



Quasar Limited v Kenya Farmers Association Limited (Miscellaneous Application 36 of 2021) [2022] KEHC 12123 (KLR) (3 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS APPLICATION 36 OF 2021**

REA OUGO, J

AUGUST 3, 2022

IN THE MATTER OF ADVOCATES REMUNERATION ORDER

AND

**IN THE MATTER OF PARTY TO PARTY COSTS ARISING
FROM CHIEF MAGISTRATE'S COURT AT KISII**

BETWEEN

QUASAR LIMITED APPLICANT

AND

KENYA FARMERS ASSOCIATION LIMITED RESPONDENT

RULING

1. What is before the court for determination is the chamber summons dated July 6, 2021 brought pursuant to article 159 (2) (d) of the Constitution of Kenya 2010, order 42 rule 6 of the Civil Procedure Rules 2010, rule 11 (2) & (4) of the Advocates (Remuneration) Order, the applicant is seeking for the following orders:
 1. Spent.
 2. That the honourable court be pleased to grant leave for the applicant to file the reference herein out of time and the application herein be deemed as properly filed.
 3. That the honourable court be pleased to stay execution proceedings in Kisii Chief Magistrate's Court Civil Suit No 927 of 2002 pending the hearing and determination of this reference application.
 4. That the honourable court be pleased to set aside/vary the decision of the Taxing Master Hon NS Lutta assessing the party to party costs at Kshs 1,335,105/= *vide* a certificate of costs issued on April 27, 2021.



2. The application is supported by the grounds on the face of the application and the affidavit of Jasper Lubeto. It was averred:
 3. That on the April 3, 2019 the learned Taxing Master Hon NS Lutta delivered a judgment in Kisii Chief Magistrate's Court Civil Case No 927 of 2002 where the honourable court dismissed the suit and condemned the applicant herein to pay costs to the respondent.
 4. That on April 27, 2021, the respondent was issued with a decree and a certificate of costs which assessed the costs of the suit payable at Kshs 1,335,105/-
 5. That the respondent in pursuance of the aforesaid costs applied for execution of decree and has since obtained and served the applicant with a notice to show cause dated the May 12, 2021.
 6. That the respondent is currently in the motions of seeking attachment of the applicant's movable property in satisfaction of the decree and the said matter has already been slotted for notice to show cause on the July 7, 2021.
 7. That the applicant aggrieved with the certified costs of Kshs 1,335,105/= which it contends are manifestly excessive and erroneously assessed by the taxing master necessitating the reference application herein.
 8. That the applicant is apprehensive that given the respondent is swiftly moving with the motions of execution, the respondent is likely to soon obtain warrants of attachment and seek to attach its movable property causing them irreparable harm.
 9. That unless this honourable court intervenes as a matter of urgency and grants the orders sought in this application, the reference application herein shall be rendered nugatory.
3. The application was opposed by the respondent who filed notice of a preliminary objection on grounds that the application was premature, incompetent and that the applicant's advocates were not properly on record. The respondents also filed a replying affidavit and averred that they had drawn a certificate of costs for Kshs 1,539,461/-. The taxing officer guided by the provisions of the 7th schedule of the *Advocates (Remuneration) Order* and gave his reasons as required under paragraph 11 (2) of the *Advocates (Remuneration) Order*. The respondent contends that paragraph 11 (1) & (4) of the *Advocates (Remuneration) Order* have not been complied with. The applicant has also failed to seek for extension of time to give notice in writing to the taxing officer requesting for the decision on the items objected to. Failure to seek for enlargement of time to file a reference to the High Court amounts to jumping the gun, as the High Court may not be in a position to determine whether or not the discretion of the taxing officer was judicially exercised. The respondent averred that the applicant was aware of the taxation as his advocate on record before the subordinate court was served. The respondent averred that the applicant's previous advocate M/S Ochillo & Co Advocates are still on record. Further no leave has been sought to come on record after judgment in order to deal with any question arising from the satisfaction, discharge or execution of the decree. It was also averred that no reason has been given for the delay to give notice in writing and for the filing of the reference within time.
4. The parties were directed to file their submissions and both parties have complied. The applicant in its submissions identified two issues for the courts determination: whether the court should grant leave for the applicant to file a reference out of time; and whether the taxing master considered public interest to ensure the costs were fair and reasonable.



5. The applicant on the first issue submitted that paragraph 11 (1) of the *Advocates (Remuneration) Order* is not couched in mandatory terms. They relied on the case of *Republic v Capital Markets Authority EX Parte Solomon Muyeka Alubala; National Bank of Kenya Limited (Interested Party)* [2021] eKLR.
6. The applicant submitted that it was not aware when the taxation by the taxing master took place. The applicant's advocate on record before the subordinate court, failed to notify the applicant of the taxation thus it was denied an opportunity to object to the decision of the taxing officer. They cited the case of *In re Estate of Mutetema Itumo* [2019] eKLR. They urged the court to apply itself to paragraph 11 (4) of the *Advocates (Remuneration) Order* that grants it jurisdiction to enlarge time.
7. On the second issue, the applicant submitted that the counsel on record ought to have raised a preliminary objection from the onset on grounds that the court lacked jurisdiction. The negligent acts of the advocate on record should not be borne by the client. They urged the court to consider that the amount taxed was manifestly excessive and unreasonable.
8. The respondent in its submission contend that the applicant failed to comply with order 9 rule 9 of the *Civil Procedure Rules* 2010 and therefore the application is incompetent. They submitted that seeking to set aside the decision of the taxing master without first requesting for the reasons for the decision in writing amounts to jumping the gun. The applicant has also not satisfactorily explained the delay in bringing its application. The applicant should not invoke article 159 of the *Constitution* to breathe life into its application which is already dead on arrival as it is not merited.
9. The applicant filed supplementary submissions on November 25, 2021. The taxing master ought to have taxed the bill at Kshs 540,000/- as the pecuniary jurisdiction of the court is Kshs 20,000,0000/-. Any taxation for amounts higher than Kshs 20,000,000/- is governed by schedule VI for proceedings at the superior courts. The bill of costs has been assessed at the value of Kshs 50,000,000/- a value which can only be admitted at the high court. The applicant maintained that it only came to know of the taxation when it was served with a notice to show cause.
10. The respondent in a rejoinder through its further submissions filed on January 14, 2022 submitted that the applicant failed to demonstrate that the fees awarded was manifestly excessive.

Analysis And Determination

11. Before I turn to consider whether the taxing master's award was manifestly excessive, the respondent has challenged the applicant's standing in this matter arguing that its advocate failed to comply with order 9 rule 9 of the *Civil Procedure Rules*, 2010. Order 9 rule 9 of the *Civil Procedure Rules*, provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change of intention to act in person shall not be effected without an order of the court-

 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
12. Failure to comply with the provisions of with order 9 rule 9 of the *Civil Procedure Rules* has adverse effect to any application filed before compliance as the newly appointed advocate is considered not



to be properly on record. In *Florence Hare Mkaba v Pwani Tawakal Mini Coach & another* [2014] eKLR the court held that:

“The question is; was the execution validly carried out on behalf of the plaintiff? There are glaring anomalies in respect of the representation of the plaintiff. As clearly set out above the plaintiff was represented by Pandya & Talati Advocate up and until judgment was entered in her favour on July 31, 2012. Once judgment was entered the provisions of order 9 rule 9 had to be complied with if the plaintiff required to change the advocates representing her. This was not the case. She was variously represented by Shikely Advocate, who filed the submissions in support of the plaintiff’s bill of costs, and was represented by Kinyua Njagi & Co Advocates through the execution of the decree stage. In both those occasions the two advocates did not obtain an order of the court to take over the conduct of plaintiff’s case. Much more Shikely Advocate was not properly on record to enable him consent for Kinyua Njagi & Co Advocates to conduct the plaintiff’s case.”

13. The applicant changed their advocate without filing any document before the court as required for the change of advocate. The applicant having failed to comply with the provisions of order 9 rule 9 of the *Civil Procedure Rules*, 2010, I find that the applicant is not properly before the court. I therefore find no reason to delve into the merits of the application and hereby strike out the application dated July 6, 2021 and make no orders as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 3RD DAY OF AUGUST 2022

RE OUGO

JUDGE

In the presence of:

Mr Kiema h/b Mr Lubeto for the applicant.

Respondent absent.

Ms Aphline/Emily Court Assistant.

