



REPUBLIC OF KENYA



KENYA LAW
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**Lubullelah & Associates Advocates v Okemwa (Miscellaneous Application
44 of 2017) [2022] KEHC 401 (KLR) (Civ) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION 44 OF 2017

CW MEOLI, J

APRIL 28, 2022

BETWEEN

LUBULLELAH & ASSOCIATES ADVOCATES APPLICANT

AND

JOHN ALLAN OKEMWA RESPONDENT

RULING

1. The live prayers for determination in the motion dated 16th June, 2021 filed by John Allan Okemwa (hereafter the Applicant) are seeking orders;
.... “3. That this honorable court be pleased to grant an extension of time to the Applicant to file a reference application to the certificate of taxation issued on 28th April, 2021.
4. That this honorable court be pleased to deem the Applicant notice of reference dated 14th June 2021 properly filed albeit out of time.” (sic).
2. The motion is expressed to be brought pursuant to Article 48 & 50(1) of the *Constitution of Kenya 2010*, Paragraph 11 of the *Advocates Remuneration Order*, Section 3A of the *Civil Procedure Act*, Order 50 Rule 2 & Order 51 of the Civil Procedure Rules. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the Applicant. To the effect that the Advocate-Client Bill of costs proceeded *exparte* for taxation and a ruling delivered, and a certificate of taxation issued on 28th April, 2021. He deposes that he only learned of the matter on 21st May, 2021 when Lubullelah & Associates Advocates (hereafter the Respondent) called with regard to service upon him of the motion seeking to enter judgment, based on the certificate of taxation. That by the time he received the motion and certificate of costs period within which to challenge the certificate of taxation by way of reference had lapsed. He goes on to assert that he was condemned unheard and that he is desirous of defending the Advocate-Client Bill of costs so that the matter can be determined on merit. Finally, he asserts that



- the motion was timeously filed and the Respondent will not suffer any prejudice if the orders sought are granted.
3. The motion is opposed through the replying affidavit of Eugene Lubale Lubullelah, a partner at the Respondent firm of advocates. He contends that the motion is an abuse of the court process, made in bad faith, misconceived, and bad in law. Counsel swears that the prayer for extension of time to file a reference to the bill of costs is untenable as it is not grounded on any provision of law and referring to the evidence of service on record, contends that the Applicant was duly served with taxation notices on 30th March 2017 and 29th January, 2018 but failed to attend court when the matter up for taxation on 14th June, 2017 and 31st May 2018. That in opting not to attend court despite service, the Applicant had waived his right to be heard. He views the motion as intended to delay the matter and to frustrate the Respondent. In conclusion he deposes that the bill of costs was drawn to scale hence the Applicants objection is untenable and the court ought to reject the motion as it is devoid of merit.
 4. By a supplementary affidavit, the Applicant disputed service of the Respondent's bill of costs dated 18th November, 2016 and whether the process server who allegedly effected service was a licensed process server in the year 2017. He went on to contend that the postal address P.O Box 253-00502 through which the process server purportedly effected service is not his and no attempt had been made to effect personal service. He took issue with the contents of the affidavits of service asserting that they were vague and deficient of pertinent information. He contended that he had never met the process server until the 21st May, 2021 when he was served with the Respondent's motion seeking to enter judgment on the taxed sums
 5. The motion was canvassed through written submissions. Counsel for the Applicant anchored his submission on the provisions of Article 48 of the Constitution, Section 49(b) of the *Advocates Act*, Order 5 Rule 15(1) of the *Civil Procedure Rules* in arguing that the service of the bill of costs and hearing notices was not proper. Relying on the decisions in *Marvel Kisaka Wandabwa v Steadfast Capital LLP* [2019] eKLR and *James Kanyitta Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR counsel asserted that the resultant certificate of taxation is irregular for want of proper service and the court is obligated to set aside and vacate the said certificate of costs. Concerning extension of time to file reference counsel relied on Paragraph 11(4) of the Advocates Remuneration Order and the decision in *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR in submitting that the Applicant had moved expeditiously to file the instant motion and had offered satisfactory explanations for his failure to file the reference within time. Counsel urged the court to exercise its discretion and allow the motion as prayed with costs in the cause.
 6. The Respondent's counsel for his part submitted that the motion bad in law. He cited Paragraph 11(1) & (4) of the *Advocates Remuneration Order* and the decision in *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR. Pointing out that the instant motion was served upon the Respondent on 17th June, 2021 long after taxation and issuance of the certificate of costs he asserted that the Applicant had failed to explain the inordinate delay. On service of the bill of cost and taxation notice counsel relied the provisions of Order 5 Rule 15(1) of the Civil Procedure Rules, the decision in *Shadrack Arap Baiywo v Bodi Bach* KSM CA Civil Appeal No. 122 of 1986, *Shah v Mbogo* (1967) E.A 166 and James Kanyitta Nderitu (Supra) in asserting that the affidavits of service were in drawn in compliance with statute and thus the certificate of taxation was regular, as proper service of the Bill of Costs and taxation notices had been effected. Citing several decisions including *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd* [2007] eKLR and *Muchanga Investments Limited v safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No. 25 of 2002 counsel contended that the Applicant's deliberate failure to attend court amounted to waiving



his right to be heard, and his present motion is an abuse of the process of the court. The court was asked to dismiss the motion with costs.

7. The Court has considered the material canvassed in respect of the motion. The key theme recurring in the parties' respective affidavits and submissions is the question of service of the bill of costs and hearing notices in respect of the taxation proceedings upon the Applicant. Indeed that question is the basis of the Applicant's present motion. For that reason, the taxing master who conducted proceedings in respect of the bill of costs, rather than this Court, is best suited to deal with the question whether the Applicant was indeed properly served. Consequently, it is my considered view that the Applicant ought to have first sought to set aside the ex parte proceedings before the taxing master that resulted in the impugned certificate of taxed costs. In the circumstances, the court will strike out the motion dated 16th June 2021 with costs to the Respondent. The Applicant may, if he deems it fit, apply before the taxing master to set aside the taxation proceedings regarding which he complains to have had no notice.

DELIVERED AND SIGNED ELECTRONICALLY IN NAIROBI ON THIS 28TH DAY OF APRIL 2022

C. MEOLI

JUDGE

In the presence of:

For the Advocate /Respondent:

For the Respondent/Applicant

C/A: Carol

