



M/s Kipkoech Terer Advocates v Towet; Rotich (Objector) (Miscellaneous Application E005 of 2022) [2023] KEELC 21961 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21961 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
MISCELLANEOUS APPLICATION E005 OF 2022
MC OUNDO, J
NOVEMBER 30, 2023**

BETWEEN

M/S KIPKOECH TERER ADVOCATES RESPONDENT

AND

JANET TOWET APPLICANT

AND

JOHN KIPNGENO ROTICH OBJECTOR

RULING

1. Before me for determination is a notice of motion application dated June 29, 2023, brought under the provisions of order 10 rule 11 and order 22 rule 22(1), order 51 rule 1 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* and all enabling provisions of the law where the Applicant herein seeks for the following orders;
 - i. Spent
 - ii. Spent
 - iii. That this Honourable Court be pleased to declare that the warrant of arrest issued against the Applicant was irregularly obtained as there is no judgement and decree to be executed against the Applicant herein as the same is unlawful, ultra vires, null and void.
 - iv. That this honourable court be pleased to call, arrest, vary and annul the warrant of arrest issued by the Deputy Registrar against the applicant herein.
 - v. That in any event, the cost of this application be borne by the respondent.
2. The said Application is based on the grounds therein and a supporting affidavit of Janet Towet, the Applicant herein, of an equal date to the effect that on July 29, 2022, the respondent obtained a



- certificate of costs pursuant to a taxation of an advocate-client bill of costs whereby the said respondent proceeded with the execution process and irregularly obtained a warrant of arrest against the applicant without observing the due process of law. That the said warrant of arrest was obtained by fraud and/or misrepresentation without disclosure of sufficient material facts and against the policy of this court.
3. She deponed that the warrant of arrest was irregularly obtained as the same was not based on any executable decree since the Respondent had not sought a judgement as stipulated by section 48 of the [Advocates Act](#) hence on the account of the totality of the circumstances herein, it was just and equitable to stay the execution and lift the warrant of arrest issued against the Applicant. That no execution of any decree can take place without such a decree coming into existence. That section 48 of the [Advocates Act](#) was not observed while applying for execution yet no execution could take place without judgement of the court. The Applicant thus urged the court to exercise its discretion and stay the execution since could be arrested and harassed by the execution officers any moment.
 4. The Application was opposed by the respondent's replying affidavit and grounds of opposition both dated July 21, 2023 in which he deponed that there was misapprehension of facts in the Applicant's application which prompted the conception and the ultimate making of the instant application since what triggered the issuance of the warrant of arrest by the court against the Applicant was the blatant failure by the applicant to attend court pursuant to the notice to show cause dated June 9, 2023 without any lawful or reasonable excuse.
 5. That on the June 9, 2023, the magistrate's court issued a notice to show cause against the applicant for the applicant to show cause why she should not be committed to civil jail for failure to pay the remaining balance of legal fees in the sum of Kshs. 481,125/= in respect of the professional legal services rendered by the Respondent.
 6. He deponed that the terms of the Notice were unequivocal and clear, requiring the Applicant to appear before the honourable court on June 20, 2023 at 9:00 in the morning in person or through an advocate or a duly authorized agent or else she be committed to civil jail. That on the said date and time, neither the applicant's advocate, the applicant nor her duly authorized agent attended court despite being aware of the court's order. Subsequently, no cause was ever shown as to why the applicant should not be committed to civil jail hence the issuance of the warrant of arrest.
 7. That the applicant was ultimately arrested by the police officers of litein police station and arraigned in court wherein she did not give any justification for failure to attend court. Nonetheless, she had been released on a cash bail and was now out on the said cash bail.
 8. That the 'decree' and 'judgement' complained of by the applicant was just incidental to issuance of notice to show cause and the warrant of arrest for committal of the judgement debtor to civil jail hence it was evident in the circumstances of the instant matter, that the warrant of arrest was lawful and justified. The respondent urged the court not to interfere with the warrant of arrest issued in the magistrate's court but to uphold the same in the interest of justice.
 9. He further deponed that the prayers sought by the applicant in the instant application were akin to those which are sought in the typical judicial review application before the high court and that the respondent intended to raise a preliminary objection and was thereby giving notice. That the issues raised by the Applicant seemed to be challenging the exercise of the function of a judicial officer and ought to have been determined in a judicial review application as opposed to an application of this nature, hence the instant application was outrageously improper, irregular and incompetent and should be dismissed with costs.



10. On his grounds of opposition, the respondent/applicant deponed that the applicant/respondent's application dated June 29, 2023 was procedurally and substantially bad in law and a clear misapprehension of law and misconceived hence suitable to be dismissed.
11. That the matter concerning the Advocates fees are governed by the provisions of the [Advocates Act](#) and the [Advocate \(Remuneration\) \(Amendment\) Order, 2014](#) and not the [Civil Procedure Act](#) and [Rules](#) relied upon by the Applicant/Respondent in the instant application.
12. That this court should not try the instant application as matters that were directly and substantially in issue in the Applicant's Preliminary Objection dated February 16, 2023 which was before the Deputy Registrar who made a determination and no appeal had been preferred.
13. That the taxing officer certified the Plaintiff's bill of costs dated April 14, 2022 on July 26, 2022 in the sum of Kshs. 556, 125/=. That the provisions of section 51 (2) of the [Advocates Act](#) were to the effect 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 recovered.
14. That the taxation of the Advocate client bill of costs lies within the province, competence and discretion of the Deputy Registrar of the High Court (sic) and that only a Reference could challenge a certificate of costs awarded by the Taxing master. That Judicial authority is derived from the people and vests in, and in exercise of judicial authority thus court should be subjected only to the [Constitution](#) and the law and should not be subject to the control or direction of any person or authority. He reiterated that the Applicant's application was not a Judicial Review and or a Reference against the decision of the Taxing Officer.
15. In response to the Respondent's Grounds of Opposition, the Applicant filed her Replying Affidavit dated October 11, 2023 to the effect that the court taxed the Advocate-Client Bill of Costs dated April 14, 2022 by delivering a ruling on July 26, 2022 pursuant to which the Applicant/Advocate without any observance of the law, went ahead and executed the said ruling by attaching the objector's properties. That later on, the Applicant/Advocate filed a notice to show cause contrary to section 48 of the [Advocates Act](#).
16. She deponed that section 48 of the [Advocates Act](#) required an Advocate to file a suit for recovery of costs, after taxation of the Advocate-Client Bill of Costs and that it was only after obtaining a Decree in such a suit, that the Advocate proceeds to execute a Decree.
17. She further relied on the provisions of section 51 (2) of the [Advocates Act](#) that required the Advocate to file a suit if retainer was disputed and where it was not disputed, the Advocate must move the court to enter Judgement, and extract a Decree for execution to depone that in the instant matter, the advocate/respondent just ambushed her with an execution after obtaining ruling from the taxing officer.
18. That the process of executing the Advocate-client bill of costs was well settled in the [Advocates Act](#) and the court should not allow an Advocate to adopt a flawed recovery process from the innocent clients. That the Advocate's Grounds of Opposition dated July 21, 2023 was not only filed in bad faith as there was no judgement on record and a decree capable of execution but that the same was also an abuse of the court process as the it arose from a no known legal basis. That the said grounds of opposition was fatally defective and should be dismissed with costs.
19. Directions were taken that the Application dated June 29, 2023 be disposed of by way of written submissions to which only the Respondent complied by filing his written submissions dated September 11, 2023 in support of his Grounds of Opposition dated July 21, 2023 against the Applicant's Application dated June 29, 2023.



20. The Respondent summarized the factual background of the matter to the effect that after the Applicant herein benefitted from his representation in Kericho ELC No. 49 of 2006, she did not pay the Advocate's fee prompting him to file his Bill of Costs *vide* Kericho Misc. Application No. E005 of 2022.
21. He submitted that the taxation of the said Advocate-Client bill of costs proceeded through the laid down procedure and at some point, the Applicant herein filed a Preliminary Objection dated February 16, 2023 seeking to challenge the Notice to Show Cause dated January 19, 2023 and not the final judgement and/or decree of the court allowed by the Taxing Master which Bill of Costs dated April 14, 2023 had been taxed in the sum of Kshs. 556, 125/= on the July 26, 2022.
22. That the said decree had since been partly executed on November 22, 2022 when the firm of Hegeons Auctioneers conducted a public auction of the animals attached. That the Respondent/Applicant herein did not object to the said attachment or seek to set aside the decision of the Taxing Master.
23. The Respondent thus framed their issues for determination as follows:
 - i. Whether or not the Applicant's application is merited.
 - ii. Who should pay costs for the application?
24. On the first issue for determination as to whether or not the Applicant's application is merited, the Respondent submitted that the Applicant's argument was premised on section 48 of the [Advocates Act](#), which argument was also raised by the said Applicant *vide* her notice of Preliminary Objection dated February 16, 2023 before the Deputy Registrar where it had been found unmerited. That the Applicant did not Appeal the decision dismissing the said Preliminary Objection.
25. With regard to the procedure on execution, the Respondent relied on the provisions of section 38 and 40 of the [Civil Procedure Act](#) to submit that the Respondent fully complied with the above provisions of law and that the Applicant herein had the intention of delaying or obstructing the execution of the decree under the guise of the provisions of section 48 of the [Advocates Act](#).
26. Further reliance was placed on the provisions of rule 13 (3) of the [Advocate Remuneration Order](#) to submit that the Respondent was entitled to professional legal fees for the services rendered to the Applicant. That it was not in dispute that there had been an Advocate-client relationship between the Applicant and the Respondent. He reiterated that the Applicant only challenged the warrant of arrest but was now insinuating that the Respondent ought to have filed a suit or Reference so as to recover his legal fees.
27. His further submission was that it was not in dispute that the primary suit, that is, Kericho ELC No. 49 of 2006 had been concluded. That an Advocate who had been instructed to act for a client had a legitimate expectation that his/her legal fees would be paid by the client whether or not the Advocate-client relationship was severed and that he was not offering pro bono services to the Applicant. To buttress the above assertion, he relied on the decided case of [Mwangi Kengera & Co. Advocates v Invesco Assurance Co. Ltd](#) [2021] eKLR
28. He reiterated that he had adhered to the procedure and form of approaching the court as provided for in section 48 of the [Advocates Act](#) and rule 13(3) of the [Advocates Remuneration order](#) after which the Deputy Registrar had issued a certificate of costs pursuant to paragraph 68A of the [Advocates \(Remuneration\) Order, 2014](#). Further that article 159 (2)(d) of the [Constitution](#) mandated the courts to administer justice without undue regard to procedural technicalities. That the Applicant would not suffer any prejudice since she benefitted from the Respondent's legal representation.



29. Reliance was also placed on the provisions of paragraph 11 of the *Advocates Remuneration (Amended) Order, 2014* to submit that that Applicant herein had never attempted to invoke the said provisions if at all she disagreed with the decision of the taxing master. Reliance was further placed on the provisions of section 51(2) of the *Civil Procedure Act* to submit that there existed a decision of the taxing master, which decision had not been challenged hence it remained a final judgement of the court. Subsequently, in the absence of an appeal and/or judicial review application, the Applicant's application was procedurally defective. That if the Applicant was challenging the exercise of functions of a judicial officer, then the same ought to have been determined in a Judicial Review application as opposed to an application of this nature hence the instant application was outrageous, improper, irregular and incompetent.
30. Regarding the costs of the application, the respondent relied on the decision in the case of *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others* [2013] eKLR where the court cited with approval the words of Murray C J in *Levben Products v Alexander Films (SA) (PTY) Ltd* 1957 (4) 225 (SR) at 227 to submit that the costs should be borne by the Applicant since it was trite law that the winning party should be awarded costs. That in addition to the Respondent herein being awarded costs, the court allows the warrant of arrest in execution to be enforced.
31. In conclusion, the Respondent urged the court to disallow the instant application with costs and allow the lower court exercise its constitutional authority and functions.

Determination.

32. I have considered the Applicant's application herein, the Respondent's replying affidavit and Grounds opposition as well as the Respondent's written submissions. In his application dated June 29, 2023, the Applicant herein sought that the court declares the warrant of arrest issued against him as the irregular as it had been obtained where there was no judgment and/or Decree to be executed. The Applicant therefore sought that the said warrant of arrest issued by the Deputy Registrar be declared as unlawful, ultra vires, null and void and the same be recalled, arrested and/or varied.
33. In response to the said application the Respondent in his Replying Affidavit and Grounds of Opposition both dated July 21, 2023, was that the issuance of the warrant of arrest by the court against the Applicant was after failing to attend court pursuant to the Notice to Show Cause dated June 9, 2023 on why she should not be committed to civil jail for failure to pay the remaining balance of legal fees in the sum of Kshs. 481,125/= in respect of the professional legal services rendered by the Respondent.
34. On the October 16, 2023, by consent parties took directions to dispose of the application through the filing of written submissions wherein the court acquiesced and directed that the application be canvassed by way of written submissions and parties file and exchange their submissions within 7 days respectively. Only the Respondent herein complied.
35. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that an Applicant who fails to file his submissions on an application as ordered by the court is deemed as a party who has failed to prosecute his application and therefor that application is liable for dismissal. The filing of submissions having been ordered by consent, the failure by the Applicant to exercise the leave granted to her to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on her part in the prosecution of the matter.



36. The Court of Appeal in *Rowlands Ndegwa and 4 Others v County Government of Nyeri and 3 others; Agriculture, Fisheries and Food Authority & another (Interested Parties)* [2020] eKLR, citing with approval the decision of the High Court in, *Winnie Wanjiku Mwai v Attorney General & 3 others* [2016] eKLR, observed as follows:

“With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the Respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity...”

37. The mode of hearing having been chosen by consent and the same having been adopted by the court, and there having been no compliance by the Applicant to prosecute the same, I am persuaded to dismiss the main motion dated the June 29, 2023, which I now do, with costs to the respondent.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 30TH DAY OF NOVEMBER 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

