



Kwengu & Company Advocates v Raja (Environment and Land Civil Miscellaneous Application 94 of 2017) [2023] KEELC 20377 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20377 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION 94 OF 2017
MD MWANGI, J
SEPTEMBER 28, 2023

BETWEEN

KWENGU & COMPANY ADVOCATES APPLICANT

AND

HITENKUMAR A. RAJA RESPONDENT

(In respect of the Client/Applicant's application dated 6th April, 2023 (reference) and the Advocate/Respondent's Preliminary Objection dated 19th April, 2023)

RULING

1. The application before me is the Client's application dated 6th April 2023 seeking for the following orders:
 - a. That the Ruling of the Taxing Master delivered on 21st August, 2017 and all subsequent Certificate of Taxation dated 4th November, 2022 be varied and/or set aside.
 - b. That the Advocate-Client Bill of Costs dated 22nd May, 2017 be struck-out in its entirety.
 - c. That in the alternative, this Honourable Court be pleased to tax the Bill of Costs dated 22nd May, 2017 afresh and/or make directions as to its fresh taxation before a different Taxing Master.
 - d. That the costs of this reference be provided for.
2. The application is based on the grounds that;
 - a. That the reference is filed pursuant to leave granted by this Honourable Court on 23rd March, 2023.



- b. That via the Bill of Costs dated 22nd May, 2017, the Advocate herein sought to recover costs allegedly due to him owing to his representation of the Client in Nairobi 312 of 2009; *Ashok Rupshi Shah and Hitenkumar A. Raja v Jacob Juma & 2 Others*.
 - c. That despite there being no evidence of the Bill of Costs upon the Client, the Deputy Registrar delivered an ex parte Ruling dated 21st August, 2017 and taxed the Advocate's Bill of Costs at Kshs. 1,319,894.88. The Client is aggrieved by the said Ruling and the Certificate of Costs issued therein on the basis that;
 - d. The Client was condemned unheard having not been served with the Notice of Taxation and the Bill of Costs itself.
 - e. The Bill of costs had been overtaken by events at the time of taxation as parties herein had recorded a Deed of Settlement dated 22nd July, 2017 for the alleged costs. Consequently, the Taxing Master lacked the requisite jurisdiction to tax the Bill of Costs and therefore erred in taxing the bill.
 - f. The Bill was sub judice to the then subsisting Bill of Costs fled in the High Court on 3rd June, 2014 being Nairobi Elc Misc. 200/ 2014; *Kwengu & Company Advocates v Hitenkumar A. Raja* which also sought to recover costs arising out of Nairobi Elc 312 of 2009; which Bill was marked as settled pursuant to the Deed of Settlement.
 - g. Further in light of the Bill of Costs filed by the Advocate on 21st October, 2022 being Nairobi Elc. Misc. E233 of 2022, which also sought to recover costs arising out of Nairobi Elc 312 of 2009. The Bill was struck out with costs to the Client on 8 the March, 2023 for being an abuse of the process of court.
 - h. That on a without prejudice basis, the Advocate failed to lead any evidence of the existence of an Advocate-Client relationship between the parties herein. The Taxing Master therefore lacked jurisdiction to tax the bill. The Client disputes the existence of a retainer between parties herein.
 - i. The Applicant therefore prays that the Deputy Registrar's Ruling dated 21st August, 2017 together with the consequent Certificate of Taxation dated 4th November, 2022 be set aside and the Advocate's Bill of Costs dated 22nd May, 2017 be struck out with costs to the Client.
3. The response by the Advocate was by way of a notice of Preliminary Objection framed more like grounds of opposition, in the following terms;
- a. This Honourable Court having found and held that the taxation proceeded before the Taxing Master ex-parte and without service upon and participation of the Respondent/ Applicant, this Honourable Court is functus officio and it therefore has no jurisdiction in law to re-hear the issue of service.
 - b. This Honourable Court having found that the taxation proceeded before the Taxing Master ex parte and without service upon the Respondent/ Applicant, this Honourable Court could only exercise its jurisdiction by setting aside the impugned taxation and referring the bill of costs to the Taxing Officer for fresh inter-partes taxation proceedings.
 - c. Granted that the Respondent/ Applicant admits that he never filed a reference in opposition to the impugned Bill of Costs; it is obvious that the Honourable Court has no jurisdiction in law to hear and or entertain in the first instance, the following grounds raised for the first time in the said Reference as if they fell for determination before the Taxing Master;



- i. That the Bill of Costs was overtaken by events owing to the Respondent/Applicant alleged full and final settlement of the costs claimed in the Bill of Costs.
 - ii. That there allegedly exists a valid and binding agreement for the remuneration of the Respondent/ Applicant, being a Deed of Settlement dated 22nd June, 2017.
 - iii. That the Bill of Costs was sub judice and is res judicata by dint of proceeding in Nairobi ELC Misc. 200/ 2014.
- d. Without Prejudice to the grounds above, the application is fundamentally ex-officio incompetent an abuse of the court process and ought to be dismissed in limine for being based on a misrepresentation and falsehood to the Honourable Court on the basis that the Respondent/ Applicant only became aware of the taxation proceedings on 16th January, 2023, yet he now admits that when the alleged Deed of Settlement dated 22nd June, 2017 was entered into(almost six years ago), the Remuneration under the Bill of Costs was covered and or taken into account.

Court's Directions

4. The court's directions in this matter were that the application dated 6th April, 2023 be heard alongside the Preliminary Objection and by way of written submissions. The Preliminary Objection was to be treated as the response by the Advocate to the application. Both parties complied. The Client/ Applicant's submissions are dated 22nd May, 2023 whereas the Advocate/ Respondent's submissions are dated 16th June, 2023. The court has had the opportunity to read the submissions by both parties.

Issues for determination

5. I have considered the application, the grounds in the Advocate's preliminary objections as well as the rival submissions. The issues for determination in my opinion are;
 - a. Whether the Taxing Officer erred in principle in assessing the Advocate's costs.
 - b. Whether the orders sought by the Client/Applicant should be issued as prayed.

Analysis and Determination

A. Whether the Taxing Officer erred in principle in assessing the Advocate's costs

6. The well settled principle in respect to references against an award of costs by way of taxation by a Taxing Master is that the Superior Court will not interfere with the award of the Taxing Master unless it is shown that there was an error in principle.
7. The court in the case of *Kipkorir, Tito and Kiara Advocates – Vs Deposit Protection und Board* (2005) eKLR re-emphasized the principle and stated that: -

“On a reference to a Judge from the taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer, unless the Taxing Officer erred in principle in assessing the costs.”
8. What then this court must determine in this Reference is whether the Taxing Officer erred in principle in assessing the Advocate's costs in this matter.



9. The Advocate/Respondent has in his preliminary objection pointed out that this court in its Ruling of 23rd March 2023 already made a finding to the effect that the taxation before the Taxing Master proceeded ex-parte and without service upon the Client/Applicant herein. He therefore avers that this court can only exercise its jurisdiction by setting aside the impugned taxation and referring the bill of costs to the Taxing Master for fresh inter-partes taxation.
10. It is indeed true that this court in its Ruling of 23rd March 2023 already made a finding to the effect that the taxation before the Taxing Master proceeded ex-parte and without service upon the Client/Applicant. At paragraph 30 of the said Ruling, the court stated that: -

“I am persuaded that the Client/Applicant was not served with the taxation notice nor notified about the ruling by the taxing master. From the record, I have not seen the evidence of service of the bill of costs too upon the Client/Applicant.”
11. The failure by the Taxing Master to ascertain that the client was indeed properly served before proceeding with the taxation definitely constitute an error in principle. It is a violation of the cardinal rule of natural justice that no-one should be condemned unheard. Proceeding with the taxation in the absence of the Client/Respondent further amounts to a violation of his constitutional right to a fair hearing and is not only against the rules of natural justice but also the good order of administration of law. The right is sacrosanct and must be upheld at all times.

A. Whether the orders sought by the Client/Applicant should be issued as prayed.

12. I agree with the Advocate/Respondent that the option that is available to this court having already made the above finding is to set aside the Ruling by the Taxing Master delivered on 21st August 2017, and refer the Advocate's bill of costs dated 22nd May 2017 to the Deputy Registrar of this court for fresh taxation before a different Taxing Master. That way, the Client/Applicant will then have an opportunity to bring out all the issues he seeks to before the said Taxing Master. I will therefore refrain from commenting on all those issues raised by the Client/Applicant herein in order not to influence, prejudice or embarrass the proceedings before the Taxing Master.
13. Accordingly, I hereby set aside the Ruling by the Taxing Master delivered on 21st August 2017 and all consequential orders thereof, and refer the Advocate's bill of costs dated 22nd May 2017 to the Deputy Registrar of this court for fresh taxation before a different Taxing Master.
14. The costs of this reference shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kimani for the Client/Applicant

Ms. Wanjiru holding brief for Mr. Oduk for the Advocate/Respondent

