



Osundwa & Company Advocates v Vaghjiyani Enterprises Limited (Miscellaneous Application E140 of 2018) [2022] KEHC 16039 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E140 OF 2018
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

OSUNDWA & COMPANY ADVOCATES APPLICANT

AND

VAGHJIYANI ENTERPRISES LIMITED RESPONDENT

RULING

1. This ruling determines the advocate/applicant's application dated May 13, 2022 and the client's application dated June 2, 2022.

Application dated May 13, 2022

2. Through the application dated May 13, 2022 the advocate seeks the entry of judgment against the client for the taxed costs in the sum of Kshs 4,533,120 as shown in the certificate of costs dated September 23, 2019. The advocate also seeks to be awarded interest at 14% per annum on the judgment sum from September 23, 2019 until payment in full.
3. The application is supported by the affidavit of Mr Michael Osundwa Sakwa advocate and is premised on the grounds that:-
 1. On the July 17, 2019 the honourable court sitting as a taxing master rendered itself in a ruling allowing the applicant's advocate-client bill of costs dated October 24, 2018.
 2. On September 23, 2018 this court certified the costs awarded against the respondent in the sum of Kshs 4,533,120.



3. In what has turned out to be delay tactics in fulfilling its obligations in settling. The legal fee as taxed, the respondent has moved the court on multiple occasions through various applications seeking and consequently securing a perpetual stay of execution of the ruling on taxation.
 4. The respondent has so far filed a series of suits and miscellaneous applications before different judges of the commercial division of the High Court seeking the same prayers including several references which have variously been tried out of time and are *res-judicata*.
 5. The respondent filed a plethora of applications, references and appeals to wit HC Misc Appl No E421 of 2019 and HC Misc Appl No E206 of 2021 in which they variously moved the court via different processes dated September 23, 2019, November 25, 2019, February 27, 2020, March 26, 2021 and May 6, 2021 amongst others invariably seeking the same prayers all of which have been dismissed by this honourable court.
 6. The central and main issue that runs through all the five applications is that the respondent has been hell bent on frustrating the applicant to a certain despair and it is now imperative that they should be made to desist by this honourable court
 7. In essence, the respondent's right and window to lodge an appeal against this court's certified costs is therefore spent with no other appeal forthcoming from the respondent.
 8. The respondent has been enjoying the protection of interim reliefs borne out of their multiple applications, appeals and references in court which is a clear testament to their abuse of the honourable court process.
 9. The respondent has been unnecessarily delaying the implementation of the well-reasoned decision of this honourable court and thereby denying the applicant its hard-earned pay for quality services rendered to the respondent.
 10. In its ultimate decision of May 5, 2022 this honourable court dismissed the respondent's consolidated appeals and references.
 11. Owing to the aforesaid proceedings, the applicant has been denied the fruits of his award for the last four years and the only recourse now available to him is the reliefs sought in the instant application, the respondent having exhausted all avenues of appeal in the matter.
 12. The applicant is entitled to rest and closure; litigation must come to an end.
 13. The respondent has by lodging one counter after another unfairly kept the applicant from reaping the fruits of his success; an unsuccessful one must learn to let go.
 14. Despite the certificate of costs dated September 23, 2018 of which the respondents are fully cognizant, they have not settled the taxed sum thereby constraining the applicant to make the instant application.
 15. The applicant's retainer by the respondent has never by disputed thus this honorable court has the jurisdiction to issue the order that judgment be entered for the sum certified to be due with costs.
 16. The applicant now seeks to proceed with and realize the costs taxed by way of execution of which it is only just.
4. The client opposed the application through the replying affidavit sworn by its legal officer Ms Betty Kimiro who states that the respondent is aggrieved by the ruling of May 5, 2022 and has filed a notice



of appeal and an application for leave to appeal. It is the client's case that the taxing master erred in taxing the bill of costs.

5. The application was canvassed by written submissions which I have considered. The main issue for determination is whether the advocate has made out a case for the entry of judgment for the taxed costs.

6. Section 51 (2) of the Advocates Act 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.'

7. The foregoing provisions gives the court the discretion to enter judgment where a certificate of costs has not been set aside or where there is no dispute as to the retainer. A perusal of the record reveals that this court, in its ruling dated May 5, 2022, dismissed the client's application to set aside the certificate of costs. I note that even though the client has preferred an appeal against the said ruling, such intention to appeal does not operate as an automatic stay or barrier to the granting the orders sought in the present application.

8. In Lubullellah & Associates Advocates v N K Brothers Limited [2014] eKLR the court observed that:-

' The law is very clear that once a taxing master has taxed the costs, issued a certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the applicant against the respondent herein for the taxed sum indicated in the certificate of taxation that was issued on November 25, 2012.'

9. Guided by the foregoing decision, I find that the application dated May 13, 2022 is merited and I therefore allow it as prayed.

Application dated June 2, 2022.

10. The client seeks the following orders in the application dated June 2, 2022: -

1. Spent
2. That this honourable court be pleased to grant the applicant leave to file an appeal against the orders and the ruling of May 5, 2022 by Honourable Lady Justice Okwany.
3. That this honourable court be pleased to validate the notice of appeal dated May 19, 2022 as being properly on record.
4. That costs of this application be provided for.

11. The application is supported by the affidavit sworn by Ms Betty Kamiro and is premised on the following grounds:-

1. That a ruling was delivered in the matter on May 5, 2022 by Hon Lady Justice WA Okwany.
2. That applicant is at a high risk of losing all his properties to the advocate pursuant to the said ruling hence being greatly inconvenienced and prejudiced by the advocate.



3. That the previous advocate on record failed to promptly advise and forward the file to my current advocates on record hence the delay in filing the instant application.
4. That the default to timeously file the appeal was due to factors beyond our control and the same should not be visited upon client.
5. That the applicant's intended appeal is arguable with a high probability of success and needs to be determined by this honourable court on merit.
6. That the court dismissed my reference without taking into account the issues raised and in particular the glaring arithmetical error by the taxing master of taxing the getting up fees at Kshs 1.5 million instead of Kshs 1 million based on Kshs 3 Million erroneously awarded.
7. That it is in the interest of justice that this application be allowed so as to allow his reference, and the bill of costs in question be remitted back for taxation to obviate a miscarriage of justice and curb unjust enrichment by the advocate.
8. That the intended appeal is not frivolous and/or vexatious.
9. That the applicant will continue to suffer irreparable prejudice, loss and damages unless this honourable court intervenes and grants orders sought herein and further, this application will be rendered a nugatory and a mere academic exercise.
10. That the applicant is ready and willing to comply with all the conditions that this honourable court is going to set.
11. That it is only fair and in the interest of justice that the prayers sought herein are granted.
12. The advocate opposed the application vides a replying affidavit sworn by Mr Michael Osundwa Sakwa who states that the time within which to make an application for leave to appeal has already lapsed and that the current advocates were aware of the facts of the case within 14 days of the delivery of the ruling. The advocate states that the respondent's application is time barred and is meant to deny him the fruits of his judgment. It was the advocate's case that the client has filed different application in different courts seeking the same reliefs.
13. The client on the other hand attributed the delay to the differences that it had with its previous advocates who did not avail to them the file on time. The client argued that the advocate will not suffer any prejudice if leave to appeal is granted.
14. The application is premised on rule 11(3) of the [Advocates Remuneration Order](#) which provides that:-

' Any person aggrieved by the decision of the judge upon any objection referred to such order under sub-rule (2) may, with leave of the judge but not otherwise appeal to the Court of Appeal.'
15. The above provision calls for a party to obtain leave from this court to appeal against the ruling of taxation. The applicant contended that the delay in filing the application was occasioned by the change of advocates.
16. I note that the ruling on taxation was delivered on May 5, 2022 while the notice to appeal is dated May 19, 2022 and the application for leave dated June 2, 2022.



17. In *Muriru Mungai & Co Advocates vs New KCC Limited HCCC 284/07* it was held: -

' In all matters involving the exercise of the court's discretion, it must be exercised judiciously for furtherance of substantive Justice. It is necessary for a party to seek leave of the court file an appeal against the decision of a judge in respect of a decision of a reference filed against the decision of the taxing master, consequently a party seeking leave must demonstrate good faith and the application must be done without undue delay.'

18. I have considered the reasons advanced by the client for seeking the leave of this court to file the appeal and I find them to be plausible. In the circumstances of this case, I find that the delay should not be visited on the client. I therefore allow the application dated June 2, 2022 with orders that costs shall abide the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Kokebe for Osundwa for applicant.

Ms Tuwei for Kirimi for respondent.

Court Assistant- Sylvia

