



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MISC. APPLICATION NO. 608 OF 2011**  
**IN THE MATTER F THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF THE REMUNERATION ORDER**  
**BETWEEN**  
**KENYARIRI & ASSOCIATES ADVOCATES ..... APPLICANT**  
**VERSUS**  
**KCA UNIVERSITY .....RESPONDENT**

**RULING**

This ruling is in respect of an application by the respondent dated 2<sup>nd</sup> March, 2012 seeking to set aside this court's order made on 2<sup>nd</sup> March, 2012 dismissing the respondent's Notice of Motion dated 21<sup>st</sup> February, 2012.

The application was supported by an affidavit sworn by **Julie Obel**, an advocate practicing in the firm of **Rachier & Amollo Advocates**. She deponed that on 2<sup>nd</sup> March, 2012 when the respondent's application dated 21<sup>st</sup> February, 2012 was coming up for hearing before this court she instructed another advocate to hold her brief as she had been caught up in heavy traffic on the way to court. Her instructions were that she would be ready to proceed with the hearing of the application at 10.00 am. Ms. Obel was also going to hold brief for her colleague in another matter which was before the Hon. Justice Odunga which was the first on the day's cause list.

Counsel first attended Justice Odunga's court but the judge started by delivering a ruling which took sometime before he embarked on other matters. As a result she was unable to attend this court in good time and by the time she arrived the application had been dismissed for want of prosecution. She urged the court not to punish the respondent for her own mistake. She added that unless the order sought is granted the respondent stands to suffer great prejudice, financial hardship and denial of justice.

The respondent's application was opposed by the applicant who filed grounds of opposition stating that:

- “1. The application is an abuse of the court process and ought to be struck out.**
- 2. The reasons given are an afterthought and not convincing.**
- 3. Mayfair Centre where the offices of the advocates for the respondent/applicant are situate is a walking distance to the Milimani Law Courts and hence the issue of having been caught in heavy traffic cannot arise.**
- 4. There is no prejudice the applicant/respondent will suffer because it has not even sought leave to file a reference and hence the taxation is not contested at all.**
- 5. The orders sought are not obtainable.”**

Both **Mr. Ligunya** for the applicant/respondent and **Mr. Kenyariri** for the applicant made brief oral submissions which I have duly considered.

Mr. Kenyariri pointed out that there was no basis for granting the orders sought by the respondent since the application that was dismissed for want of prosecution on 2<sup>nd</sup> March, 2012 was seeking to set aside the orders of this court made on 21<sup>st</sup> February, 2012 vide which the court had entered judgment for the applicant as per the certificate of taxation dated 12<sup>th</sup> January, 2012. The costs had been assessed at **Kshs.3,412,004/=**. No reference had been filed within fourteen days from 19<sup>th</sup> December, 2011 when the Taxing Officer delivered her ruling in respect of the applicant’s bill of costs. Further, the respondent’s application to challenge the judgment was also dismissed for non-attendance. He urged the court to dismiss the application.

In response, Mr. Ligunya submitted that they were instructed to come on record for the respondent in January 2012 after delivery of the ruling by the Taxing Officer on 19<sup>th</sup> December, 2011. On 12<sup>th</sup> January, 2012 his firm wrote to the Deputy Registrar asking for reasons for the award of the taxed costs and the reasons were given on the 17<sup>th</sup> February, 2012. They had filed an application seeking stay pending the filing of a reference out of time. They had even appeared before Justice Mabeya on 18<sup>th</sup> January, 2012 and the court certified the application urgent and directed that a hearing date be taken at the registry within twenty one days from the aforesaid date. Mr. Ligunya added that the respondent was keen on challenging the judgment that had been entered in favour of the applicant. He further stated that the respondent was willing to deposit the judgment sum in court as a condition for grant of the orders sought.

I have considered the respondent’s affidavit, the grounds of opposition as well as the submissions as hereinabove summarized. It is not necessary for the court to delve into the merits of the judgment at this stage. This is because there is a substantive application on record relating to that issue. For now the court is required to consider whether it ought to set aside its orders made on 2<sup>nd</sup> of March, 2012.

It is not in dispute that the respondent’s Notice of Motion dated 21<sup>st</sup> February, 2012 was dismissed for want of prosecution. Ms. Obel explained in her affidavit the circumstances that led to the dismissal of her client’s application. I have no reason to doubt the explanation advanced by counsel. She did not state that on the material day she was driving from her office at Mayfair Centre to court, which is a walking distance as rightly stated by Mr. Kenyariri. She may have been driving from her home straight to court or through her office before coming to court.

The respondent’s application was filed within three days from the date of dismissal of the said application. That, in my view, demonstrates due diligence on the part of the respondent’s advocate to have her client’s dismissed application reinstated for hearing.

Further, I agree with the respondent that if the court does not set aside the orders made on 2<sup>nd</sup> March,

2012 the respondent may suffer for her counsel's mistake.

For these reasons therefore, I set aside the orders made on 2<sup>nd</sup> March, 2012 dismissing the respondent's Notice of Motion dated 21<sup>st</sup> February, 2012. I further order that the respondent's application be set down for hearing within the next ten days from the date hereof. The respondent's advocates shall bear the applicant's costs of the application which are assessed at Kshs.5,000/=. The same to be paid before the respondent's application is heard.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF MAY, 2012.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Muriithi – Court Clerk**

**Mr. Kenyariri for Applicant**

**Mr. Juma for Mr. Ligunya for Respondent**