



REPUBLIC OF KENYA



Kiama Wangai & Co. Adovcates v Nyalita & another (Miscellaneous Application 11 of 2019) [2022] KEELC 13260 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13260 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
MISCELLANEOUS APPLICATION 11 OF 2019
CG MBOGO, J
SEPTEMBER 30, 2022**

BETWEEN

KIAMA WANGAI & CO. ADOVCATES APPLICANT

AND

DR ALPHONCE MWENDWA NYALITA 1ST RESPONDENT

CAROLINE WANYUA MWENDWA 2ND RESPONDENT

RULING

1. Before this court for determination is a notice of motion application dated March 12, 2020 and brought under the [Advocates Act](#) chapter 16 of the laws of Kenya seeking the following orders: -
 1. That this honourable court be pleased to issue directions on the taxation of the advocates client bill of costs dated October 31, 2019 and filed on November 1, 2019.
 2. That this honourable court be pleased to issue any other orders that are deemed fit under the circumstances.
 3. That the costs of this application be provided for.
2. The application is premised on the grounds on its face and more particularly in the supporting affidavit of the applicant sworn on even date. The applicant deposed he is aware that the respondents withdrew instructions from his law firm and that his law firm filed Misc Application No 3 of 2019 and Misc 5 of 2019 for recovery of professional fees. The applicant further deposed that he is aware that two rulings were delivered in both applications on October 23, 2019 and that to date no taxation has been done to determine the sums due to the law firm.
3. Further that pursuant to the ruling delivered on October 23, 2019, the applicant filed the instant application but the deputy registrar declined to sign the taxation notice and directed that a reference to her rulings be filed instead. The applicant deposed that no taxation has taken place and no items



stand to be challenged by way of reference and it is in the interest of justice that the advocates-client bill of costs dated October 31, 2019 be taxed.

4. The application is opposed by the replying affidavit of the 2nd respondent sworn on April 30, 2020. The respondents deposed that the application is contradictory, frivolous, misconstrued both factually and legally and as such is an abuse of the court process. Further, that the applicant filed Misc Application No 3 of 2019 and 5 of 2019 which was heard before the deputy registrar and a ruling delivered on October 23, 2019. Further, that Misc Application No 3 of 2019 was struck out due to duplicity of suits and as such the instant application is *res judicata* as the matter has been heard and determined substantively by the deputy registrar.
5. The respondents further deposed that the applicant should have filed an objection to the decision by the deputy registrar in accordance with rule 11 of the [Advocates Remuneration Order](#) and having failed to file a reference within the period prescribed, the instant application and the bill of costs should be struck out with costs.
6. The applicant filed written submissions dated May 20, 2021. The applicant submitted that he was instructed to file suit for recovery of Kshs 257,000,000/= and is therefore entitled to full professional fees and that the instructions having been withdrawn, the applicant had no choice but to file a bill of costs. The applicant submitted that the deputy registrar purported to dismiss the bill of costs basing her argument on a retainer agreement that she found illegal. The applicant submitted that in the instant case, the retainer agreement if found unlawful, then the same does not exist and the [Advocates Act](#) needs to be applied.
7. The applicant further submitted that the jurisdiction of a taxing officer is to tax bill of costs in accordance with the applicable schedule of the remuneration order and where the very fundamental issue of whether or not an advocate is entitled to any costs in the first place arises before a taxing officer, that issue must first be determined by the courts and therefore the taxing officer did not have jurisdiction to hear and determine the application because the issue being canvassed was whether or not the advocate was entitled to costs.
8. The applicant submitted that striking out and or dismissing a bill of costs is not taxation and that filing a reference is to the extent that taxation has taken place without the same taking place, there was nothing to object to.
9. The respondents filed written submissions dated May 24, 2021. The respondents raised two issues for determination as follows: -
 - i. Is this matter *res judicata*.
 - ii. Is the applicant entitled to any of the prayers sought?
10. On the first issue, the respondents submitted that the only difference between the bill of costs dated October 31, 2019 and the previous bill of costs is that they have now been placed together as opposed to the previous bill of costs which had been filed separately. The respondents relied on the English case of [Henderson versus Henderson](#) (1843-60) ALL ER 378 and [Carolyn K Mumbo & Co Advocates versus Mulu Mbuvi](#) Garissa High Court Misc App No 3 of 2017 [2019] eKLR. The respondents submitted that since both rulings were delivered in both matters, the applicant ought to apply the provisions of paragraph 11 (1) and (2) of the [Advocates Remuneration Order](#). The respondents submitted that the applicant is under the misguided impression that a certificate of costs is the ultimate outcome of taxation and that the decision of the taxing officer is subject of a reference.



11. The respondents submitted that the applicant's grievance prima facie is the alleged failure by the deputy registrar to sign the taxation notice to initiate the taxation of the bill of costs dated October 31, 2019 which grievance ought to be addressed by way of judicial review.
12. I have considered the application, replying affidavit and the written submissions filed by both parties and the issue for determination at this stage is whether the applicant is entitled to have the bill of costs dated October 31, 2019 taxed.
13. The deputy registrar delivered two rulings in Misc Appl No 3 of 2019 and Misc Appl No 5 of 2019 on October 23, 2019. The bill of costs in Misc Appl no 3 of 2019 was struck out on grounds of duplicity with no orders as to costs. The honourable deputy registrar gave reasons for her determination which were contained in a ruling. The bill of costs in Misc Appl No 5 of 2019 was dismissed with the orders that each party to bear their own costs. Again, the honourable deputy registrar upon analysing and considering the issues for determination, made a finding arising therefrom.
14. I do not agree with the applicant's submissions that since no taxation took place, then there was nothing to object to. Paragraph 11 of the *Advocates (Remuneration) Order* provides a detailed process of objection to taxation of costs as follows:
 - “ 11. Objection to decision on taxation and appeal to Court of Appeal.
 - (1) 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.
 - (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 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.”
15. Considering the two rulings delivered by the taxing officer on October 23, 2019, it is my view that the taxing officer addressed the reasons, on how she arrived at her decisions. It follows that the applicant herein would have then taken the next step being the filing of the reference.
16. The Court of Appeal in the case of *Machira & Company Advocate v Arthur K Magugu* [2012] eKLR, held as follows:
 - “The appellate jurisdiction of any court is a creature of the statute and has to be exercised in accordance with the provisions creating it. With regard to the advocates' bill of costs, we agree with the decision of Ringera J (as he then was) in *Machira & Co Advocates V*



Arthur Magugu & another, HCC Misc application No 358 of 2001 that the Advocates Remuneration Order is a complete code which does not provide for appeals from the taxing masters 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 ...”

17. In this case, there is no reference as contemplated under paragraph 11 of the *Advocates Remuneration (Amendment) Order* 2009 filed before this court challenging the decision of the taxing officer that would grant this court jurisdiction to hear and determine the prayer sought in the applicant’s notice of motion dated March 12, 2020. Instead of following the laid down procedure, the applicant has devised his own procedure in an attempt to draw from the well of justice. The well has however yielded nought for want of compliance.
18. Arising from the above, the notice of motion application dated March 12, 2020 is dismissed with costs to the respondents. The advocate-client bill of costs dated October 31, 2019 is hereby struck out. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 30TH DAY OF SEPTEMBER, 2022.

HON. C.G. MBOGO

JUDGE

