



Cherono v Chelagat (Environment & Land Miscellaneous Case 004 of 2024) [2024] KEELC 5109 (KLR) (1 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5109 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT & LAND MISCELLANEOUS CASE 004 OF 2024**

L WAITHAKA, J

JULY 1, 2024

BETWEEN

KIPRUTO CHERONO APPLICANT

AND

LOISE CHELAGAT RESPONDENT

RULING

1. This ruling is in respect of the application dated 27th February 2024 through which the applicant seeks the following orders:-
 - a. Spent
 - b. Stay of execution of the taxed bill of costs in the sum of Kshs. 150,725/-, dated 10th January 2023 pending the hearing and determination of the application;
 - c. An order setting aside the taxed bill of costs pending the hearing and determination of the application;
 - d. An order remitting the respondent's bill of costs to the trial court for fresh assessment and/or the same be assessed by this court;
 - e. Costs of the application be provided for.
2. The application is premised on the grounds on its face and supported by the affidavits (supporting and further) of the applicant's advocate, Edwin K. Mwaita sworn on 27th February 2024 and on 12th March 2024 respectively.
3. It is opposed through the replying affidavit of the respondent, Loise Chelagat, sworn on 12th March 2024.
4. When the application came up for hearing, the parties relied on their sworn affidavits.



5. From the affidavits sworn in support of the application, the application is based on the grounds that there was a professional undertaking by the respondent's advocates that they would settle out of court the costs payable to the respondent upon withdrawal of the suit; that in disregard of that professional undertaking, the respondent filed a bill of costs which he served on the applicant's counsel and that upon being served with the bill of costs, the applicant's counsel contacted the respondent's counsel who advised him to ignore the bill.
6. Lamenting that the respondent's counsel, in breach of his professional undertaking, proceeded with the taxation of his bill of costs without the participation of the applicant, the applicant faults the respondent's counsel for having acted against his professional undertaking/ representation that he would not proceed with taxation of the bill until and unless they failed to agree on the costs payable to the respondent in respect of the withdrawn suit.
7. Whilst the applicant's application raises serious issues touching on the professional undertaking / representations by her counsel which were acted upon by the applicant's advocate to the detriment of the applicant, I note that the respondent has not addressed those issues. Instead, she faults the advocate for what she calls clouding himself into the arena of the proceedings where he was not a party and prosecuting the reference in his personal capacity without any indication of instructions from his client.
8. Concerning that ground of attack of the applicant's application, upon review of the affidavit evidence adduced in this application, this court finds that the undertaking and/representations on which the application is premised on were made to the applicant's advocate and not the applicant. That being the case, the applicant's advocate is the right person to raise them and is entitled to raise them on behalf of his client to demonstrate to the court the circumstances upon which the impugned bill of costs was taxed.
9. I also note that the respondent has not disputed the issues of fact raised in the affidavit sworn in support of the application concerning her advocate's alleged engagements/ conversation with the applicant's counsel. Concerning those engagements, which I find to be uncontroverted, the respondent has inter alia deponed as follows:-
 - “(k). That I am advised by my advocate on record, which advice I verily believe to be true, that the applicant has not annexed any proof of negotiations and settlement and or any consent recorded regarding settlement either in the court's file or any other recognized forum.
 - (l). That my counsel on record informs me, which information I believe to be true, that the narratives by the applicant's counsel in his supporting affidavit regarding communication with my counsel on the issue at hand in the absence of an undertaking or elaborate proof are mere stories that are tantamount to chasing a wild goose in the darkness.
 - (m). That my advocate on record informs me, which information I verily believe to be true, that an agreement to agree is not enforceable in law of contract worse when it is undocumented or formally executed”.
10. It is clear from the foregoing averments, that the respondent does not deny or controvert the averments by the applicant's counsel that he engaged with the respondent's advocate on the issue of the bill of costs and that the advocate told him to ignore it only to later on go behind his back and get the bill taxed without his involvement.



11. Whereas the conduct of the applicant's counsel of believing the respondent advocate's oral representation was below that of the standard required of a diligent counsel, given that it was not followed by a written commitment from the respondent's counsel, from the totality of the evidence adduced in this case and the circumstances surrounding the withdrawal of the suit, I am convinced that the respondent's counsel undertook to discuss the fees payable to the respondent with the applicant's counsel out of court.
12. Based on that undertaking, the applicant's counsel may be excused for insisting on fulfilment of that undertaking. Until and unless, the parties engaged in negotiation to settle the issue of costs and failed to agree, it was not open for the respondent's counsel to file and tax his bill of costs on the pretext that they failed to agree on costs when there is no evidence to that effect.
13. Being the one claims that his counsel engaged the applicant's advocate and failed to agree on the issue of costs, the burden was on the respondent or his counsel to prove that he indeed engaged the applicant's counsel on the issue of costs and that they failed to agree.
14. It is noteworthy that it is none other than the respondent's advocate, Kiptoo, who informed the trial court that they had agreed with the applicant's counsel that the suit be withdrawn and that they would agree on costs. If they failed to agree on costs, as anticipated, I reiterate that the burden was on the respondent or his advocate to demonstrate that fact.
15. The applicant's counsel deponed that he was surprised when he was served with the respondent's bill of costs. He further deponed that upon being served with the bill of costs, he contacted the respondent's counsel who told him to ignore the bill.
16. As pointed out herein above, whilst the averments by the applicant have serious bearing on the legal propriety of the conduct of the respondent's advocate of proceeding with the taxation of his bill of costs even after making representation to the applicant's counsel to the effect that he would not, those averments were not controverted.
17. In view of the foregoing, I am inclined to hold the respondent's counsel to his bargain or representation that he would not proceed with taxation of his bill of costs unless they failed to agree as intimated in the court proceedings of 23rd November, 2021.
18. Notwithstanding the applicant counsel's negligent conduct of failing to file a response to the bill, the decision of the respondent's counsel to proceed against that undertaking is, in my view, a breach of his professional undertaking, which breach neither he nor his client should be allowed to benefit from as it is tantamount to denying the applicant an opportunity to be heard on the respondent's bill of costs.
19. As was observed in the case of *Conrad Masinde Nyukuri & another v Robson Harris & another* (2021) eKLR a professional undertaking need not be in writing for it to be enforceable against an advocate.
20. In the circumstances of this case, I find and hold that there was a professional undertaking by the respondent's advocate to settle the issue of costs out of court which the respondent's advocate violated leading to taxation of the respondent's bill of costs without the participation of the applicant.
21. Being of the view that the applicant was prejudiced on account of the conduct of the respondent's counsel in that she was mischievously denied or deprived of her right to be heard on the bill of costs presented in court for taxation by the respondent's counsel, on that ground alone, I find and hold that the applicant has made up a case for setting aside of the respondent's bill of costs and remitting it back to the Deputy Registrar of this court for taxation afresh.



22. The upshot of the foregoing is that the applicant's application dated 27th February, 2024 is found to be merited and allowed to the extent that the respondent's taxed bill of costs in the sum of Kshs. 150,725/- dated 10th January 2023, is set aside and the respondent's bill of costs remitted back to the Deputy Registrar of this court for taxation afresh.
23. I award the costs of the application to the applicant.
24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 1ST DAY OF JULY 2024.

L. N. WAITHAKA

JUDGE

Ruling delivered virtually in the presence of:

Mwaita for the applicant

N/A for the respondent

Court Assistant: Ian

