



Miller & Company Advocates v China Roads & Bridge Corporation (Miscellaneous Application 168 of 2019) [2021] KEHC 408 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)

Neutral citation: [2021] KEHC 408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 168 OF 2019
WA OKWANY, J
DECEMBER 16, 2021**

BETWEEN

MILLER & COMPANY ADVOCATES APPLICANT

AND

CHINA ROADS & BRIDGE CORPORATION RESPONDENT

RULING

1. This ruling is in respect to the Applicant/Clients Application dated 24th March, 2020 seeking, inter alia, orders that: -
 - a. The execution of the Certificate of Costs dated 10th February, 2020 together with the Ruling thereto, dated 19th November 2019 be suspended and/or stayed pending the hearing and determination of this Application.
 - b. This Honourable Court be pleased to enlarge time for the Client/Applicant to file a Notice of Objection to the taxation proceedings herein together with reference to this Honourable Court against the Certificate of Costs and Ruling of the Taxing Master given on 19th November, 2019 herein.
 - c. The Application herein be admitted as a reference against the taxation proceedings and the Honourable Court be pleased to vary, review and/or set aside the Certificate of Costs and Ruling of the Taxing Master given on 19th November, 2019 and in its place strike out and/or dismiss the Advocate-Client Bill of Costs dated 20th February, 2019.
 - d. Costs of the application be awarded to the Applicant.



2. The application is premised on the main grounds that: -
 - a. Advocate/Respondent filed the Advocate Client Bill of Costs herein on 20th February, 2019 purportedly seeking to recover fees of Kshs. 2,112,420/= and thereafter unilaterally, and unlawfully proceeded with the taxation of the Bill of Costs at an unknown date without issuing and/or serving notice to the Client/Applicant and as a result obtained ex-parte Certificate of Costs which it now intends to execute against the Client/Applicant.
 - b. The Advocate/Respondent obtained the Certificate of Costs by non-disclosure of material fact to the effect that the Client/Applicant had fully settled the Advocates Costs and a receipt for Kshs. 110,000/- was duly issued by the advocate on the 23rd February, 2017 in proof of payment of fees in relation to HC OMM 621- of 2001: M. A. Bayusuf & Sons Limited Vs Express Kenya Limited & China Road & Bridges Corporation.
 - c. The Client/Applicant only learnt that the matter proceeded ex-parte for taxation on the 18th February, 2020 when it was served with a letter forwarding the Certificate of Costs issued on 10th February, 2020 and demanding payment for the taxed costs.
 - d. The execution of the decree arising from the said irregular and unlawful ex-parte Bill of Costs and taxation proceedings is not only oppressive and prejudicial to the Client but is against natural justice and unless interim stay orders are issued, the proceedings herein will be rendered nugatory and the Client/Applicant subjected to irreparable injury from the execution proceedings that cannot be compensated by way of damages
 - e. The delay in filing the Notice of Objection together with the reference was not in bad faith as the same arose from the fact that the Advocate did not notify the Client/Applicant of the date for taxation and/or delivery of the Ruling in respect to the Bill of Costs to enable the Client/Applicant participate in the same.
3. The Respondent/Advocate opposed the application through the replying affidavit of Mr. Anthony Mbaji Advocate who states that the application is fatally defective, devoid of merit, vexatious, brought in bad faith and ought to be dismissed. He avers that the Applicant's Supporting Affidavit contains blatant lies, contradictions, fabrications and material non-disclosure calculated to mislead the Court.
4. Mr. Mbajistates that the Client/ Applicant was duly served with a copy of the Advocate-Client Bill of Costs and Notice of Taxation as the same were received by its Legal Officer one Mr. Joseph Newton who accepted service by signing on a copy of the Advocate-Client Bill of Costs and Notice of Taxation. He attached the affidavit of service together with the signed copies of the Advocate-Client Bill of Costs and Notice of Taxation as annexures to the replying affidavit. He further states that the Fee Note dated 6th February, 2009 for Kshs. 110,000/- was not the final fee note as the Advocate continued to act for Client/Applicant in this matter until sometime in the year 2018.
5. It is the respondent's case that the instruction fees of Kshs. 900,000/- was based on the judgment amount of USD 62,500/-



6. Parties canvassed the application by way of written submissions which I have considered. The main issues for determination are whether, in the circumstances of this case, the court may extend the time for filing of a reference and whether the court may stay execution of certificate of taxation of costs pending the hearing of the reference.

Extension of time to file reference from taxing officer's decision on costs .

7. Clause 11 of the Advocates' Remuneration Order 2009 grants the court the discretion to extend time for lodging a reference from the taxing master's decision on costs notwithstanding the expiry of the 14-day period prescribed for the reference. Paragraph 11 of the Advocates' Remuneration Order provides as follows:

“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 subparagraph (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), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 5. 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.”
8. In *County Executive of Kisumu vs County Government of Kisumu & 8 others [2017] eKLR* it was held that: -

“the under-lying principles that a Court should consider in exercise of such discretion:

- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;”
9. In the present case, the applicant explained that the delay in filing the Notice of Objection together with the reference was occasioned by the fact that their Advocate did not notify them of the date for taxation and/or delivery of the Ruling in respect to the Bill of Costs so as to enable participate in the same. The applicant also accused the Advocate of material non-disclosure of taxation of a previous Bill of Costs dated 25th April 2015 over the same subject matter wherein the Advocate sought to recover Kshs. 631,866/- as legal fees for its services. On its part, the Advocate maintained that it duly effected service of the Bill of Costs and notice of taxation on the Client/Applicant.
10. A perusal of the proceedings before the Taxing Master reveals that both the Advocate for the Client and Advocate were present in court on 1st July 2019 when the advocates’ Bill of Costs first came up for hearing. The record shows that Mr. Ochieng advocate for the Client, was granted 14 days to respond to the Bill after which the matter was listed for mention on 30th July 2019. The record does not however show what transpired in court on 30th July 2019 as the next date that the matter came up before the Taxing Master was on 6th August 2019 when Mr. Dar appeared for the Applicant and informed the court that the Client had not filed any response to the Bill of Costs after which the matter was fixed to ruling on 3rd October 2019. I note that only the counsel for the Advocate was present in court on 3rd October 2019 when the ruling on taxation was delivered.
11. What emerges from the above narration of the sequence of events that led to the taxation of the advocates’ Bill of Costs is that while it cannot be disputed that the client was duly served with the Bill of Costs and the initial notice of taxation 1st July 2019, there is no evidence of service with the subsequent dates for taxation and ruling. This scenario lends credence to the Client’s claim that they were not notified of the taxation date and the ruling so as to enable them file the reference in time. I am therefore satisfied that the applicant has made out a case for the granting of the orders for extension of time within which to file the reference. I am guided by the decision in *Shah & Parekh Advocates vs Kenindia Assurance Company Limited [2020] eKLR* where the court held that the Deputy Registrar was duty bound to give the parties adequate notice of the Ruling on taxation and that the failure to do so was sufficient cause to justify the exercise of the court’s discretion to extend the time within which a party was allowed an opportunity to file an objection or reference. The court rendered itself thus: -

“The Deputy Registrar ought to have published or served notices on the parties at least three days before the date ruling was delivered. As this was not done, the applicant’s claim that it only became aware of the ruling on 24th June 2019 after the days limited for filing of an objection had expired is plausible.

In view of the foregoing, I find that the applicant has established that its failure to file an objection or reference within the prescribed time was not deliberate and was not caused by lack of diligence on its part. I am thus satisfied that the applicant has demonstrated sufficient cause to justify the exercise of the court’s discretion in its favour and is entitled to the orders sought.”

Stay of certificate of taxation of costs

12. Taxation of costs is part and parcel of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. Indeed, Section 94 of the *Civil Procedure Act* provides,



as a general rule, that execution of orders of the court should await the confirmation of the costs by taxation unless the Court grants leave for execution before taxation of costs. The said section stipulates as follows: -

“94. Execution of decree of High Court before costs ascertained

Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

13. Section 89 of the Civil Procedure Act provides for the application of the Civil Procedure Rules in all cases of a civil nature such as the present application arising from taxation of costs. Section 89 of the Act provides as follows: -

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“89. Miscellaneous proceedings

The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.”

14. My humble view is that the provisions of the Civil Procedure Act with regard to stay of execution will apply to proceedings, which are of a civil nature, for the reference of an objection to the Court from the taxation of a Bill of Cost by a Taxing Officer of the Court under the Advocates’ Remuneration Order. This position is in line with the principle of natural justice that a party against whom substantial sums of money has been adjudged in the nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates’ Remuneration Order, which is the procedure provided for such determination. Such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time.

Terms of stay of execution

15. The conditions to be met in an application for stay of execution pending hearing and determination of a reference to a judge from taxation of costs are similar to the conditions for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. This is to say that a court will in granting the orders be guided by presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the applicant. The court will also consider if the application has been filed without unreasonable delay.
16. On whether the application was filed without unreasonable delay, the applicant stated that it only learnt that the matter proceeded ex-parte for taxation on the 18th February, 2020 when it was served with a letter forwarding the Certificate of Costs issued on 10th February, 2020 and demanding payment for the taxed costs. The instant application was filed on 24th March 2020. I find that explanation given for the delay in filing the application is plausible bearing in mind the fact that I have already found that the applicant was neither served with a hearing notice for the date of taxation nor the notice of the ruling.
17. On substantial loss, I note that the taxed amount in dispute is over Kshs. 2,112,420 which is a substantial sum by any standards. Any loss to be suffered by the applicant in the event that it is



successful in the reference and is unable to recover the costs already paid to the Advocate can however covered by an order for security for costs.

18. The applicant submitted that because the taxation of the Bill of Costs proceeded ex-parte, the resultant Certificate of Costs is unlawful and highly prejudicial to the it thus leaving the court with no other option but to declare them unlawful and to stay the execution proceedings. The applicant added that the Certificate of Costs dated 10th February, 2020 and the Ruling of 19th November, 2019 was obtained fraudulently and by material non-disclosure of facts and issued in error of the law and as a result the said Ruling and Certificate of Costs should be set aside and the Bill of Costs dated 20th February, 2019 dismissed with costs.
19. I note that the applicant did not explain why it did not comply with the directions issued by the Taxing Master on 1st July 2019 granting it 14 days to file its response to the Bill of Costs. This failure by the applicant to comply with the court order portrays it as an indolent litigant who was not very keen on following up on the case. Be that as it may and as I have already observed in this ruling, the respondent was still under a duty to serve the applicant with the hearing and ruling notice.
20. Having regard to the findings and observations that I have made in this ruling and having found that the gist of the application was that the applicant was not served with the hearing notice for the taxation, I find that the applicant has made out a case for the granting of the orders sought in the application. I note that the applicant has raised a number of pertinent questions regarding the Advocates Bill of Costs including the claim that it amounts to double taxation of costs that had already been paid. My take is that the issues raised by the applicant can only unpacked by the Taxing Master during a fresh taxation.
21. Consequently, I allow the application dated 24th March 2020 in the following terms: -
 - a. The Application herein is admitted as a reference against the taxation proceedings and the ruling of the Taxing Master delivered on 19th November 2019 which is hereby set aside.
 - b. The Advocate-Client Bill of Costs dated 20th February, 2019 is hereby remitted back for taxation by any other the Deputy Registrar other than Hon. C. Wanyama.
 - c. The applicant shall bear the costs of this application owing to its indolence and the fact that it did not explain why it did not follow up to find out the fate of the Bill of Costs that was duly served upon its Legal Officer.
 - d. Mention before the Deputy Registrar on 24th January 2022.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Mwangi for Chege for Advocate/Respondent.

No appearance for applicant.



Court Assistant: Margaret

