



Mbaabu v Mwangangi & Company Advocates (Environment and Land Miscellaneous Application E005 of 2022) [2022] KEELC 3376 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2022
CA OCHIENG, J
JULY 27, 2022**

BETWEEN

ANGELLINA MUENI MBAABU APPLICANT

AND

MWANGANGI & COMPANY ADVOCATES RESPONDENT

RULING

1. What is before Court for determination is the Applicant's Chamber Summons Application dated the 28th February, 2022 brought pursuant to Section 1A, 1B, 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Rule 11(2) of the *Advocates (Remuneration) Order* where the Applicant is seeking the following orders:
 - a. Spent
 - b. That the Honourable Court be pleased to stay all proceedings relating to the Taxation of Advocates Client Bill of Costs filed in Misc. Civil Applications Nos. E022, 23, 32 & 33 of 2021 between the parties herein pending the hearing and determination of this Application inter-partes.
 - c. That the Honourable Court be pleased to set aside in its entirety the Ruling of Honourable B.J. Bartoo (DR) dated and delivered on the 24th day of February, 2022.
 - d. That the Honourable Court be pleased to order that all the Misc. Civil Application files being E022, 23, 32 & 33 be transferred to the High Court in Nairobi (Family Division) for Taxation of the Respondent Bills of Costs, since the said court has the requisite jurisdiction to determine the said Bills.



- e. A declaration that the decision by Hon. B.J. Bartoo in dismissing the Applicant Preliminary Objection amounts to usurping and/or assuming jurisdiction in the circumstances.
3. The Application is supported by the Affidavit of Angellina Mueni Mbaabu indicated as the Applicant herein who deposes that vide a Ruling delivered herein on the 24th day of February, 2022 by the Hon. Bartoo, the learned Deputy Registrar dismissed her Preliminary Objection and consequently usurped jurisdiction to determine Bills of Costs filed by the Respondent against her.
4. She states that the learned Taxing Master upon dismissing the Preliminary Objection proceeded to fix the taxation of the Advocate/Client Bill of Costs on the 26th day of March, 2022 after usurping the jurisdiction, a fact that is illegal, irregular and unlawful hence calling for stay of any Taxation to avert any prejudice likely to be occasioned against her. She explains that she had not declined to pay legal fees due and owing to the Respondent, but the Respondent has proceeded to file Bills of Costs in the court without jurisdiction, an act aimed at forum shopping. She reiterates that the Respondent ought to be ordered to file her Bills before the right court i.e. the High Court in Nairobi. She claims the Respondent was ordered to file her Bill of Costs to be taxed by the Deputy Registrar but proceeded to file four separate Bills of Costs relating to each of her land titles at the Machakos High Court ELC division under Misc. Nos. E022, 23, 32 & 33 respectively. Further, that she will be prejudiced if the orders sought are not granted.
5. In response, the Respondent filed a Replying Affidavit sworn by Florence Mwangangi Advocate and averred that the Application is bad in law, unfounded and premised on mere mischief, gross misconception, deliberate misrepresentation of facts, contradictory on material facts and is brought in bad faith. She contends that the Application is premature and irregularly brought as a Reference under paragraph 11 of the Advocates (Remuneration) Order while the Bills of Costs have not yet been taxed. She avers that the Applicant had not brought herself within the jurisdiction granted by the provisions of Rule 11(2) of the *Advocates (Remuneration) Order*. Further, that the Deputy Registrar has the requisite jurisdiction to tax and determine the costs payable to the Respondent for the legal services rendered to the Applicant by the said Respondent. She argues that there is no breach of the provisions of Section 6 of the *Civil Procedure Act* contrary to the allegations in the Application as there is no other suit pending in any other court over the subject matters in the Bill of Costs between the two parties herein which formed the basis of the Applicant's Preliminary Objection. She reiterates that the gist of the matter is that despite the Applicant having been granted legal services by the Respondent on registration of four parcels of land, she failed/refused to pay the Respondent the requisite legal costs resulting in the filing of the Bill of Costs.

The Application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the Chamber Summons Application dated the 28th February, 2022 including the respective Affidavits as well as the rivalling submissions, the following are the issues for determination: Whether the Applicant has satisfied the conditions for stay of Taxation and/or setting aside of the Ruling delivered on 24th February, 2022? Whether the Deputy Registrar lacked jurisdiction to make a Ruling over this matter?
I will deal with the two issues jointly.
7. The Applicant has sought for stay of the Taxation of Bill of costs and or setting aside of the Ruling delivered on 24th February, 2022 which has been opposed by the Respondent. The Applicant claims the



Deputy Registrar did not have jurisdiction to make the impugned Ruling dismissing the Preliminary Objection. Further, that the Respondent should be ordered to file the Bill of Costs at the High Court in Nairobi. She further sought for all the Misc. Civil Application files being E022, 23, 32 & 33 to be transferred to the High Court in Nairobi (Family Division) for Taxation of the Respondent Bills of Costs, since the said court has the requisite jurisdiction to determine the same.

8. I will first proceed to highlight various legal provisions governing stay.

Order 42 Rule 6(2) of the *Civil Procedure Rules* provides that:

“No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

9. In the current scenario, the Applicant claims the Taxation of the Respondent’s Bill of Costs should not proceed as it will prejudice her. She insists that the Deputy Registrar did not have jurisdiction to tax the said Bill of Costs and erred in dismissing the Notice of Preliminary Objection. Further, that she is ready to pay the legal fees.

10. In the case of *Owners of Motor Vessel “Lilian S” V Caltex Oil (Kenya) Ltd* [1989] KLR 1 the Court of Appeal (per Nyarangi JA.) held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Rule 10 of the *Advocates Remuneration Order* provides;

“The Taxing Officer for the Taxation of Bills under this Order shall be the Registrar or a District or Deputy Registrar of the High Court or, in the absence of a Registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the Taxing Officer shall be the Registrar of trade marks or any Deputy or Assistant Registrar of trade marks.”

11. In the case of *Bernard Gichobi Njira v Kanini Njira Kathendu & another* [2015] eKLR it was held that;

“A Magistrate is allowed and/or mandated by law to assess or tax costs payable in a given case. The words or terminology used whether “assess” or “tax” is immaterial in my view. The bottom line is to determine the total amount of costs payable. The fact that a Magistrate has taxed or used the terminology “taxation” to assess or determine costs payable is not fatal if the bill presented before the court is in compliance with the requirements of Schedule VII of the Advocates Remuneration Order.”



12. While in the case of *Deposit Protection Fund V Rosaline Njeri Macharia* [2006] eKLR, the Court while dealing with an Application of stay of Taxation proceedings, observed as follows:

“Going back to the 2nd Defendant’s arguments, I note them as saying that if the court did not grant an order for stay of the proceedings, the Applicant would not suffer substantial loss, on account of the Taxation of the Defendants’ Bills of Costs. When faced with those submissions, the Applicant did not tell the court how the Taxation of the Defendants’ Bill of Costs would cause them substantial loss. To my mind, the Taxation of a Bill of Costs cannot occasion any loss to the person against whom it is taxed. Therefore, the issue of Taxation causing substantial loss does not even arise. The only effect of taxing a Bill of Costs is the ascertainment of the quantum of costs payable by one person to another. Thereafter, the party whose costs had been ascertained could take out execution proceedings. The applicant did not, in my considered view, make out a case for stay of proceedings, and in particular a stay of the Taxation of the Defendants’ Bills of Costs. Furthermore, if the learned taxing officer were to proceed to tax the Defendants’ Bills of Costs, the sums would be ascertained, and that would be the foundation upon which this court could base the size of the security which the Applicant would need to raise, if the court did order that there be a stay of execution.”

13. From the Supporting Affidavit, I note the impugned Bill of Costs was in respect to a conveyance the Respondent had handled on behalf of the Applicant over various parcels of land. Further, insofar as the said lands were also subject to Nairobi HC Succession Cause No. 1647 of 2011, I opine that since the parcels of land are situated in Machakos County, the Deputy Registrar indeed has jurisdiction to tax the impugned Bill of Costs. Further, I note the Applicant never indicated what prejudice she stands to suffer if the Taxation of the Bill of Costs proceeds and neither has she offered any security for costs. Based on the facts as presented, it is my considered view that the Taxation of the Bill of Costs is not prejudicial to the Applicant as it is thereafter, that she can proceed to apply for stay of execution if the Respondent seeks to execute the Decree. It is trite that it is only through Taxation that the costs can be ascertained. To my mind, I am of the view that Taxation proceedings are independent as this is the mandate of the Taxing Officer. I note the Respondent termed the instant Application as a disguised appeal. I find that since the instant Application was based on Rule 11(2) of the *Advocates Remuneration Order*, the Applicant had not brought herself within the jurisdiction granted by the said legal provisions. I opine that since the Applicant disagreed with the findings of the Deputy Registrar, her available remedy was to appeal against the said Ruling.
14. In the circumstance, while relying on the legal provisions cited above and associating myself with the decisions quoted, I find that the Applicant has failed to meet the threshold set for granting stay of taxation of the Bill of Costs including the setting aside of the Ruling of the Deputy Registrar dated the 24th February, 2022 and will decline to grant the said orders as sought.
15. In the circumstances, I find the Chamber Summons Application dated the 28th February, 2022 unmerited and will disallow it.

Costs of this Application is awarded to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27TH DAY OF JULY, 2022

CHRISTINE OCHIENG

JUDGE

