



Gathinji v James Aggrey Mwamu t/a Mwamu & Company Advocates (Miscellaneous Civil Application E059 of 2023) [2023] KEHC 22861 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E059 OF 2023
RE ABURILI, J
SEPTEMBER 29, 2023**

BETWEEN

NDUNG’U GATHINJI APPLICANT

AND

**JAMES AGGREY MWAMU T/A MWAMU & COMPANY
ADVOCATES RESPONDENT**

RULING

1. The genesis of this matter is that the applicant Ndung’u Gathinji was represented by the Respondent Advocate James Aggrey Mwamu in a criminal matter. The applicant did not settle the Advocate’s fees. The Advocate filed his advocate/client bill of costs vide HC Misc. Application No. 29 of 2020.
2. The client objected to the taxation of the said Bill of Costs dated 24th January 2020 on the ground that there was no retainer.
3. Vide a Ruling delivered on 8th November 2022 by F. A. Ochieng J (as he then was), the court found that there was retainer and proceeded to dismiss the client’s application dated 11th December 2020 with costs.
4. The advocate then set down the said bill of costs dated 24th January 2020 for taxation on several occasions and the same was finally taxed on 24th January 2023 and a ruling delivered on 28th March 2023 by Hon. Gloria Barasah, the Deputy Registrar of this court.
5. It is that Ruling on taxation which gave rise to this application dated 17th May 2023 wherein the applicant client seeks orders for setting aside of the taxation and certificate of costs dated 5th April 2023.
6. The grounds upon which the application is predicated are that the applicant/client was never served with the notice of taxation which was allegedly send to his advocate’s email address but which email the advocate denies ever receiving.



7. The advocate for the applicant swore an affidavit and a further affidavit in which he asserts that he knew of the taxation in issue when on 5th April 2023, he was served with the certificate of costs dated the same day for Kshs.2,889,096 being the advocate/client bill of costs.
8. He denied ever receiving the Notice of taxation in respect of the taxation which took place on 28th March 2023 nor receiving a ruling Notice notifying them of the Ruling in respect of the said Bill of Costs as required by Rule 13(2) of the *Advocates Remuneration Order*; which stipulate that in taxing an advocate/client bill of costs, due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend.
9. That the advocates for the applicant/client did not attend the taxation because they were never served with of taxation and that despite filing notice of objection to the said taxation, by way of letter dated 11th April 2023 requesting for reasons, the taxing master never responded to the same.
10. The said applicant's advocate, Mr. Phillip Nyachoti also swore a further affidavit in response to the Replying affidavit sworn by James Aggrey Mwamu on 25th May 2023. In the Respondent/Advocate's Replying affidavit, he deposes that on 12th October 2012 (sic), the 'Respondent' was served with a bill of costs as per the attached email and that after the application by the applicant herein seeking to strike out the bill of costs was dismissed, after the applicant failed to file submissions, the Respondent served the applicant with a Ruling as per annexure JAM 8 copy of order and return of service. The Respondent also annexed JAM 9 copy of the taxation Notice and affidavit of service showing that the applicant's counsel was on 18th December 2022 at 9.55pm send via email, a taxation notice due on 20th December 2022, 2 days away, send to admin@nyachoti.com and that after taxation, the court fixed 28th March 2023 for a Ruling and delivered the Ruling on taxation and issued the certificate of costs which is under challenge.
11. According to the Respondent, the substance of the bill of costs has not been challenged hence this application is intended to delay justice, is brought in bad faith, bereft of truth, is misconceived in law, lacks merit and aims at wasting the precious court's time hence it should be dismissed with costs.
12. Further that the Respondent will suffer serious prejudice if the application is allowed.
13. Vide a further affidavit filed on 9th June 2023 and sworn by Phillip Nyachoti Advocate before he handed over the file to Muma Kanjama & Company Advocates to litigate on behalf of the applicant, counsel deposed that to the best of his knowledge, his firm's IT department had informed him that the email which was sent on 18th December 2022 at 9.55pm on a Sunday was not received.
14. Further that in any event, 18th December 2022 was a Sunday and taxation was to take place on 20th December 2023 a Tuesday on which date his office has closed for Christmas holiday. In addition, that 2 days' notice was not sufficient notice.
15. Parties filed written submissions to support of their respective pleaded positions and relied on various authorities which I have read and considered in reaching my findings herein and decision.
16. In brief, the applicant's counsel in their submissions dated 22nd June 2023 supported by various statutory and judicial authorities submitted reiterating the prayers, grounds and supporting as well as further affidavit by Mr. Nyachoti Advocate. Counsel reiterated the principles for setting aside the decision of the taxing master as stipulated in various decisions namely, *Premchand Raichand Limited & Another v Quarry Services of EA Limited & Another* (1972) EA 162; *First American Bank of Kenya v Shab & Others* (2002) EZ 64 and *Joreth Limited v Kigano & Associates* (2002) 1 EA 92.



17. On assertion that there was an error of principle, it was submitted that the applicant was denied an opportunity to participate if the taxation, by the Respondents failure to serve the applicant with taxation Notice and the Ruling Notice thereby denying him audience in the taxation proceedings.
18. Reliance was placed on the case of [*Kamunyori & Company Advocates v Development Bank of Kenya Limited*](#) (2015) eKLR on what an error of principle is.
19. Further reliance was placed on the case of [*Kanu National Election Board & 2 Others v Salah Yakub Farah*](#) (2018) eKLR where the court held inter alia that disregard of express provisions of the law is an error of principle and a submission made that denial of a hearing is an error of principle. Further submission was that the deposition by Mr. Nyachoti Advocate that he never received the taxation notice were never controverted. Counsel maintained that failure to give audience to the applicant amounted to a miscarriage of justice as the applicant was not enabled to participate in the taxation to defend his interests, which was in violation of paragraph 13(2) of the [*Advocates Remuneration Order*](#) which requires that Notice of Taxation shall be given to both parties and both shall be entitled to attend and be heard.
20. Further reliance was placed on Article 50(1) of the [*Constitution*](#) on the right to be heard before any court or tribunal.
21. The applicant further submitted that in the event that the taxation Notice was properly served, then it should consider the taxation proceedings to have been conducted exparte and proceed to set them aside as was stated in various cases including [*CMC Holdings Ltd v Nzioki*](#) (2004) KLR 173 cited in [*Mureithi Charles & Another v Jacob Atina Nyagesuka*](#) (2022) eKLR, calling upon court to exercise discretion to set aside exparte orders to ensure that the litigant does not suffer injustice or hardship as a result of and excusable mistake or error hence the exparte taxation carried out should be set aside, considering the lack of participation in the taxation of the advocate/client bill of costs on 28th March 2023 as non attendance by his counsel should be taken to be due to an excusable mistake or error due to the Respondent's defective service and or the applicant's former advocates.
22. Counsel argued that mistake of counsel ought not to be visited upon the client as was held in [*Patrick Maina Mwangi v Waweru Peter*](#) (2015) eKLR. Counsel for the applicant urged this court to consider the overriding objective which favours the applicant being granted an opportunity to participate in a fresh taxation of the Bill of costs dated 24th January 2020 by setting aside the impugned certificate of costs dated 5th April 2023.
23. He urged the court to grant the orders sought with costs to be borne by the Respondent/Advocate.
24. On the part of the Respondent/Advocate, it was submitted that the applicant was properly served with the Notice of Taxation and a Ruling Notice as required by Rule 13(2) of the [*Advocates Remuneration Order*](#). The Respondent further submitted that the service by email on a Sunday at 9.55pm was in accordance with the Electronic Case Management Practice Directions 2020, as reproduced, Rule 13 thereof. Counsel relied on [*Slok Construction Ltd v Erick Odhiambo Odongo*](#) (2022) eKLR where the court interpreted Section 57(b) of the [*Interpretation and General Provisions Act*](#) on computation of time.
25. On closure of office of the applicant's counsel for Christmas holidays, it was submitted that such closure did not bar the court from discharging its mandates as the High Court was in session, considering Rule 2(2) (b) of the [*High Court Practice & Procedure Rules*](#) on recess and Section 10 of the [*Judicature Act*](#) on Christmas vacation commencing 21st December and terminating on 13th January.



26. On whether the Ruling on taxation and certificate of costs should be set aside, it was submitted that the applicant's attempt to have the bill of costs struck out for want of retainer was dismissed and that the application does not meet the principles espoused.
27. He cited *Premchand Raichand Ltd & another v Quarry Services of EA Limited (supra)* and the *First American Bank of Kenya v Shah & another* and argued in contention that the applicant has not challenged any item of the bill of costs as taxed and that the certificate of costs has not been set aside, it should not be stayed as it is final.

Determination

28. I have considered the Chamber Summons filed by the applicant, the grounds, supporting and further affidavit as well as the Replying affidavit and the respective parties written submissions. The main issue is whether the application has merit.
29. From the onset, it is clear to this court, from the pleadings and affidavits that the applicant is challenging the taxation and certificate of costs on account that he had no notice of the date of taxation. In the alternative, he asserts that the Notice as issued was not received by his former advocates and that even if it was received, it was too short.
30. Additionally, the applicant's then advocate on record deposes that at the time the Notice of taxation was allegedly served 2 days to the date of taxation, which Notice was not received, his office had closed on 15th December 2022 for Christmas Holidays hence he was not able to attend to the taxation of advocate/client bill of costs which was done *ex parte* thereby denying him the opportunity to be heard.
31. On the part of the Respondent advocate, he deposes in contention that he served the Notice of Taxation on 18th December 2022 as per his affidavit of service by email upon the client's counsel. He concedes that the Notice was served on a Sunday at 9.55pm for taxation on 20th December 2023 and contends that service by electronic means is lawful.
32. There is however no contention on the lawfulness of service of Notice by email. The conduct of taxation of advocate/client bills of costs is governed by the *Advocates Remuneration Order*.
33. The taxing master is only empowered to tax the bill of costs or to adjourn the matter for taxation on another date. In addition, under Rule 75 of the *Advocates Remuneration Order*, the taxing master has power to proceed to tax the bill of costs *ex parte* in default of appearance of either or both parties or their advocates and to limit or extend the time for any proceeding before him and for proper cause, adjourn the hearing of any taxation from time to time.
34. Upon taxing the bill of costs, the taxing officer issues a certificate of taxation under Rule 51(2) which certificate is final, as to the amount of costs covered unless it is otherwise set aside by the court. Thereafter, the court enters judgment for the certified sum due.
35. However, where the Respondent contests service of notice of taxation and had intended to participate in the taxation but was not notified, nothing stops the court from hearing the Respondent on the contest.
36. In this case, the applicant claims that his counsel was not served. His counsel deposes that he never received the email send to his address on 18th December 2022 at 9.55pm, which was 2 days to the taxation of the Bill of Costs. He also deposes that by that time, his office had closed for Christmas holidays.



37. I observe that the date for taxation was taken by the Respondent/Advocates clerk one, Elijah in the Registry on 22nd November 2022. The Registry gave him 20th December 2022 for taxation and directed him to issue Notice of Taxation to the applicant's counsel.
38. On 20th December 2022, the court record shows that the file was placed before Hon. S. N. Telewa SPM and a note was made indicating that the Deputy Registrar was away on official duties, hence the file was set for mention on 24th January 2023.
39. On latter date, the file was before Hon. G. N. Barasah, Deputy Registrar of this court and only the Respondent's counsel was present and submitted that the matter was for taxation of bill of costs dated 24th October 2020 and prayed for the same to be taxed saying they had filed submissions.
40. The Deputy Registrar then fixed 28th March 2023 for a Ruling and on 28th March 2023, she delivered her unsigned handwritten Ruling.
41. I have perused the entire court file in Misc. No. 29 of 2020 and apart from the taxation Notice dated 30th November 2022 which was send to the applicant's counsel's email on 18th December 2022 at 9.55pm, showing that the taxation was due for 20th December 2022, on which latter date the Deputy Registrar or Taxing Master was absent on official duties, there is no other notice of taxation issued to the applicant's counsel after the aborted taxation of 20th December 2022. This is despite the Hon. SRM, Hon. S. N. Telewa directing that the matter be mentioned on 24th January 2023.
42. In addition to failing to serve a mention notice upon the applicant's counsel, for 24th January 2023, this court observes that despite 24th January 2023 being a mention dated and not a date for taxation, and the taxing master without establishing whether the applicant's counsel had been served for that date to appear, as he was absent, proceeded to tax the bill exparte and set the date for Ruling on 28th March 2023.
43. In my humble view, there was an error of principle on the part of the taxing master in proceeding to tax the bill in the absence of the applicant's counsel on 24th January 2023, a date which was meant for mention and not for taxation and which date the applicant's counsel was not made aware of.
44. Even after setting the Ruling date for 28th March 2023, this court observes that no Notice of Ruling date was served on the applicant's counsel.
45. On 28th March 2023, the Taxing Master delivered her Ruling in the form of taxed costs without any reasons for reaching the decision that she did. Regrettably, she did not sign the said Ruling which is only dated and delivered. Failure to sign the Ruling is a fatal error amenable for rendering the Ruling fatally defective. It follows that although both parties' counsel have belaboured so much on the 20th December 2022, yet the bill of costs was never taxed on the above date, I am satisfied that this application by the client has merit albeit for different reasons from those advanced by his counsel. I find that the Advocate/Client Bill of Costs was taxed exparte and without notice to the applicant/ client's counsel. I further find that the ruling on taxation is a nullity as it was not signed by the Deputy Registrar.
46. In the end, I make the following orders:-
 - i. The Taxation of the Advocate/Client Bill of Costs dated 24th January 2020 and Ruling of 28th March 2023 are hereby set aside and vacated.
 - ii. The Certificate of Costs dated 5th April 2023 is hereby vacated and set aside.
 - iii. The Bill of Costs dated 24th January 2020 is hereby remitted back to the Deputy Registrar, Hon. Gloria N. Barasah for taxation afresh.



- iv. As the errors on record were principally occasioned by the taxing master, I order that each party shall bear their own costs of the application dated 10th May 2023.
- v. Parties to appear before the Deputy Registrar on 12/10/2023 for taking of directions on the disposal of the advocate/client bill of costs dated 24th January 2020 and filed in court on 10th February 2020.

47. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF SEPTEMBER, 2023

R. E. ABURILI

JUDGE

