



Andrew & Steve Advocates v John Kibochi (Commercial Miscellaneous Application E773 of 2020) [2022] KEHC 13299 (KLR) (Commercial and Tax) (22 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E773 OF 2020**

**WA OKWANY, J
SEPTEMBER 22, 2022**

BETWEEN

ANDREW & STEVE ADVOCATES APPLICANT

AND

THUKU JOHN KIBOCHI RESPONDENT

RULING

1. This ruling determines two similar applications filed in Miscellaneous Application Nos E774, and E773 of 2020. The matters were consolidated as the prayers sought are similar save for the amounts claimed by the advocate.
2. In the application dated March 22, 2021 filed in Misc No E773 of 2020, the applicant seeks orders for entry of judgement against the client in the sum of kshs 192,957 in terms of the certificate of taxation dated March 1, 2021. The applicant also seeks interest on the said sum at court rates of 14% per annum from the date of taxation till payment in full.
3. The application is supported by the affidavit of the advocate, Ms Phoebe Mwaniki and is based on the grounds that: -
 - a. That the applicant/advocate filed an advocate—client bill of costs dated June 8, 2020 (hereinafter called "bill of costs") on an even date arising from CMCC No 8061 of 2016: John Kibochi Thuku v Muhoro Niogu & Ameen Motors Limited.
 - b. That when the matter came up for taxation, the court directed the parties to dispense the bill of costs by way of submissions, however the respondent/client filed their submissions out of time without leave of court.



- c. That on February 4, 2021, the taxing master delivered his ruling wherein he declined to consider the respondent/client's submissions and taxed the bill of costs as drawn at kshs 192,957 only.
 - d. That the certificate of taxation dated March 1, 2021 was thereafter issued stating the certified amount and the same was served upon the respondent client on March 8, 2021.
 - e. That a demand has since been made to the respondent/client and he has ignored, neglected and/or refused to settle the taxed amount.
 - f. That the certificate of taxation dated March 1, 2021 has not been set aside or altered by the court.
 - g. That it is necessary and in the interest of justice that the court enters Judgment for the sum, certified to be due together with interests and costs as prayed herein.
4. In Misc No E774 of 2020, the advocate seeks entry of judgment against the client for kshs 112,915 plus interest at court rates in terms of the certificate of taxation dated February 25, 2021.
 5. The application is similarly supported by the affidavit of the advocate MS Phoebe Mwaniki and is based on similar grounds as the ones stated in the aforementioned application.
 6. The client opposed the applications through similar grounds of opposition dated May 11, 2021 wherein he states that:-
 - a. That the application is brought contrary to the provisions of section 51(2) of the *advocates Act*
 - b. That the application is prematurely brought prior to the conclusion of the reference filed by the respondent
 - c. That there is no valid certificate of taxation
 - d. That the respondent has complied with the mandatory provisions of paragraph 11 of the *Advocates Remuneration Order* 2014.
 - e. That it is the advocates who should refund the respondent overpaid amounts of fees.
 7. The applications were canvassed by way of written submissions which I have considered.
 8. The main issue for determination is whether judgement should be entered as prayed in the applications. The applications are premised on section 51 (2) of the *advocates Act* which provides that:-

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
 9. The above provision empowers the court to enter judgment where a certificate of costs has been issued and the said certificate has not been set aside. Under the said provision, there should also be no dispute to the retainer. The respondent opposed the application on the basis that it is premature in view of a pending reference that is yet to be determined. The question which therefore arises is whether the reference can bar the court from entering judgement as prayed.
 10. In *Ahmednasir Abdikadir & Company advocates v National Bank of Kenya Limited* – HCCC MISC Application No 752 of 2004, the court held that if a client against whom a certificate of costs has been issued wishes to prevent the judgment from being entered, he has the option of either staying



the taxation or filing a reference before a judge and seeking a stay of further proceedings. The court held that: -

“The client’s complaints in my view are not an answer to the advocates’ application which clearly meets the requirements of section 51 (2) of the *advocates Act*. The complaints should have been made before the deputy registrar at the time the advocate/client’s bill of costs was taxed. The client did not breathe a word of the present complaints at all. The client had another option. If it believed that no fees were due to the advocates on the basis of an agreement between it and the advocates, it could have filed a suit for a declaration to that effect even before the said bill was taxed. It could have sought stay orders in the suit. The client had yet another option. It could have filed a reference to the High court and sought stay of further proceedings including these proceedings. None of the above options were taken by the client. It participated full in the taxation without raising the issues now being raised. In my view the client goofed. I would agree with Honourable L. Njagi J’s interpretation of section 51 (2) of the *advocates Act*

in Macharia Njeru advocate –v- Communications Commission of Kenya HCCC No 1029 of 2002 (UR) and Nyakundi and Company advocates –v- Kenyatta National Hospital Board HCCC No 416 of 2004 (UR). The Learned Judge held that the wordings of the said Section were very clear that where a certificate of taxation had neither been set aside nor altered by the court and where there was no order of stay, the certificate was final as to amount of costs covered thereby and to allege a dispute at summary judgment stage would amount to contradiction of express and mandatory statutory provisions.”

11. In *Njougoro & Company advocates v Dubai Bank Kenya Limited* [2008] eKLR the court stated that:-

“Starting with the assertion that they have an arguable reference, in the absence of the deputy registrar’s reasoning for allowing the amounts allowed against the items objected, to on the one hand and the respondents reasons for objecting to the amounts allowed as against those items, on the other hand, as well as the applicants reasons as to why the amounts allowed by the taxing officer should not be disturbed, the court, is not in a position to assess the argue ability of the reference. In addition to the above, this court, is satisfied and in agreement with the observation made by Warsame J in the sister application to this one, cited earlier on, that existence of such a reference does not operate as a stay. Further the court, is in agreement with the applicant’s counsels contention that no prejudice will be suffered by the Respondent, if money is paid over to him because, if the reference succeeds, he will be in a position to refund the same. This is a reasonable offer considering the fact that the respondent has not stated that the applicant will not be in a position to pay.” (Emphasis added).

12. The principle that emerges from the above cited cases is that the existence of a reference does not operate as a stay to the application for entry of judgment in respect to the taxed costs and therefore does not bar the court from granting the orders sought in the applications. I note that the reference is yet to be heard and find that no prejudice will be occasioned to the client if the orders sought herein are granted as the advocate can always refund the amount to the client in the event the reference succeeds.

13. In sum, I find that the applications satisfy the conditions set out under section 51 (2) of the *advocates Act* and I therefore allow them in the following terms: -

- a. In Miscellaneous application No E773 of 2020 I enter judgement against the client in the sum of kshs 192,957 with interest thereon at court rate of 14% per annum from the date of taxation until payment in full.



- b. In Miscellaneous application No E774 of 2020 I enter judgement against the client in the sum of kshs 112,915 with interest thereon at court rate of 14% per annum from the date of taxation until payment in full.
- c. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Mabango for applicant/advocate.

Mr. Muchui for Mereka for respondent.

court Assistant- Sylvia

