



Kahuthu & Kahuthu Advocates v Karuga & another (Environment and Land Miscellaneous Application 133 of 2019) [2022] KEELC 2520 (KLR) (14 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2520 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 133 OF 2019
MD MWANGI, J
JULY 14, 2022**

BETWEEN

KAHUTHU & KAHUTHU ADVOCATES RESPONDENT

AND

ROSE WAMBUI KARUGA 1ST APPLICANT

KENNETH GICHINGA KARUGA 2ND APPLICANT

RULING

1. The Clients/Applicants in this matter have brought this application under the provisions of Section 3A of the [Civil Procedure Act](#) seeking for two orders, that:-
 - a) That the Honourable court be pleased to order a stay of execution of the decree in the matter pending hearing and determination of this application and proceedings in ELC 20 of 2008 at Milimani High Court.
 - b) That the Honourable court be pleased to set aside the judgment/decree issued herein.
2. The Application is premised on the grounds on the face of it and on the Affidavit of Rose Karuga. The Applicants aver that the Advocate in this matter taxed the bill prematurely and fraudulently as the suit ELC 20/2008 is still ongoing. Further the Applicant did not seek a court order before prematurely taxing the bill of costs. Finally, that the advocates on record for the Clients in the suit ELC 20/2008 currently should be the ones who should tax the bill of costs.
3. In the Supporting Affidavit, the deponent Rose Karuga deposes that she is a co-administrator in the Estate of Dedan Karuga Gichinga together with one Kenneth Gichinga. She avers that this Misc. Application is unprocedural as the main suit giving rise to this application i.e. ELC 20/2008 is still ongoing. They have appointed another advocate in the said case.



4. The Advocate in this matter Kahuthu & Kahuthu Advocates had been appointed by the late Dedan Karuga Gichinga but the administrators decided to appoint another advocate in place of Kahuthu & Kahuthu Advocates to represent them in that matter. The deponent argues that the application by Kahuthu & Kahuthu Advocates is immature (I presume she meant, premature) as her current lawyers are also entitled to their legal fees and a suit cannot be taxed twice.
5. The deponent further alleges that the Advocate had received substantial legal fees from her late husband and if there are any more legal fees due to him, the Advocate should wait until the current lawyers who are handling the matter finalize the suit so as not to prejudice the other advocates.
6. Finally, the deponent avers that on 20th September 2021, this court dismissed and terminated this Misc. Application. The deponent however at paragraph 9 of the supporting affidavit again prays that the Misc. Application be struck out as it is unprocedural, and premature and prejudices the Plaintiff's case in ELC 20/2018.

Response by the Advocate.

7. The Clients' application is opposed by the Advocate by way of grounds of objection dated 8th April 2022 and a replying affidavit sworn by G. J. Kahuthu Advocate sworn on the same date.
8. The Advocate deposes that the Clients' Application is fatally defective as this court is functus officio having already taxed the bill and no reference was filed by the clients. The Advocate denies that the Misc. Application was dismissed as alleged.
9. Finally, the Advocate denies having been paid any monies by the late Dedan Karuga Gichinga (deceased). Accordingly, the taxation, entry of judgment and the issuance of the decree in this matter has followed the due process of the law.

Further Affidavit by the Applicants.

10. The Applicants filed a further affidavit pursuant to leave granted by the court.
11. In the further affidavit, the Deponent, Rose Karuga alleges that they were not served with the Advocate's bill of costs and that by the time her advocate was able to peruse the file, they discovered that the bill had already been taxed and a certificate of costs issued. Further that due to covid-19 measures in place, they were unable to pursue the matter properly.
12. The Deponent avers that her application to set aside the judgment is properly before the court and that this courts has the power to set aside judgment where there is a defect, like non-service of proceedings. She reiterates that the Misc. Application should be struck out as it is unprocedural and offends all known statutes in Kenya Laws. The Deponent poses to wonder how the Respondent calculated or arrived at his legal fees yet the suit giving rise to this Application has not been concluded.

Court's Directions

13. The court's directions in this matter were that the Clients' application dated 30th March 2022 be canvassed by way of written submissions. Both parties have complied and the court has had the opportunity to peruse the submissions.



Submissions by the parties.

A. Submissions by the Applicants.

14. In their submissions dated 7th May 2022, the Applicants reiterate the averments in their application and the supporting affidavits. They submit that the court has the inherent jurisdiction to set aside its own judgment/orders where there is a fundamental defect such as that which goes to the competency of the court and it is not necessary to appeal from it. It is the Applicants' submissions that a judgment or order which is a nullity for failure to comply with essential provisions of the laws like service of process can be set aside by the court that gave it. Where a party proves non-service, the whole proceedings become a nullity, and the trial court has the jurisdiction to set it aside.
15. Finally, the Applicants reiterate the position that since ELC 20/2008 is or was still pending, they do not understand the basis of the assessment of instruction fees by the taxing officer. They state that they do not know the value of the subject property since it had not been valued.
16. The Applicants submit that the advocate-client bill of costs is ordinarily based on party and party costs where it is increased by 50%. In this matter, the Applicants argue that the Advocate has grossly exaggerated his costs and there is no formula or logic on how the bill of costs was taxed. They submit that the Advocate wants to be paid fully for the work which he did not complete yet the current advocate will also be entitled to instruction fees. The Applicants therefore pray that the court sets aside the judgment herein and direct that the said bill of costs be taxed before another taxing officer but only after ELC 20/2008 is finalized.

B. Submissions by the Advocate/Respondent

17. The Advocate's submissions are dated the 25th May 2022.
18. In his submissions, the Advocate avers that the application dated 30th March 2022 is fatally defective and ought to be dismissed on the basis that it offends order 51 rule 13 (2) of the *Civil Procedure Rules*. Further that no fraud has been proved against the Advocate.
19. It is the Advocates submissions that the taxation of his bill of costs was not challenged or objected to by way of a reference as provided for under the provisions of the *Advocates Act*. Judgment therefore has since been entered in accordance with the law.
20. Further, the Advocate submits that the Applicants had appointed advocates to represent them in the taxation of the bill of costs. The Advocate urges the court to dismiss the application by the Clients/Applicants.

Issues for determination

21. Having scrutinized the application before me, the supporting affidavits, the responses thereto and the submissions by the parties, the issues for determination in this matter in my opinion are:-
 - a) Whether the clients/Applicants were served with the Advocates bill of costs?
 - b) Whether the clients/Applicants have proved the allegations of fraud against the Advocate?
 - c) Whether the Judgment in this matter may be set aside as prayed for by the clients/Applicants.



- d) Whether the Advocate client bill of costs was procedurally taxed before completion of the main case (ELC 20/2008) where the Advocate had represented the clients.
- e) Subject to the finding in (c) above, whether the execution of the Judgment in this matter should be stayed pending the conclusion of the main case (ELC 20/2008)
- f) Who should pay the costs of this application.

Analysis and Determination

A. Whether the Clients/Applicants were served with the Advocates Bill of Costs

- 22. As stated above, the Clients/Applicants contend in the Further Affidavit that they were not served with the Advocate's Bill of Costs and that by the time they became aware of it, the bill had already been taxed and a certificate of costs issued. Further that due to Covid-19 measures in place, they were unable to pursue the matter properly. It is on that basis that she avers that this court should set aside the Judgment entered herein in favour of the Advocate for no- service of the proceedings.
- 23. This is a court of record and in considering this issue, I will go back to the record of the court. There is a Return of Service sworn by G.J. Kahuthu, the Advocate herein on the 18th September, 2019. The deponent avers in Paragraph 3 therein that on the 27th August, 2019, he effected service of the Notice of Taxation dated the 22nd August, 2019 and the Bill of Costs dated the 22nd August, 2019 upon the 2nd Applicant, Kenneth Gichinga outside Unafric House in Nairobi. The 2nd Applicant accepted service and indeed confirmed that he had already received the documents via email.
- 24. The Clients/Applicants have not challenged this Affidavit of Service. Other than the allegation of non-service being raised in the instant application, the Clients/Applicants never disputed the said service.
- 24. The court proceedings indicate that on the 30th September, 2019 before the Taxing officer, the Clients were indeed represented by two (2) Advocates when the matter came up for taxation. On that day, the taxing officer directed parties to file and exchange written submissions in respect to the advocate-client bill of Costs. The Clients were particularly directed to sort out the issue of double representation. The Taxation of the Bill of Costs was then re-scheduled to 30th October, 2019.
- 25. On the day of Taxation, that is the 30th October, 2019. On the said date, the Clients were equally represented by a Counsel.
- 26. The record of the court therefore confirms that the Clients/Applicants were duly served with the Bill of Costs and actually fully participated in the proceedings leading to the taxation of the Advocate's bill of costs.

B. Whether the Clients/Applicants have proved the allegations of fraud against the Advocate

- 27. The Clients/Applicants contend in their Supporting Affidavit that the Advocate herein taxed the bill prematurely and fraudulently as the suit, ELC 20 OF 2008 is still on-going. Allegations of fraudulent conduct border on criminality and cannot be taken lightly.



28. Sections 109 and 112 of the Evidence Act provide that:

“ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

29. The law is clear as buttressed in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”(Emphasis mine)

30. As regards the standard of proof, the Court of Appeal in the case of *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR cited the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR in which the court expressed itself as follows; -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* [2008] 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”(Emphasis ours)

31. The Clients/Applicants herein have neither specifically pleaded fraud nor particularized it as required of them. They did not further prove any fraud on the part of the Advocate. The onus was on the Clients/Applicants who alleged fraud on the part of the Advocate. They have not proved fraudulent conduct on the part of the Advocate as alleged.

C. Whether the Judgement in this matter may be set aside as prayed for by the Clients/Applicants

31. The Clients/Applicants application is filed pursuant to Section 3A of the Civil Procedure Act only. Section 3A reserves the court’s inherent power to make such orders as may be necessary for the ends of justice or to prevent the abuse of the court process. As has been severally said, section 3A will only be resorted to where are no specific provisions in respect of the matter in question. This, respectfully is not the position in this matter.

32. As regards advocate-clients bills of costs, the Advocates Act and the Advocates Remuneration Order suffice. As the Court of Appeal held in the case of *Machira & Company Advocate v Arthur K. Magugu* [2012] eKLR:-

“With regard to the advocates bills of costs, we agree with the decision of Ringera J (as he then was) in *Machira vs Magugu* (1) that the Advocates Remuneration Order is a complete code which does not provide for appeals from the taxing master’s decisions. Rule 11 thereof



provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used....”

“In our view, the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with the decisions on advocates bill of costs through references under Rule 11 to a judge in chambers.”

33. In the case of *Carolyn K. Mumbo & Co Advocates v Mulu Mbuvi* [2019] eKLR , the court too made a similar finding that;

“Guided by the above this Court is therefore inclined to reach a finding that indeed there is a specific procedure under the Advocates Remuneration Order, which provides for the specific mechanism in the form of a reference to this Court for purposes of review and or challenging of the taxing master decision, therefore in my view paragraph 11 of the Advocates Remuneration Order cannot be short circuited by filing for review under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules as undertaken by the Respondent herein.”

34. The provision cited by the Clients/Applicants is not applicable in these proceedings in relation to the Advocate-client bill of Costs. The Advocates Remuneration Order provides for the specific mechanism for challenging or reviewing the decision of the taxing officer in the form of a reference to this Court. Paragraph 11 of the Advocates Remuneration Order cannot be short circuited by filing an Application for setting under Section 3A of the *Civil Procedure Act* as undertaken by the Applicants herein.

35. Paragraph 11 of the Advocates Remuneration Order provides that:

“Where a party is aggrieved by the decision of a Taxing Master, he is required to object in writing by requesting the Taxing Master to give reasons for the items of taxation that he is objecting to and thereafter file reference before a Judge.”

36. Section 51 (2) of the *Advocates Act* on the other hand provides 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 the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

37. In the case of *Lubulellah & Associates Advocates vs N. K. Brothers Limited* [2015] eKLR the court observed that;

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment.”

38. From the above provisions and authorities cited, a challenge to the decision of the Taxing Master properly takes the form of a reference under paragraph 11 of the Advocates Remuneration Order. In making such reference, a party is required to show that its case meets the well established principles to



justify interference with the exercise of discretion by the Taxing Master. These principles were stated in the case of *First American Bank of Kenya v Shah and Others* [2002] E.A.L.R 64 at 69 in which Ringera J (as he then was) observed as follows:

“This court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him...”

39. The Clients/Applicants have not filed a reference to challenge the decision of the Taxing Master on any of the grounds set out above. A reference is initiated by way of a chamber Summons as required by the provisions of paragraph 11(2) of the Advocates Remuneration Order. That is not what is before this Court. The Court therefore has no powers to set aside the judgement entered herein in the absence of a Reference.

D. Whether the Advocate-Client Bill of Costs was procedurally taxed before completion of the main case (ELC 20 of 2008) where the Advocates had represented the Clients

40. On whether the Advocate-Client Bill of Costs was procedurally taxed before completion of the main case (ELC 20 of 2008) where the Advocates had represented the Clients, the question that this court asks itself is; how does an advocate earn instruction fees?

41. In the case of *Nyangito and Co. Advocates Vs Doinyo Lessos Creamaries Ltd* (2014) eKLR, Justice Odunga restated the principles to be considered in making a determination on application to set aside the decision of the taxing officer in the following terms: -

“f. The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees.”

42. In the case of *First American Bank of Kenya -vs- Shah and others* (2002) eKLR, Justice Ringera (as he then was) restated the principle that:-

“Though the issue of when an Advocate became entitled to an instruction fee was the subject of apparently conflicting appellate decisions, the better position was that the instruction fee was an independent and static item, not affected by the stage a suit had reached (*Joreth Ltd vs Kigano and Associates* {2002} 1 EA (CAK) followed *Mayers v Hamilton* [1975] EA 13 referred to). The full instruction fee to defend a suit was earned the moment a defence was filed and the subsequent progress of the matter was not relevant.”

43. From the foregoing, the Advocate herein is therefore entitled to his costs regardless of the alleged on-going proceedings in ELC No. 20 of 2008. The Clients/Applicants cannot stop the Advocate getting his fees based on the said pending suit. It is a Party and Party Bill of Costs and not an Advocate-Client Bill of Costs that must be taxed at the determination of the suit. The bill herein was therefore procedurally taxed.



E. Subject to the finding in (d) above, whether the execution of the Judgement in this matter should be stayed pending the conclusion of the main case (ELC 20 of 2008).

44. This issue was dependent on the other findings (above). This court having found that the judgement herein cannot be set aside as prayed for by the Applicants, and further that the Advocate's bill of costs is independent of the pending case (ELC 20/2008) there would be no basis for the grant of the order of stay of execution of the judgement in this matter.

F. Who should pay the costs of this Application

45. Costs follow the event. This court finds no reason to deviate from the norm.
46. Accordingly, the Notice of Motion Application dated the 30th March, 2022 is hereby dismissed with costs to the Advocate/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON 14TH DAY OF JULY 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kahuthu for the Advocate

No appearance for the clients/Applicants

Hilda – Court Assistant.

M.D. MWANGI

JUDGE

