



**Ameli Inyangu & Partner Advocates v Saleh & another (Miscellaneous Application
63 of 2017) [2022] KEHC 17074 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 17074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 63 OF 2017
MN MWANGI, J
SEPTEMBER 30, 2022**

BETWEEN

AMELI INYANGU & PARTNER ADVOCATES APPLICANT

AND

ABDULGADER SHARIFF SALEH 1ST RESPONDENT

**JAMAL SHARIFF SWALEH T/A JINGO TOURS & SAFARIS
LTD 2ND RESPONDENT**

RULING

1. The application before this court is a notice of motion dated May 3, 2021 brought under the provisions of order 51 rule 1 and order 22 rule 22 of the *Civil Procedure Rules, 2010*, sections 1A, 1B, & 3A of the *Civil Procedure Act*, article 159 of the *Constitution* and all the enabling provisions of the law. The applicant seeks the following orders-
 - i. Spent;
 - ii. Spent;
 - iii. That this honourable court be pleased to issue an order setting aside the certificate of taxation issued on August 19, 2020 and all proceedings in relation to the respondent's bill of costs dated October 9, 2019 and taxed on August 19, 2020 pending the hearing and determination of the applicant's bill of costs dated March 3, 2017; and
 - iv. That costs of this application be in the cause.
2. The application is supported by an affidavit sworn on May 3, 2021 by Fred Adhoch, an advocate of the High Court of Kenya and a partner at the applicant's law firm. In opposition to the application, the respondents filed a replying affidavit sworn by Abdulgader Shariff Swaleh, the 1st respondent herein.



3. The application was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Ameli Inyangu & Partners Advocates on March 28, 2022, whereas the respondents' submissions were filed by the law firm of Derrick Odhiambo Advocates on April 25, 2022.
4. Mr Adhoch, learned counsel for the applicant submitted that the applicant herein filed a bill of costs dated March 3, 2017 for taxation for legal services rendered to the respondents. That the said bill was taxed on August 30, 2017 at Kshs 3,890,794.22 and subsequently, a certificate of costs was issued on September 5, 2017. He stated that thereafter, the respondents challenged the taxing master's orders by way of a chamber summons application dated February 23, 2018, which was heard by Judge PJ Otieno and in his ruling delivered on March 8, 2019, he directed that the said bill of costs be set aside. Mr Adhoch stated that the Judge also directed that the bill of costs and notice to be properly served upon the respondents, taxation be conducted in the usual and proper way and for costs to be in the cause. It was submitted by Mr Adhoch that the respondents then proceeded and filed a bill of costs against the applicant, which bill was taxed at Kshs 278,175.00. He submitted that thereafter, the respondents purported to attempt execution through a proclamation of attachment dated April 29, 2021 for the sum of Kshs 278,175.00 plus auctioneers charges estimated at Kshs 51,430.00.
5. Mr Adhoch relied on the case *Mabinderjit Singh Bitta v Union of India & others* 1 A No 10 of 2010, cited in the case of *Sheila Cassatt Issenberg & another v Anthony Machatha Kinyanjui* [2021] eKLR, and submitted that every person has an obligation to obey court orders that are binding upon them. He further submitted that the orders by Judge PJ Otieno were clear and unambiguous. He contended that since the respondents had not denied being aware of the ruling by Judge PJ Otieno, and had admitted filing their bill of costs, it follows that their actions were deliberate. In addition, Mr Adhoch submitted that the respondents' actions amount to pure and utter contempt of court orders. He relied on the case of *Republic v Attorney General & another ex parte Mike Maina Kamau* [2020] eKLR.
6. He stated that the order for costs to be in the cause has never been challenged by the respondents by way of an appeal or otherwise, hence the respondents ought to await determination of the cause, being the applicant's bill of costs in Miscellaneous Application No 63 of 2017. Mr Adhoch was of the view that the certificate of taxation issued in favour of the respondents was a nullity.
7. Mr Odhiambo, learned counsel for the respondents submitted that the advocate-client relationship between the applicant and the respondents ended sometime in January, 2017, and the applicant filed its bill of costs on March 3, 2017 which was set aside on March 8, 2019 and thereafter, the respondents filed their bill of costs on October 9, 2019. He stated that the applicant had not demonstrated that it had made efforts to either serve its bill of costs afresh or move the court's indulgence in case of any difficulty. He submitted that the process of taxation of a bill of costs has a special jurisdiction and without effecting proper service, one cannot claim that he has a cause of action before court to be adjudicated upon.
8. The respondents' counsel further submitted that the applicant was not entitled to the orders sought for setting aside a decree for a liquidated claim when he did not furnish the court with security, thus the orders granted on May 3, 2022 were irregularly issued and must be dismissed with costs. Mr Odhiambo contended that the respondents having filed and properly served and prosecuted their bill of costs with full participation of the applicant before a competent tax master, cannot amount to an abuse of court process or contempt.
9. Mr Odhiambo submitted that the enforcement of the respondents' costs should be allowed since the applicant's cause ended the moment Judge PJ Otieno set aside its bill of costs and directed it to commence fresh personal service in order to have a reasonable cause. He stated that the respondents



have no control on the speed and mode of litigation and that a litigant cannot hold other litigants and the court in a never-ending abeyance or at ransom since litigation must come to an end.

Analysis And Determination

10. I have considered the application filed herein, the affidavit filed in support thereof, the replying affidavit as well as the written submissions by counsel for the parties. The issue that arises for determination is whether the instant application is merited.
11. In the affidavit filed by the applicant, it deposed that on April 29, 2021, it received a proclamation notice dated April 28, 2021 by M/s Murphy Auctioneers on instructions of the 1st respondent herein, demanding that the applicant pays the sum of Kshs 278.175.00 plus costs of Kshs 51,430.00 within seven days from April 29, 2021, emanating from a purported certificate of taxation issued on February 9, 2021, failure to which the auctioneers would cart away and sell by public auction the goods proclaimed therein.
12. The applicant averred that the decree purportedly issued on February 9, 2021, and the consequential warrants and proclamation notices were unlawful since they ought to have abided the outcome of the hearing and determination of the applicant's bill of costs dated March 3, 2017 pursuant to the ruling by Justice PJ Otieno, which bill of costs was yet to be heard and determined. He further averred that Justice PJ Otieno directed that service of the applicant's bill of costs be made personally upon the respondents but attempts to so serve had been futile and the current advocates on record for the respondents, M/s Ibrahim Sankoh Advocates had consistently declined to receive the bill of costs upon attempted service, thus all that could be discerned from their conduct was sharp practice.
13. It was stated by the applicant that having perused the court file, he realized that there were ex parte proceedings conducted on October 19, 2020 against the rules of natural justice, to purportedly correct authentic errors on the ruling issued by the Deputy Registrar, which ought to be set aside as a matter of right. He averred that the proclaimed goods were crucial equipment and furniture necessary for running and operating a law firm thus if removed, the applicant's operations would be completely stifled and brought to a halt. The applicant contended that going by the applicant's bill of costs, the amount sought was in excess of Kshs 14,000,000/=
14. The respondents in their replying affidavit deposed that the applicant was its erstwhile counsel in HCC No 245 of 2010 consolidated with HCC No 165 of 2017, whose work was terminated sometime in the year 2017. They averred that the applicant filed its bill of costs on October 9, 2019 and actively participated in defending it but never made any attempt to effect service upon the respondents despite the fact that it knew the 1st respondent well and had been meeting him periodically in social settings and the applicant also knows his residence and all his business premises.
15. The respondents averred that the applicant's cause of action ended with the ruling by Judge PJ Otieno and a fresh cause of action can only arise upon personal service of the taxation notice and the bill of costs to the respondents. In addition, the respondents stated that it is now five years since inception of the applicant's bill of costs filed on March 3, 2017 which is yet to commence, hence an affront to the overriding objectives under sections 1A, 1B & 3A of the *Civil Procedure Act*. The respondents contended that the applicant's attempt to serve Ibrahim Sankoh was a violation of the ruling by Judge PJ Otieno and in any event, Ibrahim Sankoh was not empowered to receive service on behalf of the respondents, particularly on matters to do with the bill of costs. They stated that the applicant's conduct amounts to wanton mischief and sharp practice.
16. It was stated by the respondents that on August 31, 2020, his counsel sent a letter to the court seeking a mention for purposes of rectifying the orders dated October 9, 2019, and a mention date was granted



for October 19, 2020 and a mention notice was served on the applicant through the notice dated October 5, 2020, that was subsequently received on October 16, 2020. They further stated that when the matter came up on October 19, 2020, the applicant did not address court and a further mention date was issued for October 21, 2020, and a mention notice dated October 19, 2020 was served on the applicant, who received it under protest and failed to attend court on October 21, 2020.

17. After carefully perusing the pleadings and the submissions filed in this application, it is evident that the issue herein is whether Judge PJ Otieno in his ruling delivered on March 8, 2019, awarded costs of the application dated February 23, 2018 to the respondents herein or he directed that the said costs shall be in the cause. The applicant submitted that in the said ruling, Judge PJ Otieno directed that the costs of the application shall be in the cause, meaning that costs shall abide the outcome of the bill of costs dated March 3, 2017. The respondents on the other hand submitted that the applicant's cause of action ended with the ruling by Judge PJ Otieno and a fresh cause of action can only arise upon personal service of the taxation notice and the bill of costs to the respondents. It is evident from the respondents' affidavit and submissions that they contend that Judge PJ Otieno awarded them costs of the application dated February 23, 2018, hence they were at liberty to pursue the same at their preferred time.

18. I have gone through the ruling by Judge PJ Otieno and found that at paragraph 28 of the said ruling he held as follows -

“The upshot is that I do find that the client was never served with the bill of costs and his right to be heard was thus affronted and nothing done pursuant to that affront can be left to stand but must be set aside. I do set it aside with costs to the client/applicant and direct that the bill and notice thereof be properly served upon the clients/respondents to enable the taxation be conducted in the usual and proper way. I direct that costs be in the cause.”

19. Due to the use of the phrases “I do set it aside with costs to the client/applicant” and “I direct that costs be in the cause” used by Judge PJ Otieno in his ruling dated March 8, 2019, as reproduced hereinabove, I conclude that he is the one who is best suited to interpret his ruling as to whether he awarded costs of the application dated February 23, 2018 or if the costs were to be in the cause of the subsequent taxation.

20. I direct that this file be transmitted to Judge PJ Otieno for purposes of interpretation of the ruling in issue.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER, 2022.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of-

Mr Furaha h/b for Mr Adhoch for the applicant

Mr Odhiambo Derrick for the respondents

Mr Oliver Musundi – Court Assistant.

NJOKI MWANGI,

JUDGE.

