



**Kimani Michuki Advocates v Lalji; Chimande Investments Limited
& another (Objector) (Miscellaneous Application E1245 of 2020)
[2022] KEHC 10384 (KLR) (Commercial and Tax) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E1245 OF 2020**

EC MWITA, J

JUNE 24, 2022

BETWEEN

KIMANI MICHUKI ADVOCATES DECREE HOLDER

AND

DIAMOND HASHAM LALJI JUDGMENT DEBTOR

AND

CHIMANDE INVESTMENTS LIMITED OBJECTOR

PREMIER FLOUR MILLS LTD OBJECTOR

RULING

1. This ruling disposes of two applications. The client's application by way of chamber summons dated November 23, 2021 (first application) and the objectors' application dated 13th January 2022 (second application).

First application

2. The first application has been brought under articles 159(2)(d) and 50 of the *Constitution*, Paragraph 11(1) (2) of the *Advocates Remuneration Order*; section 3A of the *Civil Procedure Act* and order 41 2 rule 6(1) *Civil Procedure Rules*. The application seeks leave to file an objection and reference out of time against the ruling of the taxing officer delivered on March 4, 2021. And that the bill of costs dated November 25, 2020 be remitted back to a taxing officer other than Hon. S. A. Opande for fresh taxation. In the alternative, the applicant wants this court to tax the advocates-client bill of costs dated 25th November 2020.



3. The application is based on the grounds on its face and the affidavit sworn by Diamond Hasham Lalji on November 24, 2021. The client's case as can be seen from the grounds and affidavit is that the bill of costs was taxed unopposed and instruction fee was determined on the wrong schedule and therefore a wrong principle was applied. According to the applicant, the taxing officer applied schedule 6(1)(a) instead of 6(1)(e) of the remuneration order; the advocate did not attach instruction fee to prove that he had instructions and that the taxing officer taxed the bill of costs based on erroneous or suspicious value of the subject matter.
4. The applicant asserted that the taxing officer further erred in allowing getting up fee when there was no denial of liability. The applicant further asserted that failure to attend taxation of the bill of costs was inadvertent due to a mistake of a former legal officer.

Advocate's response

5. The advocate filed a replying affidavit sworn by Alpha Gakunga on December 6, 2021 and a notice of preliminary objection dated December 6, 2021. The preliminary objection is grounded on the fact that: this Court lacks jurisdiction to hear and determine the application since judgment has already been entered herein (on November 22, 2021) and no notice of appeal has been filed against that Judgment; that the application offends rule 11 (1) and (2) of the Advocates Remuneration Order, thus it should be struck out.

Second application

6. The second application (objection) seeks lifting of attachment and continued retention of motor vehicle registration numbers KBY 317P and KAH 117S by the advocates after the advocate filed a notice of intention not to proceed with execution over the motor vehicles. The objectors also seek compensation for the loss occasioned by the illegal, unlawful and unjustified continued attachment of the motor vehicles.
7. The motion is premised on the grounds on its face and the supporting affidavit of Peter Nguyo Ndunda, the administration manager of the objectors. Mr Ndunda deposes that he was served with a notification of sale of movable property dated December 6, 2021 by Icon Auctioneers for motor vehicles registration numbers KBY 317P and KAH 117S. The objectors filed a notice of objection to the attachment of the motor vehicles. On February 11, 2022, the advocate filed a notice of intention not to proceed with execution or attachment dated February 7, 2022.
8. According to Mr. Ndunda, although the objectors have tried to engage the auctioneers and the advocate to have the vehicles released, the two have refused to release the motor vehicles. The objectors urge this court to allow their objection and grant the orders they seek to have the auctioneers release the motor vehicles.

Response

9. The advocate filed a replying affidavit sworn by Alpha Gakunga on February 7, 2022. It was deposed that during attachment, the client agreed to provide the motor vehicles as security for payment as he made arrangements for settlement of the decretal amount; that the motor vehicles were at all material times in possession of the client and the client misrepresented to the auctioneers to be the registered owner of the motor vehicles and that it was in fact the client who directed the auctioneers to where the motor vehicles were.
10. According to Mr. Gakunga, the 1st objector pleaded with the auctioneers to hold on to the motor vehicles as a sign of good faith pending discussions on settlement of the decretal amount. Mr, Gakunga



stated that although the client indicated willingness to settle the matter amicably, he did not respond to phone calls and or email. For those reasons, the advocate was constrained not to proceed with execution and attachment of the said motor vehicles.

Client's Submissions

11. The client filed written submissions dated 14th March 2022, urging the court to dismiss the preliminary objection and allow the application dated November 23, 2021. The client submitted that this Court has jurisdiction to hear its application.
12. Relying on *Moronge & Company Advocates (a firm) v Keya Airports Authority* [2012] eKLR and *Microsoft Mitsumi Computer Garage Ltd & another* (NRB HCCC No. 810/2001), the client argued that absence a Notice of Appeal does not warrant challenge to the court's jurisdiction. Reliance was placed on the decision in *Independent Electoral and Boundaries Commission vs John Omollo Nyakongo t/a H. R. Ganijee & Sons* [2020] eKLR for the argument that this court has power to enlarge time to file a reference and that such an application should be filed in the cause in which taxation was done.
13. Regarding the merit of the application, the client asserted that it had established the conditions for grant of stay under order 42 rule 6 of the Civil Procedure Rules, as well as the principles for enlargement of time under rule 11(4) of the Advocates Remuneration Order. The client argued that the bill of costs proceeded unopposed due to the mistake of one of his former legal officers.
14. The client further argued that allowing the bill of costs as taxed will occasion substantial loss as he would be required to settle the taxed costs which are inordinately high and excessive. The client maintained that the award on instruction fee was based on a wrong schedule that is, schedule 6 (1) (a), instead of schedule 6 (1) (e), which governs instruction fees on bankruptcy proceedings.
15. The client submitted that judgment was entered on November 22, 2021 while his application was filed on November 23, 2021 timeously and without delay. On security for costs, the client submitted that non provision of security at the time of filing the application is curable by the Court as it can issue conditional orders for security to be provided. Reliance was placed on *John Kinuthia Njoroge vs Marjorie Murigu Saidi* [2021] eKLR. The client argued that the advocate will not suffer any prejudiced as he is willing to pay the advocates fees subject to taxation based on the correct principles.

Advocates' submissions

16. The advocate filed written submissions dated February 7, 2022. The advocate submitted that the application is not procedural, is unmerited and is an abuse of the court process. The advocate contended that in spite of judgment having been entered on November 22, 2021, no appeal was filed against that judgment and that a notice of objection to taxation was also not filed as required under rule 11 (1) of the Advocates Remuneration Order. It is also on these grounds that the advocate challenged this court's jurisdiction to hear and determine the application.
17. The advocate further argued that the client has failed to sufficiently explain the inordinate delay in filing the application. According to the advocate, the taxing officer's ruling was delivered on 4th March 2021, while the matter was subsequently mentioned before this court on November 3, 2021 and November 9, 2021 and heard on November 2, 2021. The advocate faulted the client for failure to file a reference within time only to file the application after entry of judgment.
18. The advocate again argued that the law allows 14 days from the date of receipt of reasons for a party to file a reference against a decision on taxation. The advocate relied on *Nyakundi & Company Advocates v Kenyatta National Hospital Board* [2005] eKLR and *Twiga Motors Limited v Hon. Dalmas Otieno*



Anyango [2015] eKLR to that effect. The advocate further faulted the client for failing to attach a draft of copy of the reference and relied on Andrew Shisala Angalushi v Zephania K. Yego & Aginga Asiligwa Chanzu [2020] eKLR.

19. The advocate asserted that the client had not satisfied the conditions for granting stay pending appeal under order 42 rule 6 (2) of the Civil Procedure Rules. In particular, the client had not demonstrated the substantial loss likely to be suffered if stay was not granted. The advocate maintained that it is a successful law firm with financial ability to pay back the amount if the reference was successful. Reliance was placed on Congress Rental South Africa v Kenyatta International Convention Center; Co-operative Bank of Kenya Limited & another (Garnishee) [2019] eKLR and Antoine Ndiaye v African Virtual University [2015] eKLR.
20. The advocate contended that the client had also failed to offer security for the due performance of the orders as may ultimately be binding on him. To this end the advocate relied on Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR that depositing security is a mandatory tenet which must be met before the court can grant an order of stay. It was also asserted that the offer for security should come from the client and not to be inferred, implied or left to the court as that would amount to stepping into the arena of the dispute.

The objectors' submissions

21. The objectors did not file submissions and none have been traced on record or even on the portal.

Determination

22. As indicated at the beginning of this ruling, there are two applications. The first application is for extension of time to file a reference while the second is an objection to attachment of goods in execution of the decree on taxed costs. I will deal with the applications sequentially.

First application

23. The first application is the client's application dated November 23, 2021 essentially brought paragraph 11(1)(2) of the Advocates Remuneration Order. The client seeks leave to file an objection and reference out of time against the ruling of the taxing officer delivered on March 4, 2021. The client wants that decision set aside and the advocate /client bill of costs dated 25th November 2020 remitted back to a taxing officer other than Hon. S. A. Opande for fresh taxation. In the alternative, the client wants this court to tax that bill of costs.
24. The client's argument is that the bill of costs was taxed unopposed due to his legal officer's mistake for failure to attend taxation and that instruction fee was determined on a wrong schedule, namely; schedule 6 (1)(a) instead of schedule 6(1)(a) of the Advocates Remuneration Order which amounted to a wrong principle. The client further argues that the advocate did not attach instruction fee to prove that he had instructions and that the taxing officer taxed the bill of costs based on erroneous or suspicious value of the subject matter. The client again faulted the taxing officer for allowing getting up fee when liability not denied.
25. The advocate resisted the application through a replying affidavit and a preliminary objection. The basis of the objection was that since judgment has already been entered herein (on November 22, 2021) and no appeal has been filed against that Judgment, this court lacks jurisdiction to entertain the application.
26. I do not agree with the respondent that this court lacks jurisdiction to hear and determine the application. The court has constitutional and statutory jurisdiction to hear a dispute presented before



it unless that jurisdiction is expressly ousted by statute. Whether to allow such application or not is a different matter.

27. Turning to the application for leave, I have carefully read the application and reasons assigned thereto. The client argues that the bill of costs was taxed in the absence of his legal counsel. The client did not take any steps to file a reference to the decision by the taxing officer. The advocate then filed an application dated July 1, 2021 asking the court to enter judgment on the certificate of costs. The application came up before this court on November 3, 2021 in the presence of Miss Njeri who was holding brief for Mr. Ntabo for the client. Miss Njeri informed the court that they had not filed a response to the application and asked for time to take instructions. The court then fixed the application for hearing on November 22, 2021.
28. On November 22, 2021, Miss Gathoni attended court holding brief for Mr. Ntabo. She again informed the court that they had not filed a response to the application and that they intended to move the court to file a reference. The court heard the application and allowed it as it was not opposed, thus entered judgment for the advocate in terms of the certificate of costs.
29. As correctly argued on behalf of the advocate, there is already judgment which has not been appealed against or set aside. The applicants cannot now seek extension of time to file a reference to challenge the taxing officer's decision which has already been adopted as a judgment, without dealing with that judgment first. This is so because, there is no longer a decision of the taxing officer once judgment is entered in terms of the taxing officer's certificate of costs under section 51(2) of the *Advocates Act*. In that regard, the application for extension of time to file a reference has been overtaken by events and, therefore, becomes moot.

Second application

30. The second application is the objection dated January 13, 2022 seeking lifting of attachment and continued retention of motor vehicle registration numbers KBY 317P and KAH 117S by the auctioneers on behalf of the advocate. The objector's argument is that despite the advocate filing a notice of intention not to proceed with execution over the motor vehicles, the vehicles have not been released.
31. The advocate's response is that the client agreed to provide the motor vehicles as security for payment of the decretal amount and that the vehicles were to be held as arrangements for settlement of the decretal amount were being made. The advocate also argued that the motor vehicles were at all material times in possession of the client who had misrepresented to the auctioneers that the vehicles were his and the client even directed the auctioneers to where the motor vehicles were.
32. I have perused the record and the objection. On record is the notice of intention not to proceed with execution, dated February 7, 2022. The notice was issued pursuant to order 22 rule 53 of the *Civil Procedure Rules*, by the advocates notifying the applicants that there was no intention of proceeding with execution against the subject motor vehicles.
33. Having notified the objectors of no intention to proceed with execution against the motor vehicles, attachment of those vehicles stood lifted. The advocate and the auctioneer were under a legal obligation to release the vehicles. This is so because the law is clear on the procedure to be followed in case of objection to attachment. There was no legal basis to continue holding the motor vehicles.
34. Having considered the applications, the responses and the law, the conclusion I come to is that the first application dated November 23, 2021 for extension of time to file a reference has no merit. It is dismissed with costs.



35. On the other hand, the application dated January 13, 2022, has merit and is allowed with costs. The respondents, the Advocate and auctioneers are hereby directed to release motor vehicle registration Nos. KBY 317P and KAH 117S to the objectors with immediate effect.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2022

E C MWITA

JUDGE

