



Mombasa Khushi Motors Co. Ltd & another v Waswa & another (Suing the Legal Representatives of the Estate of the Late Alice Nambagala - Deceased) (Miscellaneous Reference Application E005 of 2023) [2023] KEHC 20854 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS REFERENCE APPLICATION E005 OF 2023**

DK KEMEL, J

JULY 28, 2023

BETWEEN

MOMBASA KHUSHI MOTORS CO. LTD 1ST APPLICANT

ROBERT YATOR 2ND APPLICANT

AND

BONFACIO NDOMBI WASWA 1ST RESPONDENT

PATRICK MUKHEMBI WANYONYI 2ND RESPONDENT

**SUING THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
ALICE NAMBAGALA - DECEASED**

RULING

1. The Chamber Summons application dated 21st February 2023, filed on 22nd February 2023 was lodged by the Applicants herein seeking an order for stay of execution of assessed bill of costs arising from the Taxing Officer's assessment dated 9th June 2022 in addition to the following further reliefs:

“That the assessment of 9th June 2022 with respect to Item B (VAT on instruction fees), Item C1, C2 C4 and C7 (Filing fees), C8, C9, C10, C14, C15 and C16 (Filing fee on Affidavit of Service), Item C11 and C12 (Court Adjournment fees), Item D19, D20, D21, D22, D23, D24, D27 and D28 (Services), Item E29, E30, E34, E35, E37, E38, E39, E42, E43, E44 and E56 (Court Attendances), Item F62, F63 and F64 (Filing fees on Affidavit of services, Failure to subject the Bill of costs to 50% less contributory negligence by the Plaintiff) be set aside and taxed afresh by this Honourable Court.”

“That the costs of this application be provided”



2. The application is brought pursuant to Article 50(1) and 159(1) of the Constitution of Kenya, Section 27 of the Civil Procedure Act, Order 21 Rule 9A, 9B, 9C and 9D of the Civil Procedure Amendment Rules 2020, Order 51 Rule 1 of the Civil Procedure Rules, Section 89 and 3A of the Civil Procedure Act, Paragraph 49 of the Advocates Remuneration Order, Schedule 7 of the Advocates Remuneration Order (2014) and Section 11 of the Advocates Remuneration Order.
3. The application is based on the grounds set out on the face of the application and on the supporting affidavit deponed on 21st February 2023 by Eveline Ogato, on behalf of the Applicants. The Applicants contend that the Respondent herein filed a bill of costs dated 9th October 2022 which was slated for assessment on 15th February 2022 and thereafter the court directed that the same be disposed of by way of submissions and scheduled it for mention on 5th April 2022 to confirm compliance and on that date the Court directed that the file be returned back to the registry for assessment. The same was not done and that the Respondents herein failed to serve the Applicants with the respective assessment notice or ruling notice of assessment.
4. It was further deponed that consequently, the Applicants only found out that the ruling on the bill of costs was delivered on 1st October 2022 when they were served with a decree and certificate of costs dated 28th June 2022. Subsequently, after perusal of the Court file it was discovered that the costs were assessed at the Court's registry ex-parte on 9th June 2022 and that the same was punitive, exaggerated, not drawn to scale as alleged and not subjected to the 50% contributory negligence.
5. It was further averred that the Applicants aggrieved by the ruling filed an application dated 3rd October 2022 in Bungoma High Court Misc. Application No E076 of 2022 seeking leave to file an objection out of time and Reference which was granted on 15th February 2023 and they then filed the present reference.
6. It was further averred that the Taxing Master erred in principle in awarding Item B (VAT on instruction fees) despite the same not being provided for in Schedule 7 of the Remuneration Order. That, the Taxing Master misdirected herself in awarding filing fees on Item C1, C2 C4 and C7 despite being no proof of payment of the said receipts.
7. It was further averred that the Taxing Master misdirected erred in taxing Item D19, D20, D21, D22, D23, D24, D27 and D28 as the taxed costs in each item is excessive and that there was no proof of the expenses incurred by the Respondent.
8. The Applicants averred that the Taxing Master misdirected erred in awarding filing fees on Item F62, F63 and F64 despite the Court date being taken by consent and thus no need for service.
9. That the Taxing Master erred in taxing service fees under Item E29, E30, E34, E35, E37, E38, E39, E42, E43, E44 and E56 as the hearing did not take place and therefore they were in excess of what is provided under the Schedule 7 of the Advocates Remuneration Order.
10. That the Taxing Master failed to subject the assessed bill of costs to 50% contributory negligence.
11. The Applicants deponed that if the stay of execution, as sort, is not granted they are apprehensive that the Respondents will proceed to execute the said costs and that they have already been served with a letter threatening execution.
12. Opposing the application, the Respondents herein filed their grounds of opposition dated 11th March 2023 on 6th April 2023. The Respondents contended that the application is frivolous, vexatious and an abuse of due process of Court; that the application is a non-reference and that the same does not conform to the requirements of the law pursuant to Rule 11(2) of the Advocates Remuneration Order;



- that no reasons by the Taxing Officer have been exhibited in this application, that the application is filed prematurely and the same ought to be dismissed; that the grounds on the face of the application contradict the averments in the affidavit in support and that there is no reference for determination.
13. In response to the Respondents grounds of opposition, the Applicants filed a further affidavit deponed on 6th April 2023 by Eveline Ogato, on behalf of the Applicants. It was deponed that the Court in a ruling in Bungoma High Court Misc. Ref. Application No E076 of 2022 granted the Applicants leave to file their reference. She reiterated that despite payment for the ruling on the accessed lower Court matter (Bungoma CMCC No 29 of 2017) being effected the Applicants have never received the said ruling and the time of filing this further affidavit and submissions the Applicants have not yet been furnished with the said ruling. It was deponed that it was in the interest of justice that the Applicants are not condemned for failure to attach the lower Court ruling on assessment due to the lower Court civil registry's failure to avail the same despite numerous requests.
 14. The instant application was canvassed by way of written submissions. The Applicants filed their written submissions dated 6th April 2023, through the law firm of Kimondo Gachoka & Company. Counsel submitted that pursuant to Paragraph 11 of the *Advocates Remuneration Order*, the High Court can entertain a reference on assessment of the bill of costs. She relied on the case of Siaya High Court Misc. No 34 of 2022 Duke Ongaki Nyaanga & Guardian Bus Company Limited v Seldon Obel Kubondo.
 15. With respect to whether the application is proper before the Court, Counsel submitted that after being served with the Certificate of Costs on 1st October 2022 she perused the Court file and noticed that the Respondent's bill of costs was assessed on 9th June 2023 ex-parte at the registry. They proceeded to file an application before Bungoma High Court (Misc. App. No E076 of 2022) seeking leave to file Notice of Objection and Reference out of time and was granted the leave on 15th February 2023. Counsel submitted that she filed a Notice of Objection dated 25th March 2022 and vide letters dated 15th February 2023 she requested for the ruling and reasons of the assessed costs but the same was never availed despite making the requisite payments.
 16. It was submitted that failure to annex the lower Court ruling on assessment and its reasons thereof is beyond the control of the Applicants.
 17. Counsel submitted that Party to Party costs in subordinate Courts is provided for in Schedule 7 of the *Advocates Remuneration Order, 2014* and Order 21 Rule 9A, 9B, 9C and 9D of the *Civil Procedure (Amendment) Rules, 2020*. It was submitted that the Respondents did not file any receipts/supporting documents in the bill of costs in the lower Court as provided for by Order 21 Rule 9A of the *Civil Procedure (Amendment) Rules 2020*. She further argued that the same was not subjected to a 50% contributory negligence liability deduction incurred by the Respondents.
 18. Counsel urged this Court to allow the application dated 21st February 2023 with costs to the Applicants.
 19. Opposing the application, the Respondents vide written submissions dated 11th March 2023 argued that the application before this Court was filed prematurely as the Applicants did not avail the reasons from the Taxing Officer and thus the same should be dismissed for being incomplete, frivolous, vexatious and an abused of the Court's due process.
 20. It was submitted that the Applicants having filed a Notice of Objection on 15th February 2023, the Court granted them a grace period of 30 days to lodge an objection to the taxation, then they ought to have obtained the reasons to the taxation in question from the Taxing Master prior to filing of this application. Counsel further argued that it is mandatory requirement that the Taxing Master's



ruling/reasons be obtained prior to filing of the reference. The Applicants having filed their Notice of Objection on 15th February 2023 and requested for the ruling as per annexure E06 and E07, filing of the reference 7 days after violated the law and failure to exhibit the requisite ruling from the Taxing Officer, this Court has no option but to dismiss the application before it. Counsel relied on the case of Paul Gicheru T/A Gicheru & Co. Advocates v Kargua (K)Construction Co. Limited HCMCA.

21. The Court has considered the pleadings, the Court records, the rival written submissions, the cited authorities and the relevant provisions of law and finds the following are issues for determination:
- a. Whether the ruling delivered on 9th June 2022, by Taxing Master and the subsequent Certificate of Costs should be set aside.
 - b. Whether or not execution should be stayed.

Whether the ruling delivered on 9th June 2022, by Taxing Master should be set aside.

22. The principles of setting aside the decisions of the Taxing Master were well established in the cases of Premchand Raichand Limited & another v Quarry Services of East Africa Limited and another [1972] E.A 162, First American Bank of Kenya v Shah and others (2002) EA 64 and Joreth Ltd v Kigano and Associates (2002) 1 EA 92. These includes

- a. That there was an error of principle
- b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
- c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
- d. That so far as practicable there should be consistency in the award.

23. Further, in First American Bank of Kenya v Shah and others [2002] EALR 64 at 69, the Court held as follows;

“First, I find that on the authorities, 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”.

24. The question this Court has to address is whether the ruling delivered on the assessment of 9th June 2022, in respect to Item B (VAT on instruction fees), Item C1, C2 C4 and C7 (Filing fees), C8, C9, C10, C14, C15 and C16 (Filing fee on Affidavit of Service), Item C11 and C12 (Court Adjournment fees), Item D19, D20, D21, D22, D23, D24, D27 and D28 (Services), Item E29, E30, E34, E35, E37, E38, E39, E42, E43, E44 and E56 (Court Attendances), Item F62, F63 and F64 (Filing fees on Affidavit of services, Failure to subject the Bill of costs to 50% less contributory negligence by the Plaintiff) amounted to an error in principle.

25. Rule 11 (1) and (2) of the Advocates (Remuneration) Order provides as follows: -

- (i) Should any party Object to the decision of the taxing officer, he may within fourteen days of the decision give notice in writing to the taxing officer of the items of taxation to which reason he objects.
- (ii) 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 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 ...”

26. From a perusal of the documents on record, it is noted that the ruling on the Respondents bill of costs was delivered on 1st October 2022 and that leave was granted by this Court in Bungoma High Court Misc. Application No E076 of 2022 to the Applicants to file an Objection out of time and the Reference. The Applicants proceeded to file a Notice of Objection dated 15th February 2023 and also requested for the ruling.
27. Under Rule 11 (2), the Taxing Officer was required to record and forward to the Objector the reasons for his/her decision on items 1 and 2. This is a mandatory requirement as the word used is “shall”. It is only after receipt of these reasons that an Objector may within another fourteen (14) days of receipt of the reasons that he can file the application raising his objections before a judge in chambers.
28. In this particular case, the Applicants have not yet been furnished with the ruling depicting the reasons for the same. A perusal of the Court record indicates that Taxing Master is yet to give specific ruling providing in details reasons within 14 days of the Notice of Objection being filed.
29. From the foregoing, it simply means that the Applicants were not enabled to lodge an effective and proper reference. This simply means that there is no reference application before this Honourable Court to prompt itself to deliberate on and find probable reasons to set aside/interfere with the decision of the Taxing Master as no evidence was placed before the Court with regard to the Ruling.
30. The upshot of the foregoing is that there is no proper reference application before this Court for it to venture into setting aside part of the ruling of the Taxing Master. This prayer must therefore fail.

Whether or not execution should be stayed.

31. By analogy of the stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules, a Court will in granting stay of execution pending hearing and determination of a reference to a judge from taxation of costs is guided by presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the Applicants.
32. This Court, while asserting jurisdiction to order stay of execution of the certificate of taxation of costs pending the hearing and determination of the reference to a judge, will determine whether the Applicants stands to suffer substantial loss if stay is not granted and whether the Applicants have provided security.
33. The Court in *RWW V EKW* [2019] held that; -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”



34. The question is whether the subject matter of the reference if successful will be rendered nugatory. It has also been stated that the Applicants are likely to suffer substantial loss as the Respondents are already threatening subsequent execution of the Certificate of Costs. I find that the applicant had been delayed by the civil registry regarding the supply of the ruling on the respondents' bill of costs. I am unable to fault the applicants as the delay was beyond their control. I find that an order for stay of execution of the Certificate of cost pending the filing of the reference proper upon the applicants depositing the sums indicated on the certificate of costs into court within a specific timeline. This will take care of the concerns of the parties herein and ensures that they do not suffer prejudice as the canvass the reference to be lodged. To that extent, the applicants request for stay succeeds.
35. Accordingly, and for the reasons set out above, the Applicants' application dated 21/2/2023 succeeds only in terms of prayer 2 thereof. The following orders are hereby made:
- i. The Officer in charge Civil Registry CMS Court Bungoma is hereby ordered to furnish the Applicants with the Ruling on the Respondents bill of Costs dated 9th October 2021 within Three (3) days from the date hereof.
 - ii. The Applicants shall within Fourteen (14) days from the date hereof give the requisite notice in writing in accordance with Paragraph 11 (1) of the Advocates' Remuneration Order, 2009, and subsequently comply with sub-paragraph (2) of paragraph 11 thereof with regard to the filing of a reference by Chamber Summons setting out the grounds of objection to the taxation of the respondent's bill of costs.
 - iii. There shall be an order of stay of execution of the Certificate of Costs dated 28th June 2023 pending the hearing and determination of the reference to be filed by Chamber Summons in accordance with Paragraph 11 of the Advocates' Remuneration Order, subject to the deposit in Court of the amount of taxed costs in the sum of Ksh.102, 545/= or a Bank Guarantee thereof within Fourteen (14) days from the date hereof failing which the stay shall lapse.
 - iv. The costs hereof shall abide the outcome of the reference to be lodged herein.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY 2023.

D. KEMEI

JUDGE

In the presence of:

Miss Ogato for Applicants

Wamalwa R for Bw'Onchiri

For Respondents

Kizito Court Assistant

