



REPUBLIC OF KENYA



**Lubullellah & Associates Advocates v St Bakhita Daycare & Kindergarten
Limited (Environment and Land Civil Miscellaneous Application
E046 of 2021) [2022] KEELC 15333 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION E046 OF 2021
MD MWANGI, J
DECEMBER 13, 2022**

BETWEEN

LUBULELLAH & ASSOCIATES ADVOCATES ADVOCATE

AND

ST BAKHITA DAYCARE & KINDERGARTEN LIMITED 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 dated March 24, 2022 as well as the Client's application dated June 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 Client for Kshs 562,667.20 plus interest at the rate of 14% per annum from February 4, 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 and 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's Bill of Costs was taxed at a sum of Kshs 562,667.2/



- =. Prior to the taxation, the Advocate had served the Client with a final Fee Note dated February 4, 2021 and subsequently served 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 4th February, 2021 being the date of service of the bill and notice upon the Respondent.
 6. The application is vehemently opposed by the Client through the Replying Affidavit of Felista Muthoki Mutinda, a director of the Client herein. The Affidavit was deponed on the June 7, 2022.
 7. The deponent avers that the Client 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; (Agreement for Sale of Land Title Number Nairobi Block 160/154 between Kenya Bankers Savings & Credit Co-operative Society Limited to St Bakhita Daycare & Kindergarten Limited. 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 over payment 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 Client therefore believe that they have over paid the Advocates and do not owe the Advocate any money.
 9. The Advocate filed a Supplementary Affidavit deposed by Eugene Lubale Lubulellah on the July 18, 2022 in which he attached the Certificate of Taxation dated July 6, 2022 at a sum of Kshs 562,667.02/= and marked as 'ELL 4'.

The Client's application

10. On the other hand, the Client's application dated June 7, 2022 seeks that the Advocate delivers a cash account of all monies received from the Client in respect to all legal representation offered by the former to the latter.
11. Further, that upon delivery and reconciliation of such account, the court finds that the Client has paid the Advocate all the legal fees due and owing and that there are no legal fees outstanding and declare ruling by the Honourable Taxing Officer as spent. The Client's application is supported by the affidavit sworn by its director, Felista Muthoki Mutinda, sworn on June 7, 2022.
12. The Client's application is premised on the grounds that the Taxing Master on October 12, 2021 taxed the Advocate's Bill of Costs dated March 25, 2021 at a sum of Kshs 462,667.2/-. She reiterates her averments contained in the Replying Affidavit deponed on the June 7, 2022 in opposition to the Advocate's application for entry of judgement, whose contents are stated above.
13. The Client's application is opposed by the Advocate who filed grounds of opposition dated the June 21, 2022. The Advocate argues that the court lacks jurisdiction to hear and determine the Client's application and to grant the prayers sought within this miscellaneous suit 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 Client 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 Client's claim for the purported over-payments, the alleged over-payment is made over 6 years after. Such a claim can only be instituted by way of Plaint or Originating Summons, but would be nonetheless be time barred pursuant to Section 4(3) of the Limitation of Actions Act.
16. The Advocate further states that the Client's application is res sub judice as the Client has 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 subject of the taxation hereof. The Client had raised the same issues before the Taxing Officer.
17. It is the Advocate's contention that the Client has no judgement or decree against him for the money purportedly overpaid.
18. In the absence of a Reference, the taxed fee is final.
19. The Advocate further filed a Replying Affidavit against the Client's application sworn on the 22nd November, 2022. The Advocate reiterates the grounds in opposition to the Client's application dated 21st June, 2022 in his Replying Affidavit.

Court's direction

20. 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 September 16, 2022 and Further Submissions dated November 22, 2022. The Client's submissions are dated September 21, 2022. The court has had the opportunity to read the submissions.
21. I will consider the applications sequentially beginning with the Advocate's application then the Client's application, in that order.

Advocate's application

22. The Advocate's application is an application for entry of Judgment after the taxation of an 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 Client vide its ruling of March 22, 2022. Accordingly, the only issue for determination is whether the court should enter judgment in favour of the Advocate/Applicant as prayed with interest at 14% per annum from the date of service of the bill of costs until payment in full.

Determination

23. It is not in dispute that the Advocate bill of costs was taxed on October 12, 2021, at the figure of Kshs 562,667.02/=. A Certificate of Taxation dated July 6, 2022 was subsequently issued certifying the said amount.
24. The law in respect to Advocate- Client bill 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 stated in Section 51(2) of the Advocates Act.
25. The issues that the client now raises in the replying affidavit are issues that were before the taxing officer. If the client 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 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.

26. Accordingly, that being the case, the court has no option but to enter judgment in favour of the Advocate for the sum of Kshs 562, 667.02/= as prayed for in the Advocate's application the Certificate of Taxation dated 6th July issued herein.

27. On the aspect of interest, I will rely on my finding 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 its claim 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).'

28. 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 she now claims in her application. Guided by the above cited binding authority, 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*.

29. 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 from the date of Taxation of the Advocate's Bill of Costs being October 12, 2021 until payment in full. The date of October 12, 2021 was the date when the ruling of the taxing officer in respect of the Advocate's bill of costs was delivered. The Client 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.

30. Accordingly, judgment is entered in favour of the Advocate/Applicant against the Client for the sum of Kshs 562, 667.02/- with interest at 14% per annum from the October 12, 2021 until payment in full.

31. The Advocate/Applicant shall also have the costs of this Application.

Clients' application

32. Having considered the application by the Client, the response by the Advocate and submissions by the parties, issue for determination in this Court's opinion is whether the Court has the jurisdiction to determine the application as brought the Client.



Analysis and Determination

33. In the locus classicus case on this subject, *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR*, 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.'

34. 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.'

35. 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.'

36. In the case of *Lubulellab & 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'.

37. The Client's reference as I pointed out has already been determined. The Client pray that the Advocate accounts for monies allegedly over paid to him, the Advocate. As this court observed in a different ruling reported as *Lubulellab & Associates Advocates vs St. Bakhita Daycare & Kindergarten Limited (2022) eKLR* that:

' The question that the Respondent ought to have solemnly pondered before moving to court is how to recover the over-payment, 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.'



38. 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.'

39. I reiterate this court's position *Lubulellah & Associates Advocates vs 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 overpayments, if any. The client 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.

40. Accordingly, this Court lacks the jurisdiction to hear and determine the client's application. The Client's application dated June 7, 2022 is therefore struck out with costs.

Conclusion

41. In conclusion the Court makes the following orders: -

- a. Judgment is entered in favour of the Advocate/Applicant against the Client for the sum of Kshs 562,667.2/- with interest at 14% per annum from the October 12, 2021 until payment in full.
- b. The Client's application dated June 7, 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. Wendo Lubulellah for the Advocate/Applicant.

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

Court Assistant – Hilda/Yvette.

M.D. MWANGI

JUDGE

