



**Kenyariri & Associates Advocates v Kenyariri (Miscellaneous Application E002 of 2021)
[2022] KEHC 27 (KLR) (Commercial and Tax) (28 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 27 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E002 OF 2021**

**A MABEYA, J
JANUARY 28, 2022**

BETWEEN

KENYARIRI & ASSOCIATES ADVOCATES APPLICANT

AND

JAMES BICHAGE KENYARIRI RESPONDENT

RULING

1. This is a ruling an application dated 13/8/2021 brought inter-alia under section 51(2) of the *Advocates Act*. The applicant sought orders for judgment against the respondent for Kshs. 507,576.15 in terms of the Certificate of Taxation issued on 11/8/2021.
2. The grounds are that on 9/7/2021, the applicant's bill of costs for professional fees was taxed at Kshs. 507,576.15. Consequently, a certificate of taxation was issued on 11/8/2021. That the certificate of taxation is final pursuant to section 51(2) of the *Advocates Act* and that the respondent has not shown any commitment towards the payment of the certified costs.
3. In opposition, the respondent filed an application dated 31/8/2021. That application was brought inter-alia under section 63E of the *Civil Procedure Act* and Order 12 Rule 7 of the *Civil Procedure Rules*.
4. It sought the setting aside of the order of 9/7/2021 and to have the bill of costs dated 4/1/2021 reinstated to allow the same to be heard on merit. He respondent contended that the applicant had not served him with the hearing notice for the bill of costs. That the bill of costs was taxed in his absence and that his replying affidavit filed in opposition to the bill of costs was not considered by the taxing officer.
5. Via a preliminary objection dated 6/10/2021, the applicant objected to the application on a point of law. He contended that the application was an abuse of the court process as there was no reference



before court to challenge the taxing master's decision. and that the law empowers the court to enter judgment as prayed in the application dated 13/8/2021.

6. The Court has considered the representations by both parties. Section 51(2) of the *Advocates Act* states that: -

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

7. Vide a ruling dated 9/7/2021, the deputy registrar rendered her ruling on the applicant's bill of costs, taxing the same at Kshs.507,576.15. A certificate of taxation was issued on 11/8/2021 to that effect.
8. In that ruling at paragraph 1, the taxing officer noted that the respondent had not filed any submissions or objections to the bill of costs. However, a replying affidavit by the respondent opposing the bill of costs was uploaded on the Judiciary's e-filing platform on 25/1/2021. The Court has seen that affidavit. It sets out the challenge the respondent has on the bill of costs.
9. I am alive to the fact that the proper way to challenge a taxation is by way of reference. The applicant's application is opposed by an application to set aside the taxation on the basis of non-attendance. I am alive to the fact that the respondent is a lay person who was neither represented before the taxing master or before me.
10. In that regard, he may not be able to understand the procedures attendant to matters taxation. The applicant who is an advocate did not deny the contents of the supporting affidavit to the effect that he did not serve the respondent with a taxation notice. The matter was taxed in his absence. Although there is a Taxation Notice on record dated 6/1/2021 for taxation on 27/1/2021, the bill of costs was not taxed then but on 9/7/2021.
11. Before me are two competing interests, the first is that of the applicant that he has a Certificate of Costs which has not been challenged as per the law provided, whilst the second is that of the respondent that he has been condemned unheard. The right to be heard is sacrosanct. It cannot be sacrificed at the altar of technicality.
12. Had the taxing officer considered the respondent's replying affidavit to the taxation, it would have been difficult for me to heed to the respondent's concerns. Now that it is crystal clear that the taxing officer admittedly failed to consider that replying affidavit, the respondent was heavily prejudiced by failure on the part of the applicant to serve him with the taxation notice. One of the issues raised is that whilst the claim was for Kshs.1.2 million, the bill of costs was based on a claim for Kshs.12.4 million.
13. Obviously, that must prick the conscience of the Court and invite the provisions of Article 159(2)(d) of the *Constitution* to the fact that, though not properly challenged, the taxation cannot be left to stand.
14. Accordingly, the Court sets aside the Certificate of Taxation dated 11/8/2021 and directs that the bill of costs dated 4/1/2021 be taxed afresh before a different taxing officer other than Hon. S. Githongori.
15. In this regard, the application dated 13/8/2021 is struck out and the application dated 31/8/2021 allowed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2022.



A. MABEYA, FCI Arb

JUDGE

