



Tom Ojienda & Associates v Speaker, Kakamega County Assembly (Miscellaneous Civil Application 170 of 2019) [2022] KEHC 14542 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION 170 OF 2019
PJO OTIENO, J
OCTOBER 31, 2022**

BETWEEN

TOM OJIENDA & ASSOCIATES APPLICANT

AND

SPEAKER, KAKAMEGA COUNTY ASSEMBLY RESPONDENT

RULING

1. The Speaker, Kakamega County Assembly, being the client in the advocate/client bill of costs dated July 19, 2019, has by a Notice of Motion dated November 5, 2020 and brought pursuant to the provisions of Section 1A 3A and order 12 Rule 7 *Civil Procedure Act*, sought that the proceedings of December 2, 2020 and December 16, 2020 be set aside on an array of grounds. Among the grounds put forth for setting aside are that there was never issued a notice of taxation because no directions were ever issued for taxations; that there was never service on counsel on record for the client and that the advocate seeking costs from the client was never instructed but were merely holding brief for another advocate. Those grounds were reiterated in the Affidavit in Support sworn by Mr. Gabriel Fwaya, advocate, for the client in this matter, who however admits service of the bill upon client on an undisclosed date and that he was instructed by a letter of February 2, 2020 and filed a Notice of Appointment on 18/2/2020.
2. Nothing is said whether the Notice of Appointment by Gabriel Fwaya was ever served to take effect but Counsel adds that it was not until November 2021 when the client was notified by a letter dated July 13, 2021, annexure 'GF3', demanding payment of the taxed costs. Counsel swears that prior to that letter they had not been served and when he perused the court file, he confirmed that the service was effected upon the firm of Wekesa & Simiyu, Advocates, who have never been on record and that neither that client nor his advocate were ever served. It is added that no notice was ever served to enable counsel and client attend court on the September 14, 2020, December 2, 2020 and February 16, 2020 and that one Mulama Advocate who attend court took the date and attend court to take the ruling was not on record for any of the parties.



3. The last salvo was that the advocate was never instructed but was merely holding brief and that the party and party bill of costs had earlier on been taxed at Kshs. 299,475. For lack of service and lack of instructions the client sought that the certificate of costs be upset and set aside because the client was condemned unheard.
4. When served, the advocate resisted the application by the Affidavit of the Managing Partner, Prof. Tom Ojienda who asserts that the firm was indeed instructed and filed pleadings on own right, including Affidavits by the Speaker, attended court and executed the instructions with alacrity and that it is not true that the firm was merely holding brief. On service and notice of taxation, the advocate exhibited a Notice of Taxation dated August 13, 2019 setting the matter for taxation on the November 13, 2019 which is said to have been served upon the Speaker together with the bill and duly acknowledged by the client. The allegation of lack of service and being condemned unheard were therefore denied. It was then asserted that the firm of Gabriel Fwaya & Co. Advocates came on record in February 2020 and were not on record in 2019 to be served with submissions dated June 29, 2019 (sic). He clarified that Mr. Mulama held his brief with full authority and concluded that it is unjust and prejudicial to deny the advocate fees earned and that every legal process was complied with in having the costs taxed.
5. By the time the client's application was filed, there was already an application by the advocate seeking conversion of the certificate of taxation into a judgment. That application was allowed on the December 2, 2021 in the presence of both sides. Thereafter, it was proposed to court and directed by consent that the parties file and exchange submissions in canvassing the application now under consideration.
6. The submissions filed by the client are a regurgitation of the application and its grounds without more. Not even the law upon which the application is grounded was alluded to or expounded upon.
7. For the advocates, the submissions stress the assertion of having been on record then adds that retainer need not be in writing but can be inferred from the conduct of the parties. The decisions in *Ochieng Onyango, Kibet and Obaga* [2007] eKLR, and *Alex S. Masika & Co. Advocates -vs- Syner Med Pharmaceuticals Kenya Ltd* [2021] eKLR were cited on what constitutes a retainer and that retainer can be inferred from conduct of the client toward the advocate.
8. On service, it was stressed that the bill and Notice of Taxation were duly served and acknowledged by the client on January 22, 2020. The decisions in *Wambugu Kariuki -vs- Kenya Agricultural Research Institute* [2018] eKLR and *CWM -vs- JPM* were cited for the proposition that a party needs to be diligent with its claims in court and that there are conducts including indolence, unreasonable and unmeritorious conduct, manner and acquiescence which may disentitle a party to a relief. The client is then cast in the light of an indolent and evasive one as evidenced by the Affidavit of Flavian Mulamasworn on the August 30, 2021.

Analysis and Determination

9. It is now well settled that the *advocates Act* is a complete code that is self providing and invites no application of other statutes including Civil Procedure Rules in matters under its regime. The Court of Appeal in *Machira & Co. Advocates -vs- Arthur K. Magugu & Another* [2012] eKLR had this to say on how to challenge a taxing master's decision:-

“With regard to advocates' bills of costs, we agree with the decision of Ringera, J (as he then was) in *Machira vs Magugu* [2002] 2 EA 428 that the Advocates Remuneration Order is a complete code which does not provide for appeals from taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decision through references to a



judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the *Civil Procedure Act* of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide a simple and expeditious mode of dealing with decisions on advocates' bills of costs through references under Rule 11 to a judge in Chambers..."

10. I am bound to reiterate that whenever a party is aggrieved and dissatisfied with a decision by the taxing master, his recourse and remedy lies in a reference. It is not a licence to depart from that course merely because the time limited for taking steps has passed. Even then, the same code has the remedy of enlargement of time. I would declare the application incompetently brought but I consider the rules under the *Advocates (Remuneration) Order* to be subsidiary legislation that ought not be seen to override the constitutional dictate on the right to be heard. Accordingly I consider the application to merit consideration on merits and not being dependent on technical grounds.
11. While service of the bill of costs and Notice of Taxation cannot be contested, based on the acknowledgement by the client dated January 22, 2020, that was some five months after the bill was lodge and over sixty days after the due date for taxation had passed. The only question is whether after being served with a bill and a Notice of Taxation, whose date had passed, the client was ever notified of any other date the bill was to be taxed. The Court poses this question of service upon the client because while an appointment was filed on 18/2/2020, there is no indication that the notice was ever filed. The courts learning is that a notice of appointment of advocate takes effect upon service and before it is served, the adversary has no obligation to deal with an advocate who files a notice and keeps it in a safe.
12. The record of the file show that the bill was lodged on August 13, 2019, the Notice of Taxation issued the same day but both documents were served on January 20, 2020. After the service no steps appears to have been taken in the file till the September 4, 2020 when Mr. Mulama Advocate is recorded to have attended the registry and took a mention date for the 2/12/2020. By the time the same Counsel attended before the taxing officer, there was no evidence that service of that date for mention had been effected upon the client.
13. The Affidavit filed, sworn by one Kyalo Kamina, on December 4, 2022, shows that service was upon Wekesa & Simiyu Advocates on October 9, 2020 and was accepted and stamped.
14. That Affidavit has three glaring issues. The first is that the alleged acknowledgment on the face of the Notice is not evident. The second is that that firm was never on record for the client. It is not enough that the firm could have held brief for the advocate on record. In any event, I have held that the notice by Gabriel Fwaya having not been served, had not taken effect hence nobody could have validly held its brief. More importantly the record of the file has nothing to show that Ms. Gabriel Fwaya had even attended court or had its brief held prior to and upto the date of the ruling. Moreso, even if there had been appearance by Counsel holding brief, which is not apparent on the record that would not obligate him to be served in place of the advocate on record. It is therefore inevitable to find that there was no service of the notice for Mention or any other process for the 2.12.2020 or indeed any other date.
15. In addition, the Affidavit of Service show service was sworn on December 4, 2020, two days after the matter had been in court and not filed till the December 8, 2020. It was therefore not in the court file by the December 2, 2020 when the matter proceeded and a ruling date given. It therefore emerges clearly that there was never evidence of service before the Court on 2/12/2020 just like there was none on the date the ruling was delivered.



16. It is worth repeating, because the Court considers the law to be last resort, that the right to be afforded a hearing including a notice when a matter is due for hearing, is non-derogable and anything done in violation of that right cannot amount to anything. It is null and incapable of conferring a right on the person who failed to respect that very important right.
17. On the basis that the bill was taxed on a date taken *exparte*, without invitation and not served, the Court finds, *ex debito justitiae*, that this is a matter the Court's power to set aside must be exercised as of right in favour of the client.
18. I set aside the proceedings of December 2, 2020 and the resultant Certificate of Taxation extracted on the ruling of December 16, 2020 with all the consequential proceedings flowing therefrom. Let the bill be set down for taxation on the merits.
19. Let the costs of the application be costs in the taxation.

DATED, SIGNED AND DELIVERED IN KAKAMEGA THIS 31ST DAY OF OCTOBER 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Nyawa for the Advocate/Applicant

No appearance for the Client/Respondent

Court Assistant: Polycap Mukabwa

