



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC MISC. CAUSE NO. 112 OF 2019**

**NANAK HOSPITAL MANAGEMENT SERVICES LIMITED.....APPLICANT/RESPONDENT**

**VERSUS**

**MUNENE WAMBUGU & KIPLAGAT ADVOCATES.....RESPONDENT/APPLICANT**

**RULING**

The matter coming up for determination are two applications the first application is the Notice of Motion by the Respondent/Applicant dated 4/07/2021 brought under **Section 51(2) of the Advocates Act Chapter 16 of the Laws of Kenya** seeking the following orders:

- 1) *That judgment be entered for the applicant as against the respondent for the sum of Kesh 2,285,085.48 being the certified costs due to the applicant*
- 2) *That the applicant be awarded interest at the rate of 14% per annum from 1<sup>st</sup> of September 2019 (being the 30<sup>th</sup> date from the date on which the Bill of costs was served upon the respondent) as provided for at part 1 paragraph 7 of the Advocates Remuneration Order*
- 3) *That the respondent do pay to the applicant the cost of the application.*

The application is premised on the grounds that:

- a) *The advocate -client costs due to the applicant herein were taxed at Kesh 2,285,085.48 and a certificate of taxation issued to that effect*
- b) *That there is no dispute that the respondent had retained the applicant herein as her advocates in respect of which advocate-client costs were taxed herein*
- c) *It is only fair and just in the circumstances that judgment be entered for the sum certified to be due to the applicant herein.*

The Applicant in the notice of motion application is seeking for orders that, judgment be entered in its favour as against the Respondents, jointly and severally for the sum of Kshs. 2,285,085.48, plus accrued interest thereon at the rate of 14% per annum from 1/09/2019 being the 30<sup>th</sup> date from the date on which the Bill of costs was served upon the respondent plus the costs of the application.

The application is based on the grounds on the face of it and an affidavit dated 4/07/2021, sworn by C.K Kiplagat, an Advocate of the High Court of Kenya, practicing in the name and style of Munene Wambugu and Kiplagat Advocates. The Applicant avers that, it filed an Advocate-Client Bill of costs (herein "the bill"), and the same was taxed vide a ruling delivered by the Taxing master on 5/03/2020. A certificate of taxation was issued on 18/09/2020. The Bill was served on the respondent on 1/08/2019 but he has not has declined to pay willfully despite several reminders.

However, the Respondent opposed the application based on the replying affidavit dated 26/10/2020, sworn by Dr. Janardan Dhayabhai Patel the respondent /objector herein. He deposed that, the respondent settled all the fees that was by the applicant. He averred that the respondent is prejudiced by the Ruling dated the 5/03/2020 and subsequently certificate of costs dated 16/07/2019 and the respondent has since then filed an application seeking leave to Appeal against the Ruling. Through its advocates on record in the name and style of Nyawara and Co. Advocates filed a notice of preliminary objection dated 30/10/2019.

Further that in the course of the suit the respondent's advocate fell ill and dies and when the ruling was rendered on 5/03/2021 the respondent

was not informed because the advocate was demised and he was not aware about the court ruling until the auctioneers went to his office to execute the order of the court dated 5/03/2021. That the respondent has now instructed Gopichandra & Co. Advocates who filed their Notice of Appearance on 18/10/2021 and sought the file from the law firm of the deceased Nyawara advocates to no avail. That the new advocate had to write to the deputy registrar to allow them to have a copy of the court file for records and enable him to understand the matter suit. The respondent prays that the Notice of Motion dated 4/07/2021 is dismissed.

The second application is Notice of Motion for the Applicant/Respondent dated 26/10/2021 brought under **Order 51 Rule 4 of the Civil Procedure Rules and Section 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution and all other enabling laws** seeking for these Orders.

- i. *THAT this matter be certified urgent and be heard ex-parte in the first instance.*
- ii. *THAT, the Honourable court be pleased to grant an order of stay of execution of the ruling and the consequential orders of Senior Deputy Registrar delivered on 5<sup>th</sup> day of March, 2020 pending the hearing of the application and appeal herein.*
- iii. *THAT the applicant be granted leave to appeal out of time against the ruling dated the 5<sup>th</sup> day of March, 2020 by Hon. I.N. Barasa (Senior Deputy Registrar).*
- iv. *THAT corollary to the foregoing, the appeal filed by the appellant be deemed as properly and duly filed and served thus part of the record.*
- v. *THAT the applicant undertakes to lodge the intended Appeal and record whereof expeditiously within such time as this Honourable court may order upon requisite leave being granted.*
- vi. *THAT the applicant has moved diligently and expeditiously in bringing this application.*
- vii. *THAT it is therefore in the interest of justice and fairness that the prayers sought in the Application filed herewith be granted*
- viii. *THAT this Honorable Court be pleased to issue any Order it deems mete and just in the circumstances*
- ix. *THAT costs for the Application be provided for.*

The application is premised on the grounds stated on the face of the application and on the annexed affidavit of Dr. Janardan Dhayabhai Patel. The application is premised on some of these grounds among others;

Among these grounds are;

- a) *That the original advocate on record, Mr. Nyawara is deceased and he was never informed about the death*
- b) *That the original advocate had filed a preliminary objection dated 30/10/2019 on the Bill of Costs dated 16/07/2019*
- c) *That the Applicant advocate's file was in the company of the Mr. Nyawara advocate who is now deceased.*
- d) *That the advocate now on record has just received instructions to now file the application in court and therefore needs leave to file the appeal out of time*
- e) *That the time allowed to file an appeal has run out and that the delay is not so inordinate or so great as to be inexcusable.*
- f) *That the respondent will not suffer any prejudice if the application is allowed.*

The application was opposed respondent/applicant through grounds of opposition dated 15/11/2021. In in the respondent's grounds of opposition filed together with their submissions, they argue that this court lacks jurisdiction and further that the applicant/respondent application is muddled in form since they brought the application under the civil procedure rules. They contend that the applicant/respondent was represented at the taxation proceedings and made submissions on the preliminary objection to which the registrar made a determination. Further that the ruling was delivered on 05/08/2020 and the counsel for the applicant/respondent passed away on 26/11/2021 and no reason has been given. The respondent/applicant avers that the application is an abuse of the court process.

The Application was argued by way of written submissions. The applicant/respondent filed their submissions on 3/11/2021 while the respondent/applicant filed it submissions in reply on 15/11/2021. I have considered the application and the affidavit filed by the applicant/respondent and also the grounds of opposition filed by the respondent/applicant. I have also considered the affidavit filed in opposition to the application, the submissions by the parties' respective advocates and the authorities cited in support thereof. The following is my view on the matter. I am in agreement with the submission by the respondent/applicant that the applicant/respondent's application was brought under the wrong provisions of law. The application is for the extension of time to file a reference and also a prayer for stay of execution of the order made on 5/03/2020 by the Honorable Senior Deputy Registrar. Paragraph 11 (1), (2) and (4) of the Advocates Remuneration Order provides as follows: -

- i. *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.

ii. 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.

iii. ....

iv. 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 steps, 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.

The respondent/applicant has raised about four issues in their grounds of opposition. I will address myself to each of the grounds. The first ground which is closely related to the second ground is about jurisdiction. I will make brief pronouncements relating to the jurisdiction of a judge of a third-tier superior court *visa vis* the jurisdiction of the taxing officer within the context of the prevailing legal framework and the two suits before the court. I make the pronouncement because the advocate who is the respondent application questioned the jurisdiction of the court to grant the orders sought stating that this court lacks the jurisdiction to grant the orders sought by the applicant. Now this court's jurisdiction on questions relating to taxation is defined under Rules 11 and 12 of the Advocates (Remuneration) Order 1962. There are two instances when this court has jurisdiction to deal with questions relating to taxation of bills of costs. The first instance is when it is seized of an objection by way of reference under Rule 11, challenging the taxing officer's decision. The second instance is when parties, by consent, refer to the judge a matter in dispute arising out of taxation, for the opinion of the judge. The reference by consent takes the form of a case stated. In the instant situation there is an objection challenging the taxing officer's decision and therefore this settles the issue of jurisdiction.

The other issues closely tied to the issue of jurisdiction is the law under which the applicant/respondent filed their application. It is clear from the foregoing that the applicant/respondent's application should have been made under paragraph 11 (4) of the Remuneration Order by way of Chamber Summons. In the grounds of opposition and written submissions, the respondent/applicant urged the court to strike out the application for being misconceived and incompetent. I am of the view that failure to cite the correct provisions of the law under which an application has been brought, citing wrong provisions or bringing the application in the wrong form is no longer fatal to an application. This court is enjoined under Article 159 (2) (d) of the Constitution to dispense justice without undue regard to procedural technicalities. For that reason, I will disregard the respondent/applicant's objection to the application on account of the wrong provisions of the law under which the application was brought and the form thereof.

Having disposed of the technical objections which were raised against the application, I will now consider the same on merit. I am satisfied that the applicant/respondent has put forward valid grounds that warrant the granting of the orders sought. I am in agreement with the submission by the applicant/respondent that the indisposition of their earlier advocate Mr Nyawara (now deceased) occasioned the failure of the applicant/respondent to seek a stay and file a reference within the prescribed time was. I am satisfied that the applicant/respondent has made out a case for extension of time to file a reference against the decision of the taxing officer made on 05/03/2020.

Apart from the extension of time, the applicant/respondent has also sought a stay of execution for the recovery of the taxed costs. I have noted from the record that the respondent/applicant has already filed in court an application for execution for recovery of a sum of Kshs.2,285,085.48.085 being its taxed costs. It follows therefore that the Appellant would proceed with execution against the applicant/respondent if the stay sought is not granted. On the issue of delay, in my view the application was not filed after unreasonable delay the applicant has averred that the advocate on record was indisposed for long and eventually passed on. Further that for a second lawyer to take over the conduct of this matter they had to write to the deputy registrar to allow them have a copy of the court file so as to update themselves on the matter at hand. Sickness and death are acts of God that are under nobody's control. There are several occasions where the courts have held that clients cannot continue to hide behind the failure of their advocates to perform but in this case it is not failure to perform it is death. in ***PHILLIP CHEMWOLO & ANOTHER –VS- AUGUSTINE KUBEDE [1982-88] KLR 103 at 1040 Apaloo J/A*** as he then was stated thus:-

**“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit” [own emphasis]**

In the final analysis and for the foregoing reasons, I am satisfied that the applicant/respondent's application dated 26/10/2021 has merit. The application is allowed on the following terms:-

1. I grant prayers 2, 3, and 4 of the application.
2. That the applicant/respondent lodges the appeal within 45 days
3. Cost of the application to be in the cause
4. In view of my findings in the application dated 26/10/2022 it follows that the application dated 4/07/2021 is overtaken by events.
5. The costs of the application shall be in the cause.

**DELIVERED AND SIGNED AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2022**

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**MOGENI J**

**JUDGE**

**IN THE PRESENCE OF**

**.....FOR THE APPLICANT/RESPONDENT**

**.....FOR THE RESPONDENT/APPLICANT**