



REPUBLIC OF KENYA



**George Miyare t/a Miyare & Company Advocates v Gatungo & 2 others (Miscellaneous Application 97 of 2017) [2023] KEHC 19184 (KLR) (Civ) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 19184 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS APPLICATION 97 OF 2017**

**MA ODERO, J**

**MAY 26, 2023**

**BETWEEN**

**GEORGE MIYARE T/A MIYARE & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**LISSA WANGU GATUNGO ..... 1<sup>ST</sup> CLIENT**

**AIKA NYANGARA GATUNGO ..... 2<sup>ND</sup> CLIENT**

**SUSAN WANJIRU GATUNGO ..... 3<sup>RD</sup> CLIENT**

**RULING**

1. Before this court are two applications for determination as follows:-
  - i. Notice of Motion dated November 22, 2021
  - ii. Notice of Motion dated March 9, 2022
2. The applications were canvassed by way of written submissions. The applicant/clients filed the written submissions dated September 26, 2022 whilst the Advocate/Respondent relied upon their written submissions dated September 29, 2022.

**Background**

3. The two applications in this matter arise from the Ruling delivered by the Hon. Taxing Master on 30<sup>th</sup> July 2021. In said Ruling the Advocate/Client Bill of costs dated July 5, 2017 was taxed at Kshs.1,585,692.



4. The applicant/client did not defend the Bill of costs in the lower court and the same was taxed in their absence. The applicant/client alleges that they were not served with the Bill of Costs and hence they did not defend the same. I will now proceed to deal with each application separately.

**(i) Notice of Motion dated November 22, 2021**

5. The applicant/client filed the application dated November 22, 2021 seeking the following orders:-
  - “1. Spent.
  2. Spent.
  3. The Clients be and are hereby granted leave to file a response to the Advocate’s Bill of Costs filed on 5<sup>th</sup> July 2017 in terms of the draft Replying Affidavit annexed to this application.
  4. The Advocate’s Bill of Costs filed on 5<sup>th</sup> July 2017 and the Advocate’s Notice of Motion dated 23<sup>rd</sup> August 2021 be and are hereby struck out.
  5. The Ruling delivered on 30<sup>th</sup> July 2021 and Certificate of Taxation dated 20<sup>th</sup> August 2021 be and are hereby set aside ex debito justitiae.
  6. The costs of this application be provided for.”
6. The Application was premised upon sections 1A, 1B, 3A, and 63 of the *Civil Procedure Act*, cap 21, Laws of Kenya. order 51 rule 1 of the *Civil Procedure Rules* 2010 and all other enabling provisions of law and was supported by the affidavit of Lissa Wangu Gatungu dated November 21, 2021.
7. The Applicant averred that in the year 2015 the Advocate agreed to offer Pro Bono services to the client in respect of the Misc. Application No. 15 of 2014. That the Advocates failed to appraise the client of the progress of the case but nevertheless proceeded to serve upon the clients an invoice dated 2<sup>nd</sup> February 2017. That the Advocates then proceeded to draw and file a Bill of Costs dated July 5, 2017 claiming Kshs.65 Million as legal fees.
8. The Applicant claims that the Advocate failed to serve them or their Advocates on record with the Bill of costs. The Bill was eventually taxed at Kshs.1,583,692 vide a Ruling delivered on July 30, 2021. Thereafter the Advocate filed a Notice of Motion dated 21<sup>st</sup> August 2021 seeking to have judgement entered in their favour for the taxed amount.
9. The Applicants submit that the Bill of costs dated July 5, 2017 and the subsequent taxation and ruling are null and void because the Advocate had offered ‘Pro bono’ services. They further submit that the Application dated August 21, 2021 should be held in abeyance to enable them argue this present application.
10. The Advocates oppose the application through the replying affidavit dated December 16, 2021 sworn by Esther Mwikali who practices with the firm of Miyare & Company Advocates.
11. She confirms that sometime in the year 2015 the client instructed the law firm to institute legal proceedings under the *Mental Health Act*. The Advocate duly filed Misc. Application No. 15 of 2015.
12. The Respondent insists that the Advocate was in constant communication with the client and asserts that the clients were fully aware that they would be required to make payments for the legal services rendered.



13. That the clients later refused/declined to settle the invoice sent to them by the Advocate leading to the filing of the Bill of costs dated 10<sup>th</sup> July 2017. The Advocate states that being unable to trace their client the Notice of Taxation was served by registered mail.
14. The matter was fixed for taxation on 12<sup>th</sup> July 2021 and the Bill was taxed at Kshs.1,583,692.00.
15. The Advocate submits that having assessed the costs and issuing a certificate of costs the court is now 'functus officio'. They submit that the present application was filed purely as a means to deny the Advocate his fees for services rendered.
16. I have considered the application before court, the Reply filed thereto as well as the written submissions filed by both parties. The only issue for determination is whether the Bill of Costs was properly served upon the client.
17. The clients have denied having been served with the Bill of Costs. They submit that section 20 of the Civil Procedure Act and order 5 of the Civil Procedure Rules were not complied with. That it has not been proved that the clients could not be traced leading to the Advocate having to resort to service by way of registered mail.
18. The question of proper service of pleadings upon parties to a dispute is a critical component of any case. A court must satisfy itself that the person being sued has been properly served before any adverse orders can issue against that person.
19. From the averments on record it is clear and indeed it is not disputed that the clients were not personally served with the Bill of costs and the Notice of Taxation. Instead service was effected by way of registered mail. This type of substituted service is valid and is recognized in law as proper service.
20. There is no evidence that the documents conveyed by registered mail did not reach the recipient. The documents were dispatched to the clients known address. The client does not deny that this was infact their address.
21. Service of summons has now taken a paradigm shift especially in the wake of the Covid-19 pandemic. Service by way of e-mail or whatsapp are now recognized as proper service.
22. I have carefully perused the Affidavit of Service dated July 6, 2021 sworn by Esther Mwikali an Advocate of the High Court of Kenya detailing how she went to the Post Office and sent the documents by registered mail annexed to the Affidavit is the payment receipt issued by the Postal Corporation of Kenya (Annexure 'EM'). This is proof that the letter was received and was dispatched to the addressee. There was no return of the document to the sender. In the circumstances this court can only presume that the document did in fact reach the client.
23. The court has no reason to doubt the averments made in the Affidavit of Service. No valid reason has been advanced by the clients for their absence during Taxation. I find no merit in this application. The same is dismissed in its entirety.

**(ii) Chamber Summons dated March 9, 2022**

24. This was an application filed by the clients seeking the following orders:-
  - “ 1. Spent.
  2. Esther Mwikali, advocate be and is hereby ordered and directed to attend court for cross-examination on the contents of paragraph 7, 8, 9 and 10 of the replying affidavit sworn by herself on December 16, 2021.



3. Paragraphs 7, 8, 9 and 10 of the replying affidavits sworn by Esther Mwikali on December 16, 2021, be and are hereby struck out.
4. The costs of this application be provided for.”
25. The application was premised upon sections 1A, 1B, 3A of the *Civil Procedure Act*, cap 21 Laws of Kenya, order 19 rules 1,2,3 and 9 of the *Civil Procedure Rules* 2010 and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by Issac Rene an Advocate of the High Court of Kenya.
26. The Clients allege that the claim by the Respondent Esther Mwikali that she received instructions from them in the year 2015 cannot be true as the said Advocate began to practice in the Respondents law firm way after the year 2015.
27. It is further alleged that the deponent has averred to facts, meetings, events which happened in the years 2015, 2016 and 2017 which she is not able to her own knowledge to prove.
28. The deponent Esther Mwikali opposed the application through her Replying Affidavit dated April 7, 2022. She states that she joined the law firm of Miyare & Company Advocates as a legal intern in the year 2015 and that she worked at the said law firm both pre and post her admission to the bar. The deponent further averred that she attended court sessions in Misc. Application No. 15 of 2015 and that under the guidance of Mr. George Miyare she drafted pleadings and correspondence in this matter.
29. The Deponent states that she did not need to be an admitted Advocate in order to attain knowledge of the facts deponed in her Replying Affidavit dated 16<sup>th</sup> December 2021. She prays that the application seeking to have her summoned for purposes of cross-examination be dismissed.
30. The application was canvassed by way of written submissions. The clients filed the submissions dated September 26, 2022 whilst the Advocates filed submissions dated September 29, 2022.
31. I have carefully considered the written submissions filed by the parties. The only issue for determination is whether the prayer to cross examine Esther Mwikali be allowed.
32. Order 19 rule 2 of the *Civil Procedure Rules* provides as follows:-
  - “(1) Upon any application, evidence may be given by affidavit, but the court may at the instance of either party, order the attendance for cross-examination of the deponent.”
33. The cross-examination of a deponent to an Affidavit is not a matter of right but may be allowed by the court in its discretion sufficient basis having been laid. It is only in instance where cross-examination of a deponent is deemed to be necessary to advance the course of justice that such a prayer may be granted.
34. In the case *Ahmed Nasir Abdulkadir & Co. Advocates -vs- National Bank of Kenya Ltd* (2) [2006] E.A. 6 court held as follows:-
  - “Pursuant to the provisions of Order XVIII, rule 2 of the Civil Procedure Rules, the court may, at the instance of either party order the attendance for cross-examination of the deponent of an affidavit used as evidence in an application.
  - d) Any party who seeks to cross-examine a deponent must satisfy the court that there is good reason for the proposed cross-examination, that is, the party



ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent.

- e) Since the rules recognize the use of affidavits as evidence, especially in the course of interlocutory applications courts ought not to readily permit cross-examination of the deponents of affidavits.

It is only in instances where the court is satisfied that the cross-examination was essential in enhancing the course of justice that the court should allow deponents to be cross-examined.

- f) Rule 9 of the Advocates Practice Rules does not give rise to an automatic bar to affidavits being sworn by advocates who then also appear before the court for the hearing of matters in which the affidavits are adduced in evidence. The rule allows advocates to swear affidavits on ‘formal or non-contentious matters of any fact in any matter.....’

35. Likewise in GGR -vs HPS [2012] eKLR the courts in discussing the issue of cross-examination of a deponent of an Affidavit stated as follows:-

“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.” [own emphasis]

36. In this matter aside from alleging that the Deponent could not have had knowledge of the matters deponed to, the clients have not presented before the court any material that would justify the cross-examination of the said deponent.
37. The deponent in her reply has explained that she was working in the law firm at the material time and thus acquired knowledge of the matters in issue. I do agree that the Deponent did not need to be an Advocate in order to attain knowledge of the facts to which she has averred.
38. The Taxing Officer duly conducted the taxation of the Bill of Costs after considering all items therein. If the Clients wish to challenge the decision arrived at after taxation they are at liberty to file a reference.
39. Finally and in conclusion I find no merit in the two applications dated November 22, 2022 and November 9, 2022. Both are dismissed in their entirety. I direct that each party bear their own costs.

**DATED IN NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2023.**

**MAUREEN A. ODERO**

**JUDGE**

