



Ngaywa & Kibet Partners LLP v County Government of Kiambu (Miscellaneous Application 124 of 2020) [2022] KEHC 12687 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12687 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION 124 OF 2020
MM KASANGO, J
JULY 27, 2022**

BETWEEN

NGAYWA & KIBET PARTNERS LLP APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU RESPONDENT

RULING

1. Ngaywa & Kibet Partners Llp (the advocates) on 29th July, 2020 filed an advocate/client's Bill of Cost to be taxed against its erstwhile client, The County Government of Kiambu. On 12th August, 2020, taxation matter was adjourned by the taxing master to 25th August, 2020. On that date, 25th August, 2020 the client failed to attend the taxation matter. The taxing master reserved his ruling on that taxation. On 27th August, 2020 the taxing master ruled and taxed the bill of costs as drawn. A certificate of costs was issued following that taxation for the amount of Kshs.120,152,205.00.
2. There are two applications under consideration in this Ruling.
3. The first time is the notice of motion dated 17th September, 2020. It was filed by the advocate. It is for entry of judgment, in favour of the advocate for the taxed costs. The application is based on the grounds that the costs were taxed; that there is no dispute on retainer; and that the client has refused and/or failed to settle that amount.
4. The second application is filed by the client and it is dated 13th November, 2020. The client has brought the following prayers in that application:-
 - a. The plaintiff/applicant be granted leave to file reference out of time.
 - b. That the court be pleased to set aside the Taxing Officer's decision made on 27th August, 2020.
 - c. The applicant be given a chance to respond to the Bill of Costs dated 13th July, 2020.



- d. That leave be granted to the applicant to defend the bill of costs and the bill of costs be taxed a fresh.
 - e. The applicant be granted extension of time to file a reference to the taxation.
5. In seeking the above prayers, the client acknowledges it was served with the bill of costs on 4th August, 2020 but that before that bill of cost could be allocated to the advocate to represent the client, the client's offices were shut down for 21 days because some of the client's officers tested positive for COVID-19 virus. That it was during the period of that closure of those offices that the advocate/client's bill of costs was taxed in the absence of the client.
 6. The client by the affidavit in support of the application object to the item number 1 in the bill of costs, by reason that it was not clear how the value of the subject matter was arrived at. Further, the client objected to items Nos.2 to 43 of the bill of costs on the ground that the amount in those items did not correspond to the matter the advocate represented the client that is a constitutional petition. The client stated in the affidavit in support of its application that the bill of costs taxed at an amount of Kshs.120,152,205.00 was unsupported by provisions of law.

Analysis

7. I have considered the affidavit evidence and the parties' submissions.
8. The starting point of my consideration is the provision of paragraph 11 of the *Advocates (Remuneration) Order*. It provides in the relevant parts as follows:-
 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 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 those 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) ...
 - (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."
9. The bill in this matter was taxed on 27th August, 2020. Paragraph 11, above, required the client within 14 days of the taxation to write and request the taxing master's reasons to the items it objected to in the bill of costs. Within 14 days of provision of such reason, a reference ought to have been filed. Paragraph 11(4) however affords the court's discretion to enlarge the period set in that paragraph.
10. In the present case, the client did not seek reasons within 14 days of the taxation. The prayers set out in the client's application are jumbled up. Those prayers do not strictly follow the order set out in paragraph 11. That notwithstanding I am of the view that administration of justice requires that substance of the dispute should be investigated and decided on their merits. In this regard, I am



persuaded by the holding in the case of *Ahmed Nassir v National Bank Of Kenya Ltd* (2006) E.A. thus:-

“Although Rule 11(1) of the *Advocates Remuneration Order* stipulates that any party who wishes to object to the decision of the Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the *Advocates Remuneration Order* demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”

11. The client stated that the failure to file its reference or request for reasons for the taxation as provided under paragraph 11 was due to the closure of its offices due to infection of some of its staff with COVID-19 virus. In my view, the client has shown sufficient cause for delay in following the timelines in paragraph 11. I here make reference to the case *Republic v Kenyatta University & Another Ex Parte Wellington Kibato Wamburu*(2018) eKLR :-

“... The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to disregard the delay and admit the reference out of time. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice...”

12. Although the client has jumbled up its prayers in its application it is however my view that, that should not debar the client to pursue its rights. The client has pursued its rights. The client has prayed to be permitted to file a reference out of time, and has also objected to all items in the bill of costs therefore it requests for the taxation to be undertaken afresh.

13. The taxing master in a short ruling of 27th August, 2020, stated:-

“Ruling

The Bill of Costs is dated 13th July, 2020 filed by the firm of Ngaywa & Kibet Partners LLP prayed that the same be taxed at Kshs.120,152,205.00.

The client was duly served which they acknowledged, instructed advocates who filed a notice of appointment but left it at that.

In the circumstances, it is unopposed and is therefore allowed as prayed.”

14. The taxing master whether or not the clients were present was obligated to tax the bill of costs as provided under the remuneration order. A case in point is *Mugambi & Co. Advocates v John Okalogwayo & Another* (213) eKLR thus:-

“The jurisdiction of a taxing officer is provided for in the *Advocates (Remuneration) Order*. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of the Court.”

15. The taxing master as it will be observed above, did not tax the bill nor refer to any provision of the remuneration order.



16. Further, I have noted from the proceedings that when the taxation was before the court on 12th August, 2020 it was adjourned to 25th August, 2020 for mention, not taxation. The taxing master however on 25th August, 2020 proceeded to entertain the advocate who informed the taxing master that the client was served but had failed to respond. The taxing master reserved ruling to 27th August, 2020.
17. Further, although the taxing master in his ruling stated the client had instructed an advocate to represent it, there was no notice of appointment of advocate to represent the client in this matter. The notice of appointment, which I have seen in this file, relates to a different court action and bears no relations to this matter at all. The fact that the taxing master would make such error to find that an advocate was appointed by the client, simply shows how carelessly the taxing master undertook the taxation in this matter. Bearing the above discussion in mind, I am of the view that the conduct of this taxation manifest as a whole, that the taxing master improperly exercised his discretion and which led to injustice. That discretion therefore can be interfered with.
18. I hold that it is necessary for this taxation to be conducted afresh.
19. Before concluding this ruling, I wish to state that the advocate erred to find a bill of costs in a miscellaneous file and not in the file which the advocate acted for the client, which is after all, the basis of the costs the advocate seeks by that bill of costs. One wonders how the taxing master was able to confirm the amount claimed in the bill of costs without reference to the file which is the subject of those costs that is, Kiambu High Court Petition No. 18 of 2017 *James Gacheru Kariuki & 60 Others v William Kabogo & 104 Others*.
20. Undoubtedly there is need for the bill of costs to be taxed afresh and it is necessary for the bill of costs to be filed in the cause it relates to. Such fresh taxation shall be undertaken by a different taxing master other than Hon. W. Rading.
21. It follows that the advocate application fails and will be dismissed.

Disposition

22. Having considered the notice of motion application dated 17th September, 2020, and the chamber summons dated 13th November, 2020 the following is the determination and the orders of the court:-
 - a. The Notice of motion dated 17th September, 2020 is dismissed with no orders as to costs.
 - b. The taxation hereof of 27th August, 2020 is hereby set aside.
 - c. The bill of costs dated 13th July, 2020 is struck out and the same shall be filed afresh in Kiambu High Court Petition No. 18 of 2017.
 - d. There shall be no order as to costs in respect to the chamber summons dated 13th November, 2020.
 - e. This file shall henceforth be closed.

RULING DATED AND DELIVERED AT KIAMBU THIS 27TH JULY, 2022.

MARY KASANGO

JUDGE

In the presence of:-

Coram:



Court Assistant:- Mourice

For Applicant:- Chepngetich

For Respondents:- N/A

Court

Ruling delivered virtually,

MARY KASANGO

JUDGE

