



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC MISC. APPLICATION NO. 79 OF 2019

TARIQ KHAN & ASSOCIATES ADVOCATES.....APPLICANT

VERSUS

MOHAMED ALI YUSUF ALI.....RESPONDENT

RULING

1. The Advocate, referred to as the Applicant in this ruling had his bill of costs taxed following which the taxing officer delivered the ruling on 18/12/2019. The Client referred to as the Respondent filed the application dated 14/5/2019 on 19/6/2020 seeking stay of execution of the orders of the taxing officer and the enlargement of the time for filing the reference against the ruling of the taxing officer delivered on 17/12/2019. Further, the Respondent sought to have the Applicant directed to release all the client documents including the original title in respect to Westland's Business Park, documents relating to the incorporation of Muffadal Limited together with the building plans and architectural design for Westlands Business Park and the file relating to **ELC Milimani No. 23 of 2014**. The Respondent sought to have the decision of the taxing officer set aside and to have the bill of costs remitted for taxing before a different taxing master.

2. The Respondent also sought to have the court settle accounts between the Applicant and the Respondent and to have the taxing officer directed to take into account monies already paid to the Applicant in arriving at the sum owing to the Applicant. The Respondent further sought to have the bill of costs in **ELC Misc. Application number 79 of 2019** consolidated with Misc. Application No. 80 of 2019 and the two to be taxed as a single bill.

3. The application was made on the grounds that the taxing officer did not supply the reasons to the Respondent despite request and that she did not take into account monies already paid to the Applicant as fees while taxing the bill of costs. The Respondent contended that the Applicant was still holding the original client file including other documents and as such the Respondent was unable to carry out his business and personal affairs including registering the tenancy leases. The Respondent contended that granting the orders he sought would assist the court in the efficient and prudent management of judicial time when all the issues are determined together and the bills of costs are addressed as one under a single ruling. He contended that many of the items on the bill of costs relating to the same matter were duplicated. The Respondent claimed that he applied to have the two bills of costs consolidated but the taxing officer declined to consider his application. The Respondent further contended that the taxing officer proceeded on the basis that there were two sets of instructions while it was only one and the authority to compromise the suit could not be deemed as new and separate instructions.

4. The application was supported by the Respondent's affidavit sworn on 18/5/2020 in which he deponed that the Applicant acted for him in **ELC Milimani No. 23 of 2014** being a property dispute. The Applicant entered appearance and filed a defence but he contended that the case did not move beyond the application for interlocutory injunction. In the course of the proceedings the Respondent authorised the Applicant to compromise the suit. The Applicant filed an advocate - client bill of cost claiming Kshs. 3,728,780/= being the legal fees for defending him in ELC Milimani No. 23 of 2014. The bill was taxed at Kshs. 1,812,662.40. At the same time, the Applicant filed a bill of costs claiming Kshs. 2,175,500/= as the legal fees for the conveyancing transaction of the property which was the subject matter in ELC Milimani No. 23 of 2014 yet there was no sale agreement drawn for the Suit Property. The bill was taxed at Kshs. 193,258.80/=.

5. Mr. Yusuf Ali deponed that he paid the Applicant Kshs. 5,000,000/= which was negotiated and agreed upon as a global sum. However, the court notes that he did not annex the documents including the cheques and bank statements as proof of that payment. Mr. Ali relied on the affidavit of K. M Mwangi Advocate sworn on 14/5/2020 deponing to the fact that the Deputy Registrar had declined to give the reasons for her ruling on the taxation despite several written requests and numerous verbal follow ups. The court notes that the bundle of letters the advocate referred to in that affidavit were not annexed to that affidavit. Mr. Yusuf Ali deponed that the Applicant had refused to release the documents claiming that he was exercising lien over the files and the documents.

6. The Applicant swore the replying affidavit in opposition to the application and confirmed that his firm filed Misc. Application No. 79 of 2019 and Misc. No. 80 of 2019 relating to two different bills of costs. He gave the chronology of the court proceedings relating to Misc. No. 79 of 2019 as well as those relating to number 80 of 2019. He stated that neither the Respondent nor its advocates attended court when the ruling in respect of the two miscellaneous applications were delivered. His firm wrote to the Respondent's advocate on 12/11/2019 notifying him of the ruling in Misc. Appl. 80 of 2019. His firm wrote again to the Respondent on 14/1/2020 reminding them of the ruling in both miscellaneous applications. He maintained that the Respondent and his advocates were both aware of the ruling from November 2019 but chose to ignore the fact that his firm had the right to execute for payment. He added that the Respondent had the opportunity to consolidate the two miscellaneous applications at the initial stages but failed to do so.

7. Mr. Khan clarified in his affidavit that the documents the Respondent seeks to have produced relate to a separate and distinct transaction which the Respondent had shown belonged to Westlands Business Park while this litigation concerns Yorkhouse Properties Limited in which the Respondent was sued in his own personal capacity. He added that Westlands Business Park was owned by Muffaddal Investment Limited which was a separate and distinct entity without any nexus to the bill of costs taxed. He urged that the documents being produced now were produced before the taxing master and were rightfully disregarded. He added that the Respondent was given many opportunities by the court to canvas his case but failed to do so and added that his law firm had been patient and extremely accommodating of the Respondent. He concluded that the Respondent's intention was to frustrate his firm from enjoying the fruits of the ruling.

8. The Respondent filed submissions and gave the narrative of the proceedings in this matter in an attempt to demonstrate that the Respondent failed to attend the hearing and sought indulgences and extension of time when he failed to act timeously.

9. The Applicant urged the court to take into consideration the length of delay, the reasons for the delay, the chance of the Respondent succeeding in the reference if the application were granted and fourthly the degree of prejudice the Respondent stood to suffer if the application was not granted. The Applicant submitted that it took the Respondent close to 5 months to file his reference yet Rule 11 of the Advocates Remuneration Order required an aggrieved party objecting to the decision of the taxing officer to give notice of his objection within 14 days of the decision. The Applicant added that the Respondent had not given any reason for the inordinate delay. The Applicant added that the Respondent had not set out the items on the taxation on the taxation that he was objecting to which makes it impossible to determine whether his reference has any chance of succeeding or not.

10. The Applicant urged that through his conduct the Respondent had demonstrated that he was not deserving of the court's discretion and added that he would greatly suffer prejudice if the application were to be allowed. The Applicant added that the apprehension of execution on the part of the Respondent was premature since he was yet to comply with Section 48 of the Advocates Act and Paragraph 68 A of the Advocates Remuneration Order. The Applicant submitted that the Respondent could not be heard to say that the Deputy Registrar acted on a wrong principle for he failed to canvas his position before the taxing master despite being granted many opportunities. The Applicant concluded that the prayer to consolidate the two miscellaneous applications was mischievous and intended to hoodwink the court and circumvent the decision of the taxing master. The Applicant submitted that the Respondent filed one set of submissions in Misc. Appl. No. 79 of 2019 after a ruling had been delivered on 7/11/2019 in Misc. Appl. No. 80 of 2019.

11. The court notes that despite being directed to file submissions on 30/9/2020 and 12/11/2020, the Respondent had not filed its submissions by 3/12/2020 and on that day the court directed that it would not take into account the submissions if they were not filed on that day. The court notes that the Respondent filed his bundle of documents in Misc. Appl. No. 80 of 2019 on 7/11/2019 which was the day when the court delivered its ruling. It is rather curious that the Respondent filed his submissions in respect of both bills of costs in Misc. Cause No. 79 of 2019 instead of filing his submissions in respect of Misc. No. 80 of 2019 in that file well before the ruling date. There is a letter dated 2/12/2019 written by Manases Mwangi and Associates to the Applicant claiming that they had sent the sum Kshs. 25,200/= to this law firm. The court notes that the taxing master gave the reasons for the ruling in the ruling dated 26/10/2019. The taxing master struck out the affidavit of K. M. Mwangi sworn on 1/11/2014 for contravening Section 4 of the Oaths and Statutory Declarations Act. The application dated 1/11/2019 was also struck out. That was the application that sought to have the Deputy Registrar review and set aside the order scheduling the bill of cost for ruling and to have the two bills of costs consolidated. There is no record on the court file of the Respondent's advocate's letters to court seeking to be given the reasons for the taxation.

12. The issue for consideration is whether the court should allow the application made by the Respondent. The court notes that the Deputy Registrar already dealt with the issue of consolidation of the two miscellaneous applications and that the Respondent did not lodge an appeal against the order of the taxing master striking out the application for consolidation of the two causes.

13. The court is persuaded that the Respondent was accorded ample opportunity to challenge the items on the bill of costs but failed to do so in good time. It is clear that the Respondent filed its submissions relating to the bill of costs in Misc. Appl. No. 80 of 2019 on the date the ruling on the taxation was delivered and notably in Misc. No. 79 of 2019. No reasons were given for the delay in filing the reference within the stipulated time. There is no explanation as to why the Respondent did not place any evidence before the Deputy Registrar of the sum of Kshs. 5,000,000 he claimed to have paid to the Applicant in settlement of his legal fees. There is no evidence that an agreement was reached by Respondent and the Applicant on the payment of Kshs. 5,000,000 as a global sum for the legal work undertaken by the Applicant.

14. The court declines to grant the orders sought in the application dated 14/5/2019. The Applicant is granted the costs of that application.

Delivered virtually at Nairobi this 1st day of February 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Tariq Khan for the Applicant

Mr. Kabui Mwangi for the Respondent

Mr. V. Owuor- Court Assistant