Advocates Remuneration Order demands so.”
26. Since the present reference was then filed on the 12<sup>th</sup> November, 2019 over 50days after filing of the notice, I uphold the Respondent’s grounds of objection to the effect that the reference is incompetent in relation to the provisions of Rule 11 (1) of the Advocates Remuneration Order.....”
32. The Respondents urged the court to find that there is no reference before the court and what has been referred to as a reference is an incompetent one which cannot stand the test of the law.
33. Counsel further argued that the application has been brought under wrong provisions of the law. That Rule 11 of the Advocates (Remuneration) Order which outlines the specific procedure for addressing a grievance arising from taxation which ought to be strictly adhered; there is no justification that has been offered by the Respondent/Applicant for citing wrong provisions of the law and the entire application is incompetent.
34. In support of the above, counsel cited the case of *Robert Mutuku Musyoki vs China Road & Bridge corporation* {2018} eKLR which relied in the case of *Gacau Kariuki & Co. Advocates vs Allan Mbugua Nganga* and in relying in the above authority the court went ahead to find that an application that was not brought under the correct provisions of the law when challenging a taxing master decision violate Rule 11 of the Advocates (Remuneration) Order as the same is not a reference.
35. In view of the above counsel argued that the present application is incompetent and the same is incurably defective, improper and an abuse of the court process; and without a competent reference, the Respondent/Applicant has not laid any basis for grant of stay of execution and or any other proceedings thereof.
36. The respondent further argued that stay of execution that was granted on April 6, 2022 on condition that the Applicant deposits the taxed amount in court within 14 days and having complied with the said orders, the prayer for stay is as good as already spent; and having argued that there is no reference, there is no action pending for stay of execution to be stayed.
37. As to whether the warrants of attachment and warrants of sale dated March 14, 2022 can be quashed, counsel submitted that failure to secure entry of judgment before extracting warrants of sale and attachment is a procedural technicality which is curable under Article 159(2) (d) of the *Constitution* which provide that justice shall be administered without undue regard to procedural technicalities; and in any case, the failure to have judgment entered for the taxed costs does not render the costs taxed or certificate of costs issued a nullity; that the certificate of costs issued on February 7, 2022 is final as to the amount of costs as was held in the case of *Odera Obar & Co Advocates*.
38. The respondent urged this court to dismiss the application dated April 1, 2022 and award costs to the Applicant/Respondent/Advocate.



## Analysis And Determination

39. I have considered the grounds in support of the application, averments by the parties and submissions filed. What I consider to be in issue is whether warrants of attachment and sale dated March 14, 2022 are irregular and/or defective and whether I should quash/set aside.
40. Section 51 of the *Advocates Act*, cap 16 Laws of Kenya provides: -
- The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.
41. In the case of *Muiruri & Wachira Advocates v Nicola Farms Limited [2021] eKLR* where the court held:
- 1 it is worth to note that the certificate of taxation, issued after taxation of advocate client bill of cost, cannot be the subject of execution. For clarity, such certificate can only be executed after judgment has been entered and not otherwise.
42. Further the in case of *Professor Tom Ojienda vs County Government of Meru (2021) eKLR* the court stated as follows: -
- “The Provision tells me that a decision of the taxing master on taxation is not a final judgment capable of execution and the court, as defined by the Act, must be resorted to pronounce a judgment. I further read and understand the statute to say that a judgment would only be entered by the court where there is no contention as to retainer of the advocate. Where there is dispute as to retainer, the recourse is a suit in which retainer is to be proved.”
43. In view of provisions Section 51(2) of the *Advocates Act* as captured above and the above decisions, certificate of costs issued after taxation of Advocate –Client Bill of costs should be adopted as judgment of the court. Decree to be executed is then drawn from the judgment. Execution process should not therefore commence before entry of judgment and decree being drawn.
44. It is not disputed that the applicant did not seek to have certified costs adopted as judgment of the court before commencing execution. There was no judgment upon which to execute and in my view the entire execution process was irregular; that cannot be termed as procedural technicality.
45. In the case of *L. N. Ngolya and Company Advocates vs Jackson Mithi Kilango [2008] eKLR* Lenaola J (as he then was) was faced with pertinent procedural question of whether, upon taxation of costs, an advocate can execute for the recovery of the taxed costs without filing a suit for judgment on the Certificate of Costs. In paragraph 6 of the judgment in the above case, the court held that once costs are taxed, then Section 48 and Section 49 of the Act became operational and the advocate should follow through on the steps provided to institute a suit for recovery of costs and obtain a judgment and decree capable of being executed.
46. The Certificate of Costs provides the basis for exercise of jurisdiction by the court to enter judgment for the taxed costs in accordance with Section 51(2) of the *Advocates Act* as captured in paragraph 40 above.



47. Similar position was reiterated in the case of *Musyoka & Wambua Advocates v Rustam Hira Advocate* (2006) eKLR where it was held: -

“Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has discretion to enter judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view is a mode of recovery of taxed costs provided by law, in addition to filing of suit...”

48. The procedure provided in section 51(2) of the *Advocates Act* aids expeditious disposal of cases relating to recovery of advocate-client costs as long as: (1) the costs have been taxed by and certified under the hand of the taxing master by a Certificate of Costs; (2) the Certificate of Costs has not been set aside or stayed or appealed against on a reference filed upon it; and (3) there is no dispute on retainer. In such case, judgment is ordinarily entered in the sum in the Certificate of Costs upon application by the advocate.

49. The issue of retainer is not subject for determination in the current application and I will not therefore delve into the issue.

50. In compliance with Section 51(2) of the *Advocates Act*, the Applicant/Respondent having obtained a certificate of the taxed costs from the taxing master should have sought adoption of certified costs as judgment of the court before commencing the execution process and the failure by Applicant/Respondent to comply with the procedure rendered the whole execution process null and void.

51. Having found that the Applicant/Respondent failed to comply with the procedure of Section 51(2) of the *Advocates Act*, this therefore invalidates the whole execution process. I therefore find that the warrants of attachment and sale dated 14.03.2022 and all other consequential orders should be set aside and or quashed.

52. The Applicant/respondent having instigated the execution process which I have found was irregular and should therefore bear the costs of the instant application.

53. Final Orders:

1. warrants of attachment and sale dated March 14, 2022 are set aside.
2. costs of this Application to the Applicant.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 27<sup>TH</sup> DAY OF APRIL 2023.**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

**Mr Sitienei - Court Assistant.**

**Mr Kiptoon for the Respondent/Applicant.**

**No appearance for the Respondent.**

