



**Anchor Limited & another v Ireri & Co Advocates (Miscellaneous Application E164 of 2021) [2023] KEHC 21925 (KLR) (18 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21925 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS APPLICATION E164 OF 2021**

**A MSHILA, J  
AUGUST 18, 2023**

**BETWEEN**

**ANCHOR LIMITED ..... 1<sup>ST</sup> APPLICANT**

**SAMUEL MWANIKI NDIAGUI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**IRERI & CO ADVOCATES ..... RESPONDENT**

**RULING**

**Background**

1. Before court is the Notice of Motion dated 6<sup>th</sup> July, 2022 which is brought under the provisions of Section 44 of the [Advocates Act](#) Rule 11(4) of the [Advocates Remuneration Order](#); Section 3A of the [Civil Procedure Act](#); Order 51 of the [Civil Procedure Rules, 2010](#), Articles 25, 50 and 159 of the [Constitution of Kenya](#) and all other enabling provisions of the law; The applicants sought for the following orders:-
  - a. Spent
  - b. That there be a stay of execution of the certificate of taxation/ruling delivered on 14/10/2-21 in Kiambu HCMISC No.E164 of 2021 and any other consequential orders pending hearing and determination of this Application.
  - c. That there be a stay of execution of the certificate of taxation/ruling delivered on 14/10/2-21 in Kiambu HCMISC No.E164 of 2021 and any other consequential orders pending hearing and determination of the Reference
  - d. That this Honourable Court be pleased to extend time within which the Applicants to file and serve the reference challenging the Ruling delivered by the Taxing Master on the 14/10/2021 on the taxation of the Respondents Advocates/Client Bill of Costs dated the 15/07/2021.



- e. That consequently the said reference be deemed to have been properly filed within time.
  - f. That the cost of the application be awarded to the applicant.
2. The application is premised on the grounds on the face of the application and the Supporting Affidavit made by Samuel Mwaniki Ndiangui in which he deposes that the Taxing Master misdirected himself and erred in law and principle in arriving at the decision that the Bill of Costs was unopposed by placing reliance on a defective and incompetent affidavit of service sworn on 30/09/2021; the same being incapable of sustaining these proceedings, having not provided proof of service.
  3. The parties were directed to canvass the application by filing and exchanging written submissions. Hereunder are the parties rival submissions.

### **Applicants Submissions**

4. All along with reasonable justification the Applicants believed that the issue of Advocates fees had been settled with finality upon payment to the Respondent Advocate of a total sum of Kshs.2,267,045/78 following the determination of Kiambu High Court Civil Case No.19 of 2016.
5. The Applicants were at all material times not aware of the existence of the Taxation proceedings until April, 2022 when service of the application for execution of the certificate of taxation was effected with the hearing notice indicating the 20<sup>th</sup> July, 2022.
6. The Applicants contend that the Affidavit of Service dated 30/09/2021 was defective thereby rendering the application for execution of the Certificate of Taxation to be improperly before the court; that the execution of the Certificate would be prejudicial to the Applicants as they would be made liable without being granted an opportunity to a fair hearing.
7. The Applicants prayed for enlargement of time to file their reference; they also prayed that it be deemed as filed; and were also opposed to the Application for execution of the Certificate of Taxation dated 29/10/2021 and prayed that it be dismissed.

### **Respondents Submissions**

8. The Respondent opposed the application and states that the Applicants were properly served vide their email mwanikizz@yahoo.com and the Affidavit of Service dated 30/09/2021 confirmed that service had been effected and the affidavit of service was properly before the taxing master.
9. The Applicants having been duly served with the requisite documents failed to enter appearance in the matter. In the Ruling the Taxing Master noted the absence of the Applicants' entry of appearance and rendered the bill unopposed and proceeded to tax the costs and delivered the ruling in favour of the Respondent in the sum of Kshs.4,656,457/24.
10. The Respondent prayed that the application be dismissed as the taxing master did not err in law and in fact in finding that the Applicants had been properly served neither had they demonstrated any loss or damage that they would suffer if the certificate of taxation was executed.

### **Issues For Determination**

11. The court has considered the Application and the parties rival written submissions and has framed the following issues for determination;



- a. Whether the court should be pleased to extend time within which the Applicants to file and serve the reference challenging the Ruling delivered by the Taxing Master; whether the said reference be deemed to have been properly filed within time.
- b. Whether this court should set aside and/or review the Taxing Officer's decision.

## Analysis

### **Whether the court should extend be pleased to extend time within which the Applicants to file and serve the reference challenging the Ruling delivered by the Taxing Master; whether the said reference be deemed to have been properly filed within time.**

12. The Applicants aver that there was improper service of the hearing notice for the bill of costs and contend that no evidence in the form of email delivery service report was attached to demonstrate or confirm that the alleged email had been sent to the Applicants. The taxing master nevertheless proceeded to tax the bill of costs in their absence and a certificate of taxation was issued.
13. The Applicants aver that they were only made aware of the taxation when the Respondent advocate filed the application dated 29/10/2021 seeking the entry of judgment as prayed in the certificate of taxation. Vide this instant application they seek for enlargement of time to file the Reference as they had been condemned unheard. They also sought a prayer that the Reference be deemed as filed and further prayed for the dismissal of the Respondents application of 29/10/2021.
14. In response the Respondent opposed the application and states that the Applicants were properly served vide their email mwanikizz@yahoo.com and the Affidavit of Service dated 30/09/2021 confirmed that service had been effected and the affidavit of service was properly before the taxing master.
15. The Applicants having been duly served with the requisite documents failed to enter appearance in the matter. In the Ruling the Taxing Master noted the absence of the Applicants' entry of appearance and rendered the bill unopposed and rightfully proceeded to tax the costs and delivered the ruling in favour of the Respondent in the sum of Kshs.4,656,457/24.
16. The Respondent prayed that the application be dismissed as the taxing master did not err in law and in fact in finding that the Applicants had been properly served neither had they demonstrated any loss or damage that they would suffer if the certificate of taxation was executed.
17. It is noteworthy from the record that the taxing master did not consider that no evidence in the form of an email delivery service report was attached to demonstrate or confirm that the alleged email had been sent to the Applicants.
18. The burden of proof that service had been effected upon the Applicants lies squarely upon the Respondent; In the absence of such crucial evidence it is difficult for this court to heed the Respondents submissions or find in their favour;
19. This court is satisfied that in the absence of the email delivery report, which evidence the taxing master ought to have considered, this then renders the affidavit of service as not being properly before the taxing master; which would then mean that the taxation notice was not properly served upon the Applicants and that they were condemned unheard; The right to be heard is sacrosanct and this court is satisfied that the Deputy Registrar erred in law and in fact in admitting the affidavit of service and finds that the Applicants were greatly prejudiced by such failure.



20. This court shall enlarge the time within which the Applicants may file the reference challenging the Ruling delivered by the Taxing Master; and hereby deems the reference as having been properly filed and served within time;

**Whether the court should set aside and/or review the Taxing Officer's decision;**

21. It is trite law that a Court can interfere with the decision of the Taxing Officer where there has been an error in principle and will intervene only in exceptional cases as was held in *Joreth Limited vs. Kigano & Associates* [2002] 1 EA 92 at 99 where the Court of Appeal stated;

“the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle, he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.”

22. Upon perusal of the Ruling this court finds that the Deputy Registrar erred in law in failing to indicate which charging schedule of the Order was being
23. In this instance the proper to be utilized would have been Schedule 6 Paragraph 1(b) which provides, inter alia, that:

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- (b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties

That value exceeds But does not exceed Kshs.- 500,000 75,000 500,000 750,000 90,000 750,000 1,000,000 120,000 1,000,000 20,000,000 fees as for Kshs.1,000,000 plus an additional 2%. Over 20,000,000 Fees as for 20,000,000 plus an additional 1.5%.

24. Further to the above, the value of the subject matter is not disputed. This courts point of contention is how the Deputy Registrar arrived at the astronomical figure of Kshs.4,656,457/24. It is noteworthy that the Deputy Registrar's ruling of 14<sup>th</sup> October, 2021 does not contain the reasons as to how and why the said figure was arrived at and just states that it was because the bill of costs was unopposed.
25. Going by the schedule, it is this courts considered view that it is evident that there was an error as to principle as the Deputy Registrar incorrectly came up with the total figure and that the amount awarded is found to be manifestly excessive and justifies and warrants interference by this Court.



## **Findings and Determination**

26. In the light of the foregoing this court makes the following findings and determinations;
- i. The application to enlarge time is found to have merit and is hereby allowed;
  - ii. This court hereby enlarges the time within which the reference challenging the Ruling delivered by the Taxing Master; The reference is hereby deemed as having been properly filed and served within time;
  - iii. The taxing masters' decision is hereby set aside;
  - iv. The Bill of Costs is hereby remitted back for taxation before a different taxing master upon the Applicants/Clients being granted an opportunity to respond to the same.
  - v. There shall be no order as to costs.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 18<sup>TH</sup> DAY OF AUGUST, 2023.**

**HON. A. MSHILA**

**JUDGE**

In The Presence Of

Mourice – Court Assistant

Wairimu -holding brief for Muchiri for Applicant/Client

Ireri – Respondent/Advocate

