



REPUBLIC OF KENYA



KENYA LAW
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**Ngesa v Odhiambo (Miscellaneous Civil Cause E194 of 2022)
[2023] KEHC 25014 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 25014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL CAUSE E194 OF 2022
MS SHARIFF, J
OCTOBER 27, 2023**

BETWEEN

JOSHUA NGESA APPLICANT

AND

DOLROSE ACHIENG ODHIAMBO RESPONDENT

RULING

1. Vide an application dated 9th December, 2022, brought under the provisions of orders 9 rule 9, 10 rule 11, 40 rules 1 and 2, 42 rule 6 of the Civil Procedure Rules A, 1B, 3, 3A and 63(e) of the Civil Procedure Act. Applicant sought the following reliefs as against the Respondent;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Spent.
 - e. The honourable court be pleased to extend time to file a notice of objection against the decision of the taxing master.
 - f. The notice of objection dated 7th December, 2022 and filed herein be admitted and deemed as duly filed.
 - g. In the alternative and without prejudice to the foregoing, this honourable court be pleased to set aside the certificate of taxation and proceed to issue an order for re-taxation.
 - h. The costs of the application be bore by the Respondent.



2. The Applicant swore an affidavit in support of the application and deposed that he had received a call from an individual whom he later learnt was an auctioneer who was desirous of proclaiming his motor vehicle following taxation proceedings, which he was not privy to. He stated that the taxation had been conducted 3 years after the determination of the parent suit.
3. Upon scheduling a meeting with the auctioneer, he learnt of the said taxation and of a certificate of costs issued by the taxing master.
4. The Applicant deposed further that subsequent thereto he endeavored to trace the court file at the registry without avail and in the process the limitation period for lodging a reference against the decision lapsed. He is apprehensive that if the orders sought herein are not granted, he will be condemned unheard as neither his advocates nor himself were ever served with the notice of taxation and subsequently with the certificate of costs.
5. The Respondent filed a replying affidavit sworn by Dorcas Akinyi Oluoch advocate who deposed that the bill of costs dated 16/10/2019 was filed on 3/2/2021 and a taxation date of 18/2/2021 served upon the Applicant's advocates Messrs Mose, Mose & Milimo Advocates. That the said bill was later assessed by consent of parties on 3/3/2021 in the sum of Kshs.130,154/-. Further that given that the Applicant had all along been represented by M/S Mose, Mose & Milimo Advocates, service upon his advocates sufficed for all intents and purposes.
6. The Respondent states that the Applicant's insurer M/s Monarch Insurance paid the Respondent a sum of Kshs.161,726/- leaving out costs. That the costs having been assessed by consent, the same cannot be set aside on grounds raised by the Applicant.
7. The parties were directed to file written submissions on the application. Only the Applicant complied.
8. On the issue of whether the court should enlarge time within which to file reference, the Applicant submits that when the insurer paid the award, he was not aware of subsequent proceedings. That if indeed the advocate was informed, the said advocate did not inform him. He thus posits that under order 11 of the [*Advocates Remuneration Order*](#) and the authorities in [*County Executive of Kisumu v County Government of Kisumu & 8 others*](#), (2017) eKLR and [*Lucy Bosire v Kebanicha Div. Land Disputes Tribunal & 2 others*](#) (2013) eKLR, the court is empowered to enlarge time to allow him file the reference.
9. On whether the Applicant has explained the delay in filing notice of objection, it is argued that after the determination of the parent suit, the trial court file could not be traced from the registry, that if the bill was served on his erstwhile advocates, the advocate did not inform him. Further that he had assumed that once the sum was paid by the insurer, the matter was fully settled. He also argues that the delay in filing the application was not inordinate. In support of the assertion, he cites [*County Executive of Kisumu \(supra\)*](#) and [*Shah and Parekh v Kenindia Assurance Company Limited*](#) (2021) eKLR.

Analysis and determination

10. Upon consideration of this application, the issue that emerges for consideration is whether this application conforms with rule 11 of the [*Advocates Remuneration Order*](#) which rule provides;
 - (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.



- (2) 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 the 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.
11. Although the issue of non-conformity was not raised by any party, I find it a core issue that goes to the root of the matter and worthy consideration in priority.
12. Going back to the application, the same is expressed to be brought pursuant to rule 11(1) & (2) of the *Advocates Remuneration Order* as well as section 1A, 1B & 3A of the *Civil Procedure Rules* *inter alia*. The Rule provides that the manner of approaching the court is by way of Chamber Summons. It has been held that whenever there is a clear procedure provided by statute, that procedure ought to be taken for instance in *Speaker of National Assembly v Njenga Karume* [2008] 1 KLR 425, the court held that;
- “Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”
13. Given that the Rule provides that the mode of approaching the court is by way of Chamber Summons, I find that the procedure adopted by the Applicant offends mandatory provisions of the *Advocates Remuneration Order* and the application is therefore bad in law.
14. The above finding notwithstanding I will delve into the substantive prayers. The advocates/respondent had adduced proof of the fact that the Applicant herein had all along been duly represented by M/s. Mose, Mose & Milimo Advocates who entered into a consent on the costs wherefore the pleadings and submissions of the Applicant to the effect that he had no notice of the taxation is but an outright lie. The Applicant has therefore approached this court with tainted hands. Additionally, given that the impugned costs were fixed by consent of parties this court cannot set aside that consent order as the same imposes contractual obligations on the parties and can only be impeached on ground of fraud, collusion or where the consent was against the policy of the court.
15. The court of appeal had the occasion of considering a similar application in the case of *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR, and it rendered itself as follows:
- “A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”
16. Author Setton on Judgments and Orders (7th Edition), Vol.1 pg 124 states that:
- “Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... it cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”



17. The Applicant has not adduced any shred of evidence to demonstrate that the impugned consent order is vitiated by fraud, collusion or is against court policy wherefore he has not established any legal basis for seeking to file a reference out of time. The advocate/respondent has already acted on the consent and the applicant is thus estopped from avoiding performance of his part of that consent.
18. On the balance I find that the application dated 9th December, 2022 is devoid of merit and it is hereby dismissed with costs to the Respondent assessed at Ksh.8000.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 27TH DAY OF OCTOBER, 2023.

MWANAISHA S. SHARIFF

JUDGE

