



Koske v Joshua Mutai t/a Mutai Kipkemoi & Co. Advocates (Miscellaneous Civil Application E003 of 2023) [2023] KEELC 18181 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18181 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION E003 OF 2023
MC OUNDO, J
JUNE 15, 2023
IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA
IN THE MATTER OF THE TAXATION COST BETWEEN ADVOCATE AND CLIENT
AND
IN THE MATTER OF REFERENCE FROM THE RULING OF
THE TAXING OFFICER IN MISC. NO. E019 OF 2022
AND
IN THE MATTER OF KERICHO ELC CASE NO 61 OF 2012
BETWEEN
EZEKIEL KOSKE APPLICANT
AND
JOSHUA MUTAI T/A MUTAI KIPKEMOI & CO. ADVOCATES . RESPONDENT

RULING

1. Before me for determination is an Application by way of Chamber Summons dated 27th January 2023 brought pursuant to the provisions of section 51(2) of the *Advocates Act*, rule 11 of the *Advocates Remuneration Order* and article 50 of the *Constitution* and which application was disposed of by way of written submissions.
2. In his application, the Applicant seeks for orders that he be granted leave to file an Objection and a Taxation Reference to this Honorable Court against the Ruling of the Taxing Officer delivered on 20th December, 2022.
3. That the leave if granted do operate as stay of execution of the Ruling of the Taxing Officer aforesaid and any other consequential proceedings and further that the Objection to the Taxing Officer and



the Application for Reference annexed hereto be deemed as duly filed and served upon payment of requisite fees and finally that the costs of this application be in the cause.

4. The said Application was supported by the grounds on its face and the supporting Affidavit, sworn on the 27th January 2023 by the Mr. Ezekiel Koske the Applicant herein to the effect that he was a Defendant in ELC case No. 61 of 2012 wherein he had instructed the firm of Chelule & Co Advocates. That the law firm was wound up and the matter proceeded ex-parte wherein judgment had been delivered against him. Subsequently, the Respondent had filed Misc. E019 of 2022, raising an Advocate client Bill of Costs against him and which Bill of Costs had been taxed online on the 20th December, 2022 in his absence as he was acting in person and had no technical knowledge on how to operate and proceed with the matter online due to his old age of 80 years and despite the fact that he had presented himself physically in court.
5. That thereafter, he had been served with a Proclamation of Attachment Notice by Hegeons Auctioneers dated 23rd January, 2023 for attachment of his property in satisfaction of the Bill of Costs of Kshs. 420,564/= when the requisite period for filing of a reference had lapsed.
6. That he now wished to file a Reference against the decision of the Taxing Officer allowing the Bill of Costs for a sum of Kshs. 420,564/= in favour of the Respondent because the firm of advocates, that is, Mutai Kipkemoi & Co. Advocates had never been on record for him.
7. He framed his issues for determination as follows;
 - i. Whether or not the extension of time under paragraph 11(1) and (2) and 4 of the Advocate's Remuneration Order should be granted.
 - ii. Whether or not execution should be stayed.
8. On the first issue for determination, he had relied on the provisions of the law that donated powers to the court to wit section 1(A) 1(B) 3, (A) 79(g) of the Civil Procedure Act as well as the decision in Paul Wanjobi Mathenge v Duncan Gichane Mathenge [2013]eKLR to submit that the length of the delay and reasons for none compliance of the timelines were important factors to influence the exercise of discretion of the court. That he had overreached the time limitation by one month and the failure to comply was inordinate and explained as herein above in his affidavit. That the Respondent herein was never on record for him and he had fraudulently filed the Bill of Costs against him wherein he had proceeded to attach his property.
9. On the second issue for determination, the Applicant had relied on the provisions of order 42 rule 6(1) of the Civil Procedure Rules to submit that a reference was a pathway for an aggrieved party from a Certificate of Costs of the Taxing Master. That the guiding principles for stay were whether there were special circumstances of the case so required and in this instant the Respondent had filed his bill of costs when they were never on record for him.
10. The second instant was where there was proof of substantial loss that may otherwise result and in this instant, the submission was that his property had already been attached and if the stay was not granted, he would suffer huge and irreparable damages.
11. On the third issue as to whether this appeal would be rendered nugatory should the orders of stay not be granted, his submission was that if the same was not granted and the Respondent was allowed to execute and if the objection was successful the same would be rendered nugatory. He sought for leave to file his Notice of Objection and a Taxation Reference as prayed.



12. In their Replying Affidavit sworn on the 9th February 2023, the Respondent opposed the Application averring that it was frivolous, vexatious and an abuse of the court process meant to avert justice.
13. That the Applicant ought to have filed the Application in the Misc. File No. E019 of 2022 wherein the taxation took place, so as to avoid a multiplicity of suits. That he also ought to have filed an Appeal against ruling of the Taxing Master but not the current application which was misplaced.
14. The Respondent argued that the Applicant had indeed instructed the firm of M/S Chelule & Company Advocates, to defend him in the ELC Suit No. 61 of 2012, wherein he (Respondent) was the Managing Partner and had personally taken instructions from the Applicant herein as evidenced by a copy of a payment receipt marked as “JKM-4”. That subsequently the firm had changed the name from M/S Chelule & Company Advocates to M/S Mutai Kipkemoi Advocates but the management had remained the same and all files had been retained but they had inadvertently forgotten to file the Change of Name in ELC No 61 of 2012 although the Applicant was fully aware that his matter was being handled by the said firm of M/S Mutai Kipkemoi Advocates.
15. That in the year 2020, the Applicant had visited their office and after a lengthy meeting, he had promised to visit again and but never showed up.
16. That thereafter the firm of M/S Langat Godwin & Company Advocates before coming, on record had filed an Application dated 4th November, 2022 which they served upon the Respondent’s firm and was received. That the court record could bail him out as it had evidence that they had been on record for the Applicant as far back as 2019 in ELC. No. 61 of 2012.
17. That they had desperately sought to have the Applicant visit and prepare for the case and or attend court for hearing in vain wherein they had intimated to the court of their intention to cease acting for the Applicant in the said ELC. No. 61 of 2012.
18. That upon service of their Bill of Costs, the Applicant had visited the Respondent’s offices where he had fully been explained about the bill and he had promised to pay the same. He however failed to fulfill his promise forcing the Respondent to proceed and tax the bill and thereafter instruct auctioneers. The Applicant again visited the Respondents in his Chambers on 24th January, 2022 wherein they had agreed on a mode of payment and the Applicant had made a partial payment of Ksh. 40,000/= as a show of good faith with a promise to clear the balance, only for him to file the present Application.
19. That the Bill of Costs dated 24th November, 2022 was not assessed online as alleged by the Applicant but was assessed/taxed in open court on 20th December, 2022 by the Taxing Master, Hon. F.M. Nyakundi and thus the presence and/or absence of the Applicant during the assessment of the Bill of Costs would not have made any difference.
20. That the technicalities the Applicant has invited the court to consider should be ignored in preference to substantive justice. That all along the Applicant had enjoyed the Respondent’s services without an issue but was bent on not paying his fees. That he did not raise any issue regarding the Bill of Costs nor file any response when he was served, nor has he raised any issue regarding the taxation of the same which should be the one and only issue in this Miscellaneous Suit. All that he had raised was that the Bill be taxed a fresh for the mere reason that he was not present in court during taxation.
21. The Respondent had filed their issues for determination as follows.
 - i. Whether the ruling delivered on 20th December 2022 be stayed and/or be set aside.
 - ii. Whether the Bill of Costs dated the 2nd November 2022 be referred back for taxation.



- iii. Who should bear the costs of the application?
22. On the first issue for determination, the Respondent had submitted that the Applicant had not laid down any sound or viable grounds for staying and or setting aside the subject Bill of Costs. That he had never opposed the Bill of Costs, which had been taxed in open court, despite service. That should his claim had been that he was not represented by the Respondent, he should have sought to strike out the Bill of Costs instead of seeking to have it taxed afresh.
23. On the second issue for determination, the Respondent had relied on the provisions of rule 11(2) of the *Advocates Remuneration Order* and the decision in *Nyakundi & Company Advocates v Kenyatta National Hospital Board*[2005] eKLR to submit that although the law had clearly set out the procedure on how to object to a Taxing Officer's decision, the Applicant had chosen to skip the very important step of giving notice to the Taxing Officer of the items he had objected to and hence his application was incompetent. That the Application was an afterthought and made in a bid to escape paying for the services rendered to him and therefore the same ought to be dismissed with cost

Determination

24. After having considered the application herein the submissions as well as the affidavit in opposition and the submissions thereto, I find the issues that arise for determination as being; -
- i. Whether or not extension of time under paragraph 11 (1) and (2) and 4 of the *Advocates Remuneration Order* should be granted.
 - ii. Whether or not execution should be stayed.
25. I have taken into consideration that the provisions of paragraph 11 (1) (2) of the *Advocates Remuneration Order* do 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, however it is an established position of law that the court has discretion, which is unfettered, to consider when dealing with an application for extension of time, the period of delay, the reasons for the delay and the degree of prejudice to the Respondent if the application is granted. The length of the delay and reasons for non-compliance of the time lines are important factors to influence the exercise of discretion of the Court.
26. In the present case, the Bill of Costs was taxed on the 20th December, 2022 wherein time started running and for which the 14 days period lapsed on the 3rd January 2023. This application was filed on the 27th January 2023 which was 47 days later. The delay in filing the application was on or about an overreach of 24 days which failure to comply was inordinate.
27. The Applicant in his affidavit has explained the reasons which let time to lapse to wit that an *ex-parte* judgment in ELC case No. 61 of 2012 had been entered without notice wherein Respondent herein who was not on record for him had fraudulently filed his Bill of Costs against him and the same had been taxed online in his absence. That thereafter, he had been served with a Proclamation of Attachment Notice by Hegeons Auctioneers dated 23rd January, 2023 for attachment of his property in satisfaction of the Bill of Costs for Kshs. 420,564/= when the requisite period for filing of a reference had lapsed. That he now wished to file a Reference against the decision of the Taxing Officer as the Respondent had proceeded to attach his property. The Applicant laid emphasis on the fact that he was unrepresented and had received no notice.
28. I have considered the response by the Respondent for which there were submissions to the effect that the Applicant was to blame for what befall him because of his inertia to give sufficient instructions and to prosecute his defence. That they had represented the Applicant as far back as the 2019 in



- ELC. No. 61 of 2012. That thereafter the firm of M/S Langat Godwin & Company Advocates before coming, on record had filed an Application dated 4th November, 2022 which they had served upon the Respondent's firm and it had been received.
29. That the court record could bail him out as it had evidence that they had been on record for the Applicant as far back as the 2019 in ELC. No. 61 of 2012. That upon service of their Bill of Costs, the Applicant had visited their offices where he had been fully explained on the Bill of Costs and he promised to pay the same. He however failed to fulfill his promise forcing the Respondent to proceed and tax the bill and thereafter, instruct auctioneers.
30. That on the 24th January, 2022 the Applicant had however visited the Respondent's Chambers wherein they had agreed on a mode of payment and he had made a partial payment of Ksh. 40,000/= as per a copy of receipt marked "JKM4" as a show of good faith with a promise to clear the balance, only for him to file the present Application.
31. That the Bill of Costs dated 24th November, 2022 was not assessed online as alleged by the Applicant but was assessed/taxed in open court on 20th December, 2022 by the Taxing Master, Hon. F.M. Nyakundi and thus his presence and/or absence would not have made any difference.
32. From the Applicant's application and submissions, I note that he had not raised any issue regarding the Bill of Costs nor file any response when he was served. No tangible reason has been offered as to why there was a delay in filing a Reference but what comes out clearly in his Application is that the Applicant had tried to negotiate with the Respondent on the taxed Bill wherein he had even made a part payment. His main argument herein is not related to whether there had been an error of principle apparent on the taxed Bill or whether the same was manifestly biased and/or illogical but rather that the same be taxed afresh for the reason that he was not present in court during taxation and further that the Respondent had not been his Advocate. This is not reason enough to seek for the Bill to be re-taxed, if anything the Applicant ought to have filed an Appeal.
33. I find that the Applicant has not established a sufficient cause for this Court to extend time in his favor to file a Reference under paragraph 11 (1) (2) of the *Advocates Remuneration Order*. Having held as herein above, the second issue for determination as to whether there ought to be a stay of execution of the Ruling of the Taxing Officer aforesaid and any other consequential proceedings automatically fails.
34. The Application dated the 27th January 2023 is herein dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 15TH DAY OF JUNE 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

