Kaibati v Mwenda (Civil Appeal 75 of 2019) [2022] KEHC 3089 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEHC 3089 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL 75 OF 2019

EM MURIITHI, J

JUNE 30, 2022

BETWEEN

THARUNI THAMBU KAIBATI ..... APPELLANT

AND

ANTONY MWENDA ..... RESPONDENT

RULING

1. This is a Ruling on an application under certificate of urgency dated 6/11/2021 by Antony Mwenda, the Respondent herein, brought pursuant to Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Order 10 Rule 11, Order 51 Rule 1 of the *Civil Procedure Rules* and Article 159 of *the Constitution* for specific relief that:

    1. Spent

    2. Spent

    3. Spent

    4. That the Ruling and order on taxation of the bill of costs by the Appellant dated 19/4/2021 be set aside.

    5. That costs of the application be provided for.

2. The application is premised on the grounds on the face of the application and the supporting affidavit sworn by Mwirigi Kaburu, the Respondent's Advocate sworn on even date. He acknowledges that he was served with a bill of costs on 1/4/2021 without any attached notice of taxation. Since he did not know and/or was not informed by the Appellant when the same would be taxed, he filed away the bill of costs. On 3/11/2021, his client reported to him that his parent's properties had been attached on 1/11/2021, as shown by the annexed proclamation notice. When he visited the registry on 4/11/2021, he learnt with utter dismay that the bill of costs had been taxed in his absence. He avers that it appears from the affidavit of service that the bill was taxed in the morning before he was served with it in the

afternoon at 2.50 pm. He avers that since he was condemned unheard concerning the taxation of the bill of costs dated 7/8/2020, the ruling of 19/4/2021 ought to be set aside as a matter of right.

3. The Appellant's counsel filed grounds of opposition to the application on 17/11/2021. He avers that he served the Respondent's counsel with the Bill of Costs on 1/4/2021. When no objection and/or opposition was forthcoming from the Respondent's counsel, the taxing master taxed the bill at Ksh.84,530, which decision was duly communicated to the Respondent's counsel on 21/4/2021. He avers that the Respondent's counsel knew as far back as 21/4/2021 that his client was to pay Ksh.84,530 but he remained indolent until 6/11/2021 when they filed the application, and thus there is an inordinate delay of approximately 7 months.

Submissions

4. The Respondent in his submissions filed on 29/11/2021 urged that there were glaring procedural errors and legal gaps on the face of the record that led to the ruling of 19/4/2021, as the Respondent was served with the bill way after the ruling date had been reserved. He urged the court to ignore the grounds of opposition together with the documents annexed therein, as they raised factual issues which was irregular and contrary to the law. He submitted that there was no opposition to the application as the grounds of opposition did not answer the issue at hand. He submitted that there was no delay in filing the application, as the proclamation was done on 1/11/2021 and the application was filed on 8/11/2021. He concluded that his application was merited and urged the court to allow it with costs. He relied on *East African Power Management Limited v Stephens Kithi Ngombo T/A Steve Kithi & Company Advocates*(2012)eKLR, *Andrew Achoki Mogaka v Samson Nyambati Nyamweya & Anor*(2007)eKLR and *Machiri Limited v China Wu Yi Company Ltd*(2021)eKLR in support of his submissions.

5. The Appellant in his submissions filed on 7/12/2021 urged that the Respondent's application was defective in form and substance as he did not follow the clear procedure for redress as laid down under Rule 11 of the *Advocates (Remuneration) Order*, and relied on *Speaker of the National Assembly v Njenga Karume* (1992)eKLR to support that argument. He submitted that there was inordinate delay in filing the application, which delay was inexcusable, and supported that argument with *Republic v Kenyatta University & Anor Ex Parte Wellington Kihato Wamburu* (2018) eKLR and T*wiga Motor Limited v Hon. Dalmas Otieno Onyango*(2015)eKLR. He submitted that the Court would only interfere with the decision of a taxing master where there exists an error in law or in principle, as was held by the Court of Appeal in *Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board* (2005) eKLR and urged the court to dismiss the application dated 6/11/2021 with costs.

Analysis and Determination

6. I have considered the application, the arguments by the parties as well as the authorities citied therein. The Appellant chose to oppose the application vide grounds of opposition where he averred factual matters, which ought, properly, to have been addressed through a Replying Affidavit. In P*eter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR (Maureen Odero J.) stated that

> "As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations

made on oath....Failure to file a Replying Affidavit can only mean that those facts are admitted."

7. Further in the case of *Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited* [2010] eKLR (Asike-Makhandia J (as he then was) observed as follows:- "The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant. In this regard, the court held in Kipyator Nicholas Kiprono Biwott v George Mbuguss and Kalamka Ltd Civil case no. 2143 of 199 ".....From the facts and the law I have analyzed in this case, I do find the Defendants have no defence to this suit.....having filed no replying affidavit to rebut the averments in the plaintiffs affidavit in support of the application. I therefore have no alternative but to strike out paragraphs 3,4,5,6 and 10 of the defence and enter judgment for the plaintiffs on liability..." Further the court concluded that failure to file a replying affidavit amounts to an admission of facts on the applicant's application. This was the holding in the case of Crown Berger Kenya Ltd v Kalpech Vasuder Devan and another civil case no. 246 of 2006 (UR)."

8. Be that as it may, this court will determine the application purely on its merits.

9. The singular issue for determination is whether the ruling and order on taxation of the bill of costs by the Appellant dated 19/4/2021 ought to be set aside.

Procedure for challenging taxations

10. The procedure for challenging the decision of a taxing master is provided under Section 51 of the *Advocate's Act* and Rule 11 of the Advocates (Remuneration) Order.

11. Section 51(2) of the *Advocates Act* provides 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."

12. Rule 11 of the *Advocates (Remuneration) Order* provides that, "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. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the object 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. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

13. I have noted the case of *Lubulellah & Associates Advocates v N. K. Brothers Limited* [2014] eKLR (J. Kamau J) where it was observed that:

> " The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment."

Right to be heard

14. It is respectfully agreed that the law is very clear on the procedure to be followed when challenging a decision of the taxing master properly exercised in regular proceedings. What is before this court is clearly not a reference or an application for extension of time to file a reference out of time but an application under Order 10 Rule 11 and Order 51 Rule 1 of the *Civil Procedure Rules*. But the complaint herein is also not against the taxation per se, but that the respondent was not heard on the taxation. As I understand it, it is a case of enforcement of the right to be heard under Article 50 (1) of *the Constitution*, rather than on the correctness of the taxing master's decision which ought to be challenged by way of reference under Rule 11 of the *Advocates' (Remuneration) Order*.

15. The Respondent contends that he was condemned unheard, because the the bill of costs was taxed ex parte for want of service of the notice of taxation. The record shows that on 1/4/2021, Mr. Sandi for the Appellant informed the court that the bill of costs has not been responded to despite having been duly served upon the Respondent. The court directed the Appellant to file an affidavit of service and reserved the ruling for 19/4/2021. That affidavit of service was filed by the Appellant on 6/4/2021.

16. From that affidavit of service, it is clear that service of the bill of costs dated 7/8/2020 was effected upon the Respondent's counsel on 1/4/2021 at around 2.50 pm. It is also clear that no notice of taxation and/or a hearing notice and/or a ruling notice was served upon the Respondent, thus the Respondent could not have known when the bill of costs was taxed, for him to lodge his objection in accordance with the *Advocates (Remuneration) Order.*

17. Had the issue herein been purely a matter of the merit of the taxation by the taxing Officer, this court would not have hesitated to dismiss the application for want of correct procedure for redress. But the question before the court is whether there was any valid taxation proceedings in the absence of hearing the respondent who had not been served with the necessary taxation notice as shown on the respondent's Affidavit of Service.

18. However, as the applicant was clearly not heard on the taxation of the Bill of Costs, the taxation certificate shall be set aside ex debito justitiae. There is an error of law and principle in proceedings with the hearing of the taxation without hearing the respondent on the taxation of the Bill of Costs where notice of taxation has not been given. Since *Craig v. Kanseen* [1943] 1 ALL ER 108 it is established that an order made ex parte without hearing a party, which is a nullity, shall be set aside ex debito justitiae.

19. In *James Kanyiita Nderitu & another v Marios Philotas Ghikas & anothe*r [2016] eKLR, the Kenya Court of Appeal while considering the setting aside of an irregular default judgment held as follows:

> " In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In

addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456)."

20. The Respondent/applicant was not heard before the decision on the taxation was taken. He is entitled to the setting aside of the order on taxation as a matter of right.

Orders

21. Accordingly, for the reason set out above, the Court grants the application dated 6/11/2021 as prayed.

22. Costs in the Cause.

Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF JUNE, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S B. G. Kariuki & Co. Advocates for the Appellant.

M/S Mwirigi Kaburu & Co. Advocates for the Respondent/Applicant.