



Ngonze & Ngonze Advocates v Nakumatt Holdings Limited (Under Administration) & another (Environment and Land Miscellaneous Application E044 of 2021) [2023] KEELC 18361 (KLR) (20 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18361 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E044 OF 2021
NA MATHEKA, J
JUNE 20, 2023

BETWEEN

NGONZE & NGONZE ADVOCATES ADVOCATE

AND

NAKUMATT HOLDINGS LIMITED (UNDER ADMINISTRATION) 1ST CLIENT

ATUL SHAH 2ND CLIENT

RULING

1 The Application is dated 23rd September 2022 and is brought under Sections 1, 1A, 1B, 3, 3A, 63 (e), *Civil Procedure Act*, Cap. 21, Laws of Kenya; Section 51 (2), *Advocates Act*, Cap. 16, Laws of Kenya; Articles 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 25, 28, 39, 40, 47, 48, 50, 60, 64, 159, 162, 165, 169, 258, 259, *Constitution of Kenya*, 2010 seeking the following orders;

1. That the Certificate of Costs whose details are indicated here below, be deemed as the Judgment of this Honourable Court, viz Certificate of Costs: Dated 6/07/2022 Issued on 20/09/2022 Amount: Kshs. 9,166, 666.66
2. That an order do issue to the effect that Interest on the amount subject of said Certificate of Costs do accrue at the rate of 14% p.a from the date of issuance of the Certificate of Costs until Payment in Full.
3. That Costs of this Motion be provided for.

2 The Application is premised upon the annexed supporting affidavit of Daniel M. Ngonze, Esq. and on the following grounds that vide Advocate - Client Bill of Costs dated 22nd October 2021, the Advocate/Applicant sued the Client/ Respondent seeking Costs of Kshs. 9,999,999.99, on the basis



of instructions received from the Client/ Respondent. That vide Ruling delivered herein on 6th July 2022, the Honourable Court taxed the said Bill of Costs at Kshs. 9,166,666.66. That the consequent certificate of costs was issued on 20th september 2022. that pursuant to the ruling and consequent certificate of costs, the Clients/ Respondents have, to date, not filed and/or served any reference proceedings. That similarly, said ruling and attendant certificate of costs have never been the subject of any proceedings as regards their review, variation and/or setting aside. That despite the foregoing, the Clients/ Respondents have never made any attempt to satisfy the certificate of taxation despite being fully aware of the subject ruling. That in the circumstances the Advocate/Applicant is unable to initiate the execution process to recover the subject amount as there is no decree capable of execution. The overriding objectives under the *Civil Procedure Act*, Cap. 21, Laws of Kenya as well as Section 51 (2) *Advocates Act*, Cap. 16, Laws of Kenya, aid the Advocate/Applicant in as far as instituting suit to recover said amount shall only serve to prolong these proceedings and escalate costs. It is only proper, prudent and justicious that the Honourable Court proceeds to deem the certificate of taxation herein as decree capable of execution purely for said purpose. That it is therefore only in the interests of justice, fairness, equity, constitutionalism, principles the rules of law and natural justice and protections of fundamental rights and Application ought to be allowed as prayed, to enable the execution process proceed against the Client/Respondent.

- 3 The Respondent has raised a preliminary objection that the principle ground upon the Application is sought is found at clause 4 of the said Application and is to the effect that the Respondents have to date not filed and/or served any reference proceedings. That consequent upon the above the Applicant is seeking judgment as stated above. The Respondents submit that there is no doubt at all that on the 20th of July 2022 under Mombasa Civil Reference No.49 of 2022, the Applicants exercised their rights under Rule 11 of the *Advocates (Remuneration Order)* and filed a reference to this Honourable Court. That the said reference was filed on the 20th July 2022 and therefore within the 14 day period provided by Rule 11. That having been done the certificate of costs relied on is under challenge as provided by law and therefore no judgment can issue therefrom as is currently sought. That the said reference being appellate in nature the orders currently sought by this Application cannot issue. That the order sought by this Application must abide the determination of the reference currently pending before this Honourable Court. That in considering an Application under section 51(2) of the *Advocates Act* Cap 16, one of the issues the Honorable Court has to consider is whether or not the certificate of costs has been challenged by way of a reference.
- 4 They relied in the case of *Lubulellah & Associates Advocates vs N.K Brothers* Milimani High Court Commercial Admiralty Division Misc. App No.52 of 2012 and also rely on the case of *George Miyare Versus Elsek & Elsek Construction Limited* Mombasa High Court Misc Civil Application of 2019. That same position is reiterated in the case of *Okongo Wandago & Co Advocates vs County Government of Migori* Migori High Court Misc Civil Application No.11 of 2020 and in the case of *Nyaundi Tuiyott & Co Advocates vs African Merchant Assurance Co. Ltd* Nairobi High Misc Application No.78 Of 2017. That the existence of a reference or a challenge to the certificate of costs is an integral part of the court's consideration as to whether or not to grant an Application under section 51(2) of the *Advocates Act* Cap 16, such as the instant one.
- 5 This court has considered the preliminary objection and the submissions therein. Section 51 (2) of the *Advocates Act* reads 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."



6 In the case of *Musyoka & Wambua Advocates vs Rustam Hira Advocate* (2006) eKLR where it was held;

"Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has discretion to enter judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view is a mode of recovery of taxed costs provided by law, in addition to filing of suit....."

Rule 11 of the Advocates Remuneration Order provides;

11. Objection to decision on taxation and appeal to Court of Appeal
 - (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 of taxation 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 the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 - (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; Application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

7 I have perused the court record and find that the Advocate /Applicant filed its Advocate — Client Bill of costs dated 22nd October 2021 for taxation. The said bill was taxed by way of a ruling rendered by the Taxing Master on the 6th of July 2022, in which the bill was taxed at Kshs. 9, 166,666.66. That on the 20th of July 2022, the Applicants being aggrieved with the said ruling filed a reference to the High Court under Misc. Civil Reference No. 50 of 2022. That the 23rd September 2022, the Advocates/ Applicant filed the present Application seeking judgment arising from the impugned taxation ruling. That on the 21st of October 2022, the Applicants filed the preliminary objection now the subject matter of the submissions. I find that the said bill of courts is disputed and under reference and hence this Application is premature and cannot be entertained. I find the preliminary objection is merited and I strike out this Application with costs.

8 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF JUNE 2023.

N.A. MATHEKA

JUDGE

