



REPUBLIC OF KENYA



Muchiri Gachara & Thimba Advocates v Benhard (Environment and Land Miscellaneous Application 187 of 2019) [2022] KEELC 15565 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 187 OF 2019
EK WABWOTO, J
DECEMBER 20, 2022**

BETWEEN
MUCHIRI GACHARA & THIMBA ADVOCATES APPLICANT
AND
RONOH BENSON BENHARD RESPONDENT

RULING

1. This Ruling is in respect to two applications. The first one being the application filed by the applicant dated November 25, 2021 and the second application being the application filed by the Respondent dated July 4, 2022.
2. In the application dated November 25, 2021, the applicant sought the following orders:-
 - i. That judgment be entered for the applicant against the respondent for the sum of Ksh 191,670/= together with interest thereon at 14% per annum from July 1, 2018 until payment in full.
 - ii. That the applicant be at liberty to execute against the respondent.
 - iii. That costs of this application be borne by the respondent.
3. The Application was supported by the grounds on its face and by the supporting affidavit sworn by Hiram Thimba Advocate on November 25, 2021.
4. The second application was the application dated July 4, 2022 filed by the respondent herein. In the said application, the following orders were sought:
 - i. Spent
 - ii. That this honourable court be pleased to stay the hearing and determination of the Application dated November 25, 2021 pending the hearing and determination of this instant application.



- iii. That this Honourable Court be pleased to set aside the certificate of costs dated June 28, 2021.
 - iv. That the bill of costs dated October 18, 2019 be referred afresh for taxation, hearing and determination on merit.
 - v. That the applicant herein be granted leave to put in a response to the Advocate/Client Bill of Costs dated October 18, 2019.
 - vi. Costs of the Application be met by the claimant.
5. The application was supported by the affidavit sworn by Rono Benson Behard the respondent herein on 4th of July 2022.
 6. Pursuant to the directions issued by this court on 7th of July 2022 and 28th of September 2022, the court directed that both applications be canvassed by way of written submissions and the parties were given timelines to comply.
 7. The applicant herein filed its written submissions dated 22nd of November 2022 through the firm of H. T and Associates while the respondent file his written submissions dated 27th of September 2022 through Ngeno and Company Advocates.
 8. In the applicant's submissions the applicant the background leading to the taxation of the bill of costs and issuance of the certificate of taxation.
 9. Counsel submitted that the respondent failed to adhere to the procedure set out under Paragraph 11 of the *Advocates Remuneration Order*. It was stated that the Respondent had not adhered to the proper procedure of filing the reference and had also not requested for the reasons of the taxation. The same ought to have been done within 14 days.
 10. It was also submitted that extensions of time is not a right but an equitable remedy and only a diligent party should be granted leave to file reference out of time.
 11. The respondent in his submissions outlined three issues for determination by the court. These were follows:-
 - i. Whether an order of stay of execution should be issued.
 - ii. Whether there was an advocate -client relationship between the Advocate and the applicant.
 - iii. Whether the Advocates effected proper service upon the applicant.
 12. It was submitted that the respondent is likely to suffer substantial loss in the event that the Application dated November 25, 2022 is allowed. The cases of *County Government of Tana River v Miller and Company Advocates* [2021] eKLR was cited to support this position.
 13. It was also submitted that there was no Advocate – Client relationship in existence between the parties. That the applicant was never in the panel of KCB and there was no way it could have acted for the respondent in respect to the said transaction.
 14. It was also argued that the thread of email communication between the parties that had been produced as annexure “HT2” were merely correspondences between a buyer and vendor through vendors lawyer but did not in any manner amount to instructions for any work. The cases of *Hezekiel Oira T/A Oira Advocate v Kenya Broadcasting Corporation* [2015] and *DI Lorenzo limited v Hassan Bulle & Co* [2020] eKLR was cited in support of this position.



15. On the issues of service upon the respondent, Counsel submitted that while the respondent was personally notified of the bill of costs, he instructed the firm of Cherop Marete Advocates and later changed to Ngeno Advocates who were never served since service was always effected to the previous law firm that had ceased acting.
16. I have considered both Applications, the response and submissions by parties. I have also considered the decisions relied on by parties. The issue which in my opinion arise for determination is whether a stay of proceedings should issue herein to enable the respondent challenge the bill of costs dated October 18, 2019.
17. The procedure by an aggrieved party to challenge a taxation ruling is set out in the *Advocates Remuneration Order* Paragraph 11 and is very specific on what an aggrieved party should do. “A party who intends to challenge a ruling on taxation must first write to the taxing officer within 14 days from the date of ruling of taxation, giving a notice of objection specifying the items in the bill of costs in respect of which he is aggrieved of and requesting the taxing master/officer to give reasons for allowing them as shown in the ruling”
18. Paragraph 11 of the *Advocates Remuneration Order* stipulates-
 - “ 11(1) should any party object to the decision of the taxing officer, he may within 14 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 14 days from the receipt of the reasons apply to the judge in chambers which shall be served on all 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 sub paragraph (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 enlarge the time fixed by subparagraph (1) or subparagraph (2) of the taking of any step.
 - 5) Applications for such an order may be made by chamber summons upon giving every other interested party not less than 3 clear days’ notice in writing or as the court may direct, and may so made notwithstanding that the time sought to be enlarged may have already expired.”
19. It is therefore apparent from the law that the above provision provides for the filing of a reference within 14 days from the date of receiving the reasons for the decision. This continues to apply despite the fact the Taxing Master would often indicate that the reasons are contained in the decision
20. In the instant case, no objection to taxation has been filed but instead the Respondent has filed an application seeking inter alia to set aside the certificate of costs dated June 28, 2021 and the bill of costs dated October 18, 2019.
21. In the current scenario, the respondent has not indicated what prejudice he stands to suffer if the applicant is allowed to execute his certificate of costs dated June 28, 2021.
22. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and



overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent. See Ringera J. (as he then was) in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

See also illumination on the threshold for stay of proceedings in the following passages in Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.

23. The use of discretion is to ensure proper use of judicial time and resources to dispense justice for the parties. This is also to guard against multiplicity of applications which are meant to delay the finalization of matters which go against the spirit of article 159 of the Constitution that enjoins the court to hear matters expeditiously. However, this is not to turn a blind eye on deserving applications for stay of proceedings.
24. In the case of Christopher Ndolo Mutuku & another v CFC Stanbic Bank Ltd (2015) eKLR, the court observed that;
“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”
25. The provisions of article 159(2)(a)(b)(c) and (d) of the Constitution of Kenya as read with sections 1A and 1B of the Civil Procedure Act, cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.



26. In the instant case, the respondent has not adequately explained why it took long to file the present application seeking to challenge the certificate of costs date October 18, 2019 and I do not find any merit in his application dated July 4, 2022.
27. The section 51 (2) of the *Advocates Act* 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.”
28. In this matter, I find that the respondent was properly served with the Application dated November 25, 2021. This court will therefore enter judgment against the respondent for the said taxed costs of Kshs. 191,670/= together with interest at 14% per annum.
29. The taxing officer in my view did not misapprehend the applicable principles and law in arriving at her decision of taxing the bill. It is therefore not open for this court to interfere with the same.
30. Flowing from what I have stated above, I see no reasons to set aside the certificate of costs dated June 28, 2021.
31. Consequently, the applicant’s application dated November 25, 2021 and the Respondent’s applications dated July 4, 2022 are disposed in the following terms; -
- i. The respondent’s application dated July 4, 2022 is dismissed for lack of merit.
 - ii. Judgment is hereby entered in favour of the applicant against the respondent for Ksh 191,670/ = plus interest of 14% per annum from 1st July 2018 until payment in full.
 - iii. Each party to bear their own costs of the applications.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Thimba for the Applicant

N/A for the Respondent.

Court Assistant; Caroline Nafuna.

