



**Bwosiemo & 2 others v Muchangi Nduati Ngingo t/a Muchangi Nduati
& Co. Advocates (Environment and Land Miscellaneous Application
E034 of 2023) [2023] KEELC 21754 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E034 OF 2023
CA OCHIENG, J
NOVEMBER 23, 2023
IN THE MATTER OF THE ADVOCATES ACT
AND
IN THE MATTER OF THE ADVOCATES-CLIENT BILL OF COSTS
IN THE MATTER OF REFERENCE FROM A RULING OF THE
TAXING OFFICER AT ENVIRONMENT AND LAND AT MACHAKOS**

BETWEEN

**IAN MAGARA BWOSIEMO 1ST APPLICANT
BRENDA KWAMBOKA BWOSIEMO 2ND APPLICANT
AL RUHIA ESTATES LIMITED 3RD APPLICANT**

AND

**MUCHANGI NDUATI NGINGO T/A MUCHANGI NDUATI & CO.
ADVOCATES RESPONDENT**

RULING

1. What is before Court for determination is the Applicants' Chamber Summons Application dated the 9th April, 2023 brought pursuant to Rule 11 (1), (2) and (3) of the *Advocates Remuneration Order*, 2014 and Section 3A of the *Civil Procedure Act*. The Applicant seeks the following Orders:-
 1. That Applicant be granted leave to file an objection and a Taxation Reference to this Court against Ruling of Honourable Taxing Officer's delivered on 15th December, 2022.
 2. That leave granted in prayer (1) do operate as a stay of execution against the Ruling of the Taxing Officer and any other proceedings.



3. That the objection to the Taxing Officer and the Application for reference be deemed as filed served upon the Respondent upon paying court fees.
4. Costs of the Application be determined upon conclusion of the matter.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Manwah Bwosiemo Magara where he claims to be a Holder of Power of Attorney registered IP/A 5041/1 at the Nairobi Lands Registry donated by Ian Magara Bwosiemo and Brenda Kwamboka Manwa (the 1st and 2nd Applicants), the registered proprietors of Land Reference No. 25693 and have authority to act for them. He confirms that on 15th December, 2022, the Taxing Officer delivered her Ruling on the Advocate/Client Bill of Costs which was taxed at Kshs. 424,905. He contends that he was not notified of the Ruling and this hampered his efforts to file a Reference out of time. He explains that he was made aware of the Ruling when he wrote to the Deputy Registrar on 12th January, 2023. He seeks to file a Reference out of time and has attached a Draft to that effect. He insists that many factors were overlooked including Mpesa payments made to the advocate in determining the Bill of Costs.
3. The Respondent opposed the instant Application and filed a Replying Affidavit sworn by Muchangi Nduati Ngingo where he deposes that the said Application is a sham, incompetent and amounts to an abuse of the court process. He contends that the deponent of the Affidavit has no authority to depose to the matters herein on behalf of Al-Ruhia Estates Limited who have not challenged the Taxation or the Award. He explains that the Applicant who was acting on behalf of the 1st and 2nd Applicants' herein filed his submissions in opposition to the Taxation which were duly considered by the Court before assessment of costs. He avers that the Applicant is applying delaying tactics to avoid paying the costs herein. He reiterates that the Applicant should specifically indicate which particular items he is objecting to and on what basis *moreso*, having put in his submission on the said Bill of Costs.
4. The Application was canvassed by way of written submissions.

Submissions

5. The Applicants in their submissions contend that the Court has the power to set aside the Ruling dated 15th December, 2022 which was read in the absence of parties in this case. They reiterate their averments in the Supporting Affidavit and state that the deponent only represents the two Applicants who happen to be his children but not Al-Ruhia Estate Limited. They contend that the Advocate/Respondent wrote a letter requesting that the court change the names listed in the Ruling so that he could start executing against the deponent and his children. They argue that the advocate will attempt to execute against them despite having a valid reason to set aside the Ruling delivered in their absence. Further, that they were condemned unheard as the Advocate did not copy them in the letter notifying the deponent of the Ruling date. They further submit that prior to getting knowledge of the Ruling, they had requested for the court file to peruse the same, but was informed that it was missing from the court registry. They insist that the High Court has the power to enlarge time for filing a Reference and highlighted that the advocate only attended court once but used to send his clerk to hold his brief. They argue that the advocate cannot charge full fees yet he attended court only once. Further, that the court made an error in determining the instructions fee without checking the deponent's response dated the 15th July, 2022. It was their further submission that the award of full fees as instruction fees is an injustice to them. Further, that the court in ELC 210 of 2011 only awarded a sum of Kshs. 1,950,000, which sum they instructed the advocate to Appeal against, but in the Ruling to the Bill of Costs, it was held that it was the value of the land that determines the instructions fees while the matter is not completed and determined. To support their averments, they relied on the following decision: *Kenyariri Advocates v Kenyariri* (2022) KEHC 27.



6. The Respondent in his submissions states that the Applicants have confirmed that the Bill of Costs that was taxed was the one dated 6th May, 2022. He further submits that the only issue is that there are two parcels of land involved in the suit being L.R. No. 25692 (owned by Al Ruhia Estates Limited) and L.R. No. 25693 (owned by the Applicants) but the Applicants have not explained how that affects the taxation given that the court record is explicit. He contends that the Applicants allege that their instructions in the matter to the Respondent was to challenge the Judgment awarded to Lakeview Investments Limited amounting to Kshs. 1,900,000, which is misapprehended as the Respondent's Bill of Costs relates to the original main suit in ELC No. 210 of 2011 where he represented the Applicants until they changed advocates in 2019. He insists that the instructions to challenge the Judgment referred to, relates to an Appeal against the said Judgment in which the Respondent has not filed any Bill of Costs as yet. He reiterates that this reference is simply an abuse of the court process, considering the matters raised therein are irrelevant and cannot form a basis to challenge the assessment of costs. Further, that taxation of Costs can only be challenged either on error in principle or for the award being excessive which is not the case in this Reference. To support his averments, he relied on the following decision: HCC No. 1723 of 1997 – Hon. *Wilson Ndolo Ayah v National Bank of Kenya Ltd.*

Analysis and Determination

7. Upon perusal of the Chamber Summons dated the 9th April, 2023 including the respective affidavits and rivalling submissions, the only issue for determination is whether the Court should enlarge time to enable the Applicants' to give notice to the Deputy Registrar on their objections to the Ruling delivered on 15th December, 2022 as well as lodge a Reference out of time.
8. The Applicants seek to lodge a Reference against the Ruling of the Deputy Registrar dated the 15th December, 2022 and claim they were not aware of the date the Ruling had been delivered. They dispute the amount of instruction fees awarded as well as certain court attendances.
9. I note the Applicants had retained the Respondent to act for them in High Court Case No. ELC. 210 of 2011 at Machakos. The Respondent claimed they changed Advocates in 2019 after which he filed the Bill of Costs dated the 6th May, 2022. Further, that the 1st and 2nd Applicants filed their submissions on 15th July, 2022 while the Respondent filed a reply to the Applicants' submissions on 16th September, 2022, with the Ruling to the said Bill of Costs being delivered on 15th December, 2022 and this forms the fulcrum of the instant Application. The Applicants claim they were not notified of the Ruling date and only learnt of the same after writing a letter to the Deputy Registrar. I note annexure 'MBM 1' is a letter dated the 12th January, 2023 written by the deponent and on the face of the said letter, there is a handwritten note dated the 22nd February, 2023 indicating as follows:

The Bill was taxed and Ruling delivered. The parties dissatisfied may apply for Reference.”

10. I note the Applicants thereafter proceeded to file the instant Application, seeking leave to file Reference out of time. It was the Applicants' contention that they were not aware of the date of the Ruling as no notice was issued by the Taxing Officer. The Respondent in his response has not demonstrated if he indeed served the Applicants' with the Ruling Notice. Further, there is no indication if the Taxing Officer notified the Applicants of the date slated for the impugned Ruling. The Applicants insist they should not be condemned unheard.



11. Clause 11 of the *Advocates Remuneration Order* stipulates that:-
- (1) Should any party object to the decision of the Taxing Officer, he may within fourteen (14) 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 (14) 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.”
12. The above cited legal provisions give the Court the discretion to enlarge time to lodge a Reference. In the case of *Peter Julius Njoroge v Fidelity Commercial Bank Limited & another* (2018) eKLR, the Court found a delay of forty five (45) days not inordinate and allowed an Application for enlargement of time.
13. In the current scenario, I note that the Applicants were not notified of the date of the Ruling in respect to the Taxation. I opine that this is a plausible reason for failing to lodge an objection within fourteen (14) days of the said Ruling. Even though the Respondent has opposed the Application insisting it is a delaying tactic and an abuse of the court process, while associating myself with the above cited case as well as the quoted legal provisions, in the interest of justice, I will excuse the delay as it was not inordinate and allow the instant Application.
14. I direct the Applicants to lodge an objection as well as a Reference within fourteen (14) days from the date hereof.
15. In the foregoing, I find the Chamber Summons Application dated the 9th April, 2023 merited.
16. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF NOVEMBER, 2023

CHRISTINE OCHIENG

JUDGE

