



Omondi Otieno & Associates Advocates v Ricana Enterprises Limited (Miscellaneous Civil Application E121 of 2021) [2022] KEHC 15617 (KLR) (23 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E121 OF 2021
RE ABURILI, J
NOVEMBER 23, 2022**

BETWEEN
OMONDI OTIENO & ASSOCIATES ADVOCATES APPLICANT
AND
RICANA ENTERPRISES LIMITED CLIENT

JUDGMENT

Introduction

1. This ruling determines two applications. One is dated November 27, 2021 and the other is dated March 16, 2022.
2. The /Advocate/applicant's application dated November 27, 2021 seeks the following orders:
 - a. The certificate of costs issued herein on November 25, 2021 with respect to the taxation order made on November 24, 2021 for the sum of Kshs 876,926.18 be adopted as judgement and decree of this Honourable Court, together with interest thereon at 14% per annum from September 24, 2021 being one month from the date of service of the Advocate's Bill of Costs to the Client, in accordance with the provisions of Rule 7 of the Advocates (Remuneration) Order, until payment in full
 - b. The costs of the application be borne by the Client.
3. The application is supported by the grounds on the face thereof as well as the supporting affidavit of Brian Otieno advocate.
4. It is the applicant's case that the advocate's firm was retained by the client/respondent herein to represent it in Kisumu Chief Magistrate's Civil Case No 312 of 2021; Ricana Enterprises Limited v Chemelil Sugar Company Limited, with the respondent paying the applicant a deposit fee of Kshs 100,000.



5. The applicant averred that he filed suit for a liquidated sum of Kshs 17,633,429.62 and all accompanying documents in the suit and further served the defendant with summons to enter appearance and the accompanying pleadings and they entered appearance but the respondent changed advocates on the August 16, 2021 prompting the applicant to file his Bill of Costs.
6. The applicant avers that the said Bill of costs was taxed at Kshs 876,926.18 on the November 24, 2021 and a Certificate of Costs issued on the November 25, 2021 of which he is entitled plus interest.
7. Opposing the application by the advocate, the client/ respondent filed an application dated March 16, 2022 seeking the following orders:
 - a. That the Court does extend such time limited in Rule 11 (1) and (2) of the Advocates Remuneration Order and the applicant be granted leave to request for reasons from the Hon Deputy Registrar, and if need be, file an Objection and a Taxation Reference to this Honourable Court against the Ruling of the Honourable Court's Taxing Officer Hon L Akoth delivered on 24th November, 2021. That the leave granted in prayer (1) above do operate as a stay of execution of the Ruling of the Taxing Officer aforesaid and any other consequential proceedings.
 - b. That the Objection to the Taxing Officer and the Application for Reasons annexed hereto be deemed as duly filed within time and served upon payment of requisite fees if need be.
 - c. That the costs of this application be in the cause.
8. The respondent asserted that it was aggrieved by the Honourable magistrate's ruling but the respondent's former advocate made the fatal mistake of approaching the court via review rather than by reference which led to the lapse of time within which to file a reference.
9. It was averred by the respondent that having changed counsel, it did not wish to have its former counsel's shortcomings to be revisited against him. It was further averred that the taxing officer erred legally and factually by taxing items 3,4 and 10 that were disputed.
10. The respondent further averred that the taxing officer erred in ignoring its preliminary objection which is pending ruling despite the submissions being on record. It was the respondent's case that the applicant would not suffer any prejudice if the application dated March 16, 2022 was allowed.
11. In opposition to the respondent's application dated March 16, 2022, the applicant/advocate filed a replying affidavit sworn on March 30, 2022 by Brian Otieno. It was deposed by the applicant that respondent's application was inept, devoid of merit, riddled with half-truths and inconsistencies and meant to delay the fair trial of the applicant's case.
12. The applicant further deposed that the taxing officer already gave her reasons in the ruling delivered on the November 24, 2021 and thus prayer 3 in the respondent's application was feckless.
13. It was further deposed by the applicant that the alleged mistake by counsel as cited by the respondent was made by one counsel who practiced in two different firms and that the application for review was a delay tactic to prevent the applicant from realizing the fruits of his hard work.
14. The applicant further deposed in contention that there were clear disciplinary channels upon which a client who is aggrieved could take and as such, basing its application on the said mistake by counsel was untenable.



15. It was further deposed that the respondent's preliminary objection was not ignored as alleged but the same was considered by the taxing officer and found to lack merit thus the taxing officer proceeded to tax the Bill in accordance with schedule 7 of the [Advocates Remuneration Order](#).
16. The applicant further deposed the fact that the Certificate of Costs is pending adoption of the Court was not a basis for the respondent to make an application for stay and that the application was a delaying tactic by the respondent.
17. The respondent further filed a replying affidavit in response to their application dated March 16, 2022, which was sworn on the September 22, 2022 by one Theodorah Omboto who deposed that being aggrieved by the decision of the taxing officer she wrote to the Honourable Magistrate for reasons but the reasons were never provided.
18. Ms Omboto further deposed that the taxing of the Bill as drawn was too excessive as the taxing officer did not consider the uncertain value of the claim as well as the time period the advocate participated in the matter.
19. The parties filed written submissions in support of their respective positions.

The Applicant/Advocate's Submissions

20. It was submitted by the applicant that they had sufficiently demonstrated that there existed a retainer relationship between himself and the respondent as required in the case of [Ochieng Onyango Kibet & Another v Adopt a Light Limited \[2007\] eKLR](#).
21. The applicant further submitted that he was entitled to the orders sought, specifically to have the Certificate of Costs recognised as a judgement of court as provided by Section 51 of the [Advocates Act](#) and as held in the case of [Rubo Kimngetich Arap Cheruiyot v Peter Kiprop Rotich \[2006\] eKLR](#).
22. Regarding the interest at 14% that the applicant sought, it was submitted that the same was provided in Rule 7 of the Advocates Remuneration Order and further upheld by the court in the case of [Otieno Ragot & Co Advocates v Kenindia Assurance Co Ltd \[2020\] eKLR](#).
23. The applicant submitted that the court sitting as a reference court was limited to only considering items in a bill of costs that were contested and that in this case, the respondent had not specified what it was contesting and thus this court's jurisdiction could not be extended to determination of the respondent's preliminary objection that sought to strike out the applicant's Bill of Costs. Reliance was placed on the case of [Bernard Gichobi Njira v Kanini Njira Kathendu & Another \[2015\] eKLR](#).
24. The applicant submitted that the court should not interfere with the figures awarded by the taxing officer. Reliance was placed on the cases of [Joseph Kiplangat Cheruiyot v M/S Weldon Ngetich & Co Advocates \[2021\] eKLR](#). The applicant further submitted that contrary to the allegations by the respondent that the taxing officer taxed the Bill of Costs as it was since it was undefended, the same was true but that the taxing officer taxed the Bill on merit.
25. It was submitted that the taxing officer gave reasons for her decision within the decision itself and that she further stated that her decision could be accessed by either parties upon payment of the requisite fees. The applicant further submitted that there was no evidence that the letter dated March 16, 2022 was paid for and thus validly in court.
26. It was submitted that the only viable remedy left to court was for the court to uphold the applicant's application dated November 26, 2021 and proceed to adopt the Certificate of Costs issued on the November 25, 2021 as judgement of the Honourable Court.



27. On costs, the applicant submitted that they should be awarded in his favour as the respondent has been hell-bent on delaying the conclusion of this matter.

The Respondent's Submissions

28. The respondent submitted that they had a right to be heard on its preliminary objection dated August 31, 2021 which is pending ruling to this date and that as a result of the denial, the applicant's Bill of Costs was taxed as drawn.
29. The respondent further submitted that upon the issue of Certificate of Costs, the court became functus officio on that issue and they thus sought stay over the same as the respondent was neither heard on its preliminary objection nor its submissions considered before a ruling on the Bill of Costs was issued.
30. It was submitted that the respondent's prayer for extension of time vide its application dated March 16, 2022 should be granted since the failure to comply within the required time was not due to the respondent's injudiciousness but rather the failure of the respondent's erstwhile advocates on record.
31. The respondent submitted that the mistakes of the advocate ought not to be visited on the client. Reliance was placed on the case of *Geoffrey Oguna & Another v Mohammed Yusuf Osman & 2 Others [2022] eKLR*.

Analysis and Determination

32. I have carefully considered the submissions filed by both parties in this matter as well as the relevant law. I will first determine the client/respondent's application dated March 16, 2022 as it will have an effect on whether to grant or deny the orders sought in the applicant's application dated November 27, 2021 by the applicant/advocate.

The application dated March 16, 2022

33. The respondent herein sought extension of time within which to file a reference to the taxing officer's decision as well as stay of the said decision. Having considered the grounds and affidavit evidence in this matter and the oral submissions of both counsel, the issues for determination in regard to the application dated March 16, 2022 are:
1. Whether or not extension of time under paragraph 11 (1) and (2) and 4 of the Advocates Remuneration Order should be granted
 2. Whether or not execution should be stayed.
34. The Court enjoys wide discretionary powers under the *Civil Procedure Act* and Rules more specifically as stipulated in section 1 (A), 1(B),3(A), section 79 (G) on the overriding objective, the inherent jurisdiction and on account of sufficient cause to exercise discretion and jurisdiction in matters of this nature in the interest of justice.
35. It is however observed that paragraph 11 (1) (2) of the Advocates Remuneration Order does not speak to the relevant factors that the Court should consider when exercising its discretion on whether or not an extension of time should be granted.



36. Paragraph 11 of the Advocates Remuneration Order provides that:

- ' 1. Should any party object to the decision of the Taxing Officer, he may within fourteen days after the decision give notice in writing to the Taxing Officer of the items to which he objects.
2. The Taxing Officer shall forthwith record and forward to the Objector the reasons for his decision on those items and the Objector may within fourteen days from the receipt of those reasons apply to a Judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.'

37. In *Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR* the Court of Appeal citing with approval other authorities observed that:

' The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi V Charles Gichina Mwangi – Civil Application No Nai 26 of 2004*, this Court held that:

'It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi V Kenya Airways Ltd [2003] KLR 486* in which this Court stated;-Over the years, the Court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi – Civil Application No Nai 255 of 1997*(unreported), the Court expressed itself thus; -

'It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reasons for delay; thirdly(possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.'

38. As stated in the above cases the length of the delay and reasons for non-compliance with the time lines are important factors to influence the exercise of discretion of the Court. In calculating the length of delay in making the application for an extension of time, the period will start running from November 24, 2021 when the impugned bill of costs was taxed by the taxing master to the March 16, 2022 which time the aggrieved respondent lodged the chambers summons for extension of time.

39. The delay in filing the application was on an overreach of 112 days. On whether the delay is inordinate and inexcusable, the court in *Mwangi S Kimenyi v Attorney General and Another, (2004) eKLR* considered what constitutes inordinate delay, and stated as follows:

' There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the



case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.'

40. In the instant application, I find that the delay in filing the reference was inordinate. The question is whether the delay is excusable. The respondent alleges that the delay in filing their reference was occasioned by a mistake of the respondent's former advocate who filed a review instead of a reference. It is the respondent's case that the mistake of an advocate should not be visited upon his client.
41. In *Omwoyo v African Highlands & Produce Co Ltd [2002]1 KLR*, the Court held that:
- ' Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant's Advocates. This is a proper case where the Defendants remedy is against its erstwhile Advocates for professional negligence and not setting aside the judgment'.
42. This plea that the mistakes of counsel ought not be visited upon the client is a common one and any advocate who fails to perform a duty due to his client will invariably seek relief on the basis that the mistakes or errors of the Advocate ought not to be visited upon the client. In the case of *Belinda Murai & 6 Others v Amos Wainaina [1978] KLR* Madan JA (as he then was) defined what constitutes a mistake as follows:
- ' A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.'
43. Similarly in *Phillip Chemwolo & Another v Augustine Kubede [1982-88] KLR* 103 Apaloo JA as he then was stated thus:
- ' Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit'.
44. Finally on this point, in *Shah v Mbogo & Another [1967]EA 166*, the then Court of Appeal for Eastern Africa held that:
- ' Applying the principle that the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused'.
45. The Supreme Court considered the importance of adherence to the laid down procedure in approaching a court of law. This was in an appeal of an election petition in the case of *Moses Mwicigi*



§ 14 *Others v Independent Electoral and Boundaries Commission* § 5 *Others* [2016] eKLR where the court stated thus:

' This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the *Constitution*, which proclaims that, 'courts and tribunals shall be guided by [the principle that] justice shall be administered without undue regard to procedural technicalities'. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.'

46. The importance of following procedure of paragraph 11 of the Order, was underscored by this court in the case *Vishisht Talwar v Anthony Thuo Kanai T/a A Thuo Kanai Advocates* [2014] eKLR where the learned judge stated:

' The Learned Judge referring to a decision in the Court of Appeal in *Machira & Co Advocates – vs- Arthur K Magugu & Another* CA 199/2002[2012] eKLR stated that:

'Rule 11 thereof provides for ventilation of grievances from such decisions 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 of 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 for a simple and expeditious mode of dealing with decisions on Advocate's bill of costs through references under Rule 11 to a Judge in chambers.'

47. In my view, the fact that the respondent's advocate failed to follow the right path in approaching court is an issue of negligence and for which the respondent can seek other remedy. In the circumstances, I find that the mistake by the respondent's former advocate in approaching court through review instead of a reference is not an excusable reason for this court to grant the orders sought.
48. Balancing the interests of the respective parties herein, I find that there is need to bear in mind that the applicant has a valid decree that has not been challenged and the corresponding right to enjoy the fruits of his judgement.
49. I thus find that the respondent's application dated March 16, 2022 lacks merit and is declined.



Application dated November 27, 2021

50. Having found no merit in the Chamber Summons dated March 16, 2022, I now turn to the advocate/applicant's application dated November 27, 2021 brought by the Advocate pursuant to 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 costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in the case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs.'

51. In *Lubulellah & Associates Advocates v NK 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.'

52. The Advocate prayed for costs and interest. Rule 7 of the Advocates (Remuneration) Order. The said Rule provides: -

' An Advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiry to one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount has been paid or tendered in full.'

53. Accordingly, I find that the Advocate is entitled to interest on the sum due. Therefore, since the Certificate of Taxation dated September 25, 2021 remains valid and enforceable, I do prayer (1) of the Notice of Motion dated November 27, 2021.

54. In the end, the Certificate of taxation dated November 24, 2021 for the sum of Kshs 876,926.18 is hereby adopted as judgement of this Honourable Court, together with interest thereon at 14% per annum from September 24, 2021 being one month from the date of service of the Advocate's Bill of Costs to the Client, in accordance with the provisions of Rule 7 of the Advocates (Remuneration) Order, until payment in full.

55. Decree to issue forthwith.

56. Each party to bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF NOVEMBER 2022.

R.E. ABURILI

JUDGE

