



REPUBLIC OF KENYA



KENYA LAW
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**Cheruiyot v Kiptarus (Miscellaneous Civil Application
161 of 2021) [2022] KEHC 678 (KLR) (21 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION 161 OF 2021**

EKO OGOLA, J

JUNE 21, 2022

**IN THE MATTER OF ORDER 51 AND ORDER 25
RULE 3 OF THE CIVIL PROCEDURE RULES 2010**

AND

**IN THE MATTER OF PARTY AND PARTY COSTS
PURSUANT TO THE BILL OF COSTS DATED 16/7/2021**

AND

**IN THE MATTER OF ITEN SPMCC NO. E017 OF 2020, PHILEMON
KIPKOECH CHERUIYOT VS RICHARD KIPRUTO KIPTARUS**

BETWEEN

PHILOMEN KIPKOECH CHERUIYOT APPLICANT

AND

RICHARD KIPRUTO KIPTARUS RESPONDENT

RULING

1. By a Motion dated 29th October, 2021 the Applicant seeks the following orders;
 - 1) Spent.
 - 2) Spent.
 - 3) That the Respondent's Bill of costs and /or Certificate of costs in Iten SPMCC No. E017 of 2020, Philemon Kipkoech Cheruiyot v Richard Kipruto Kiptarus be stayed, set aside, reviewed and/ or a fresh comprehensive Bill of Costs for inter-partes taxation be filed and be assessed before a different taxing master and or court.
 - 4) That Costs of the application be provided for.



2. The application is premised on the grounds set out therein and it is further supported by the affidavit sworn on 29th October, 2021 by Philemon Kipkoech Cheruiyot, the Applicant.

Applicant's Case

3. The Applicant's case is that he filed Iten SPMCC No. E017 of 2020, Philemon Kipkoech Cheruiyot vs Richard Kipruto Kiptarus against the Respondent and that on 22/9/2021 the trial court delivered its judgment against him. Consequently, the applicant was on 26/10/2021 served with a proclamation notice, warrants of attachment and illegal invoice by Chartless Auctioneers in an attempt to levy execution of a purported Certificate of Costs.
4. The Applicant contends that the said Certificate of Costs and or decree has never been served upon him or his advocates on record.
5. According to the Applicant, if there exists any Certificate of costs in the aforesaid matter then the same was taxed at undisclosed time without his or his advocate's participation. The Applicant maintains that the Bill of Costs that was served upon them did not bear any date for taxation.
6. The Applicant contends that the procedure that was undertaken in the aforementioned taxation and the outcome was therefore irregular, unprocedural and an abuse of court process and that the alleged taxation should be set aside.
7. Further the Applicant argues that the tax costs are grossly exaggerated and inordinately high.
8. The Applicant averred that the Auctioneers have wrongly attached his properties which are likely to be carted away anytime unless stay orders are granted in the first instance.
9. The Applicant urged court to allow the application as prayed and to stay all other and further proceedings relating to the matter pending the interpartes hearing of this instant application.

Respondent's Case

10. Richard Kipruto Kiptarus, the Respondent filed a Notice of Preliminary Objection dated 14th December, 2021 together with a replying affidavit sworn on the same date. In the Notice of Preliminary Objection, the Respondent raised the following grounds, that;
 - i. The application is fatally defective incompetent and should be struck out with costs.
 - ii. The application is in contravention of Rule 11 (1), (2) and (4) of the *Advocates Remuneration Order*.
 - iii. The application is an abuse of court process and should be refused.
11. The Respondent deposed that the Applicant has come to court with unclean hands hence not deserving the orders sought because his advocate was duly served with the Bill of Costs and the Taxation Notice receipt
12. Which he acknowledged by stamping and signing on face of the return copy as required by law.
13. The Respondent further deposed that if the Applicant herein is challenging service then he should do so in the trial court.



Determination

14. I have considered the application, the supporting affidavit, the notice of preliminary objection and the submissions filed as well as the authorities relied upon and it is proper that before I delve into the merits of this application I deal with the Notice of Preliminary Objection raised by the Respondent herein.
15. The law as to Preliminary Objections is well settled. In the celebrated case of *Mukisa Biscuits Manufacturing Company Ltd -vs- West End Distributors* the Eastern Court of Appeal held at page 701 that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raised a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

At page 700 the court had stated that:-

“..... So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded at which by clear implication out of the pleadings and which if argued as a preliminary point may dispose off the suit.” (Emphasis supplied)

16. I have looked at the points of law raised by the Respondent’s preliminary objection and the same touch on the competence of the Applicant’s application in view of Rule 11 (1), (2) and (4) of the Advocates Remuneration Order. These are clear points of law and need not to be ascertained in order to determine the matter. The Applicant seeks to stay, set aside and or review the Respondent’s Bill of Costs and or Certificate of costs or have the same assessed before a different taxing master.
17. Rule 11 of the *Advocates Remuneration Order* provides;

Objection to decision on taxation and appeal to Court of Appeal

- (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.
- (3) 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.
- (4) 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.



18. In the present case, the Applicant seeks to stay, set aside and or review the Respondent's Bill of Costs and or Certificate of costs or have the same assessed before a different taxing master. However, the applicant has not tendered any evidence to show that he wrote to the taxing officer notifying him of the items that he wished to object to.
19. In Matiri Mburu & Chepkemboi Advocates v Occidental Insurance Company Limited [2017] eKLR, the court expressed itself as follows:-
- “... the provisions of Paragraph 11 of the Remuneration Order serve several purposes. Firstly, the requirement that a party seeking reasons gives a notice of items objected to, serves to narrow down the issues, and secondly, give notice to the adverse party and the taxing master of his objection. Thus the taxing master, adverse party and ultimately the reference court in their respective roles can focus on the specific matter objected to rather than entire bills of costs, which often run into several pages.... The objective is obvious: the expeditious disposal of taxation disputes. Thus compliances with the requirements of paragraph 11 of the Remuneration Order is not a mere technicality that can be pushed aside peremptorily as the Applicant appears to suggest. The provisions of Article 159 (2) (d) of the Constitution were not intended to overthrow procedural or technical requirements, but to guard against “undue regard “to procedural technicalities in the administration of justice.
20. The Applicant's main contention is that in the instant case there was no ruling containing the reasons for taxation and or a certificate of costs to form the basis upon which time for filing the reference starts to run. The Applicant has submitted that the Respondent herein has not provided any ruling and or Certificate of costs to prove that indeed a ruling was rendered and a Certificate of costs issued thereafter.
21. From my perusal of the record I have not seen a copy of the said ruling. The ruling on taxation is very important as it gives rise to the process of reference. Without a ruling the affected party cannot know when to start the refence process. It is clear to me that the process leading to the attachment here has not been transparent. And since there is no evidence of a ruling, this court hereby extends the timelines herein by fourteen (14) days from the date hereof to enable the applicant to access the said ruling and proceed from there procedurally.
22. The upshot is that a stay of execution is granted pending the filing of a procedural reference by the applicant within 21 days from the date hereof. Costs in the cause.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST OF JUNE 2022.

E. K. OGOLA

JUDGE

