



REPUBLIC OF KENYA



**Lubulellah & Associates Advocates v St Bakhita Daycare & Kindergarten Limited & another (Environment and Land Miscellaneous Application E034 of 2021) [2022] KEELC 15331 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15331 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E034 OF 2021  
MD MWANGI, J  
DECEMBER 13, 2022**

**BETWEEN**

**LUBULELLAH & ASSOCIATES ADVOCATES ..... ADVOCATE**

**AND**

**ST BAKHITA DAYCARE & KINDERGARTEN LIMITED ..... 1<sup>ST</sup> CLIENT**

**FELISTA MUTHOKI ..... 2<sup>ND</sup> CLIENT**

*(In respect of the Advocate's Application dated 24th March, 2022 and the Clients' application dated 12th July, 2022)*

**RULING**

**Background**

1. Before me for determination is the advocate's application March 24, 2022 and the clients' application dated July 12, 2022. The court's directions were that both applications be prosecuted and considered together.

**Application dated March 24, 2022**

2. The application is by the advocate seeking entry of judgement in his favour against the clients for the sum of Kshs 849,123.10 plus interest at the rate of 14% per annum from February 16, 2021 until payment in full.
3. The application is premised on the grounds that the advocate - client bill of costs in this matter has been taxed whereas a reference application filed thereafter has also been considered by the court and struck out/dismissed with costs. The advocate wishes to proceed and realize the costs taxed herein by way of execution hence judgement and decree are required therefrom.



4. The advocate's application is supported by an affidavit sworn on March 24, 2022 by one Eugene Lubale Lubullellah. He deposes that the advocate-client bill of costs was taxed at a sum of Kshs 849,123.10/= on November 19, 2021. Prior to the taxation, the advocate had served the clients with a final fee note dated February 16, 2021 and subsequently a taxation notice together with the bill of costs on the March 29, 2021.
5. The advocate prays for entry of judgement upon the sums certified in the certificate of taxation and to attract interest at the rate of 14% per annum from February 16, 2021 being the date of service of the bill and notice upon the respondent.
6. The application is vehemently opposed by the clients through the replying affidavit of Felista Muthoki Mutinda, the 2<sup>nd</sup> respondent herein. The affidavit was deponed on the July 12, 2022.
7. The deponent avers that the clients engaged the advocate in several matters both contentious and non-contentious which are listed in the replying affidavit including but not limited to the subject matter of these proceedings; (Nairobi Environment and Land Court Case No 318 of 2015 - Delta Plains Management Company Limited –vs- St Bakhita Daycare and Kindergarten Limited and Felista Muthoki Mutinda). She further avers that the advocate was paid a total sum of Kshs 2,540,000/- as particularized in paragraph 7 of her affidavit. That efforts to settle the accounts between the advocate and the clients amicably have been futile.
8. The clients argue that pursuant to the ruling of this court in ELC Miscellaneous No E044 of 2021, the court directed that the client should file a new suit to claim the overpayments of Kshs 911, 820.52/-. The amount claimed by the advocate herein is therefore settled by the said over payment as the client is in the process of filing a new suit, with high likelihood of success. The clients therefore believe that they have over paid the advocates and do not owe the advocate any money.
9. The advocate filed a supplementary affidavit deponed by Eugene Lubale Lubullellah on the August 1, 2022 in which he attached the certificate of taxation dated July 21, 2022 at a sum of Kshs 849,123.10/= and marked as 'ELL 4'.

### **The clients' application**

10. On the other hand, the clients' application dated July 12, 2022 seeks that the advocate delivers a cash account of all monies received from the clients in respect to all legal engagements offered by the former to the latter.
11. Further, that upon delivery and reconciliation of such accounts, the court finds that the clients have paid the advocate all the legal fees due and owing and that there are no legal fees outstanding and declare the ruling by the honourable taxing officer as spent. The clients' application is supported by the 2<sup>nd</sup> respondent, Felista Muthoki Mutinda, sworn on July 12, 2022.
12. The clients' application is premised on the grounds that the taxing master on November 19, 2021 taxed the advocate's bill of costs dated February 23, 2021 at a sum of Kshs 849,123.10/-. She reiterates her averments contained in the replying affidavit deponed on the July 12, 2022 in opposition to the advocate's application for entry of judgment, whose contents are stated above.
13. The clients' application is opposed by the advocate who filed grounds of opposition dated the July 19, 2022. The advocate argues that the court lacks jurisdiction to hear and determine the clients' application as presented and to grant the prayers sought within this miscellaneous application which is solely and 'jurisdictionally' instituted for taxation purposes only.



14. The advocate reiterates that the proceedings herein are restricted to taxation of advocate-client's bill of costs and entry of judgement upon issuance of a certificate of costs therefrom. This is not a substantive suit under which the clients may make a claim for delivery and reconciliation of cash accounts in relation to other miscellaneous matters pending before court.
15. In any event, the advocate avers that the clients' claim for the purported over-payments the alleged over-payment is made over 6 years ago after. Such a claim can only be instituted by way of plaint or originating summons, but would nonetheless be time barred pursuant to section 4(3) of the Limitation of Actions Act.
16. The advocate further states that the clients' application is *sub judice* as the clients have filed similar applications in other matters alleging to have made the very same payments. In addition, the alleged payments were made in respect of services not the subject of the taxation hereof. The clients had raised the same issues before the taxing officer.
17. It is the advocate's contention that the clients have no judgement or decree against him for the money purportedly overpaid.
18. In the absence of a reference, the taxed costs are final.

### **Court's direction**

19. With the concurrence of the parties, the court directed that the two applications be heard concurrently and by way of written submissions. Both parties complied. The advocate's submissions to both applications are dated October 24, 2022 whereas the clients' submissions are dated October 27, 2022. The court has had the opportunity to read the submissions.
20. I will consider the applications sequentially beginning with the advocate's application then the clients' application, in that order.

### **The advocate's application**

21. The advocate's application is an application for entry of judgment after the taxation of the advocate - client bill of costs and issuance of a certificate of taxation. This court too has already pronounced itself on the reference filed by the clients vide its ruling of March 22, 2022. Accordingly, the only issue then for determination is whether the court should enter judgment in favour of the advocate/applicant as prayed for with interest at 14% per annum from the date of service of the bill of costs until payment in full.

### **Determination**

22. It is not in dispute that the advocate's bill of costs herein was taxed on November 19, 2021, at the figure of Kshs 849,123.10/=. A certificate of taxation has already been issued certifying the said amount.
23. The law in respect to advocate-client bills of costs is quite clear and settled. A certificate of taxation of the taxing officer unless set aside or altered by the court is final in regard to the amount of costs covered, as stipulated under section 51(2) of the Advocates Act.
24. The issues that the clients now raise in the replying affidavit are issues that were before the taxing officer and also in the reference. The clients being dissatisfied with the ruling of the taxing officer, filed a reference by way of the chamber summons application dated January 22, 2022 challenging the decision of the taxing officer before this court. They sought that it be set aside and the bill of costs remitted for taxation before another taxing officer other than the one who had made the decision. The chamber



summons application was duly considered by this court and struck out with costs. That ruling of the court has not been appealed from.

25. Accordingly, that being the case, the court has no option but to enter judgment in favour of the advocate for the sum of Kshs 849,123.10/= as prayed for in the advocate's application under consideration.
26. On the aspect of interest, this court in the case of *PI Samba and Company Advocates vs Buzeki Enterprises Limited [2022] eKLR* made reference to the Court of Appeal decision in *Otieno Ragot & Co Advocates vs Kenya Airports Authority (2021) eKLR*, in which the court stated that: -

' The rule (rule 7) deals with interest chargeable by an advocate in respect of claims for disbursement and costs following submissions of a fee note. It is patently clear from the rule that interest begins to accrue from the expiry of one (1) month from the date of delivery of the bill or fee note. The learned judge's reasoning that the rule does not specify the date from which time begins to run was therefore a misdirection.

Additionally, it is distinctive that a review of the applicant's bill of costs does not disclose that the applicant included a charge for 'interest at 14% per annum on his (her) disbursements and costs' in the bill of costs. As the sole basis upon which computations of amounts due to an applicant are determined by the taxing officer, the element of interest defined by rule 7 ought to have been included in the bill of costs, but it was not. This omission would thereby negate the application of rule 7, and instead render the bill liable to an exercise by the court of its discretion under section 26 of the Civil Procedure (Act).'

27. I have looked at the bill of costs that was drawn, filed and presented by the advocate/applicant in this matter. The advocate did not include a charge of interest at 14% per annum which he now claims in this application. Guided by the above cited binding authority of the Court of Appeal, rule 7 cannot therefore apply in this case. That leaves me only with the discretion under the provisions of section 26 of the Civil Procedure Act.
28. Exercising this court's discretion under section 26 of the Civil Procedure Act, the court awards the advocate/applicant interest at the rate of 14% per annum but from the date of the taxation of the bill of costs being the November 19, 2021 until payment in full. The date of November 19, 2021 was the date when the ruling of the taxing officer in respect of the advocate's bill of costs was delivered. The clients participated in the taxation of the advocate-client bill of costs and therefore had notice of the taxed amount upon delivery of the ruling of the taxing officer.
29. Accordingly, judgment is entered in favour of the advocate/applicant against the clients for the sum of Kshs 849,123.10/- with interest at 14% per annum from the November 19, 2021 until payment in full.
30. The advocate/applicant shall also have the costs of this application.

### **Clients' application**

31. Having considered the application by the clients, the response by the advocate and the submissions by the parties, the issue for determination in this court's opinion is whether the court has the jurisdiction to determine the application as brought the clients.



## Analysis and determination

32. The locus classicus on jurisdiction, is the famous case of *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR*, where the Court of Appeal expressed itself in the following words: -
- ' 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. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.'
33. 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 a reference before a judge.'
34. 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.'
35. In the case of *Lubulellah & Associates Advocates vs NK 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. An applicant is not required to file suit for the recovery of costs.'
36. The clients' reference as I pointed out has already been determined. The clients pray that the advocate accounts for monies allegedly over paid to him to the advocate. As this court observed in a different ruling reported as *Lubulellah & Associates Advocates v St Bakhita Daycare & Kindergarten Limited (2022) eKLR*:
- ' The question that the respondent ought to have solemnly pondered (in her mind) before moving to court is how to recover the overpayment, if at all. The modality adopted by the respondent is unknown in our law. Under the provisions of the *Advocates Act* and the Advocates Remuneration Order, this court's mandate is only limited to entering judgement in favour of the advocate upon issuance of a taxation certificate under section 51 (2) of the *Advocates Act* and to handle references by clients - to review, vary or set aside the decision of the taxing officer under rule 11 of the Advocates Remuneration Order. Nothing more, nothing less. In purporting to consider the application filed by the client herein, this court would be arrogating itself jurisdiction which it does not otherwise have.'



37. In the case of *NW Amolo & another vs Samson Keengu Nyamweya [2019] eKLR*, it was held that;

' On the issue concerning the reconciliation of the accounts, it is noted that the application before me is limited to the entry of judgment pursuant to the certificate of taxation. In that case, I am of the view that this is not the proper forum for me to consider the payments made by the respondent, if any. The respondent is at liberty to move the court appropriately should he wish to address this issue.'

38. I reiterate this court's position in *Lubullellah & Associates Advocates v St Bakhita Daycare & Kindergarten Limited (supra)*, that this is not the appropriate forum in which to address the subject of reconciliation of accounts and recovery of alleged over payments, if any. The clients may consider filing a suit where both parties will have the opportunity to adduce evidence and interrogate the evidence of the opposite party by way of cross-examination.

39. Accordingly, my finding is that this court lacks the jurisdiction to hear and determine the clients' application as presented in this matter. The clients' application dated July 12, 2022 is therefore struck out with costs.

### **Conclusion**

40. In conclusion the court makes the following orders: -

- a. Judgment is entered in favour of the advocate/applicant against the clients for the sum of KShs 849,123.10/- with interest at 14% per annum from the November 19, 2021 until payment in full.
- b. The client's application dated July 12, 2022 is struck out.
- c. The advocate/applicant shall have the costs of both applications.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2022**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Wendoh Lubullellah for the Advocate.

Mr. Lungure holding brief for Ms. Ngereza for the clients.

Court Assistant – Hilda/Yvette.

**M.D. MWANGI**

**JUDGE**

