



Nzei & Company Advocates v Export Processing Zones Authority (Environment and Land Miscellaneous Application E017 of 2022) [2024] KEELC 7415 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7415 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E017 OF 2022
A NYUKURI, J
NOVEMBER 6, 2024**

IN THE MATTER OF ADVOCATE/CLIENT BILL OF COSTS UNDER THE ADVOCATES (REMUNERATION) ORDER, THE ADVOCATES ACT (CAP 16) LAWS OF KENYA

BETWEEN

NZEI & COMPANY ADVOCATES ADVOCATE

AND

EXPORT PROCESSING ZONES AUTHORITY CLIENT

RULING

Introduction

1. This ruling is in respect of two applications; the application dated 3rd July 2023 filed by the client seeking leave to file reference out of time, and the application dated 7th July 2023 filed by the advocate seeking orders that the court enters judgment for the advocate against the client for the sum of Kshs. 35,505,007/- in terms of the certificate of costs, together with interest thereon.

Application dated 3rd July 2023

2. By chamber summons dated 3rd July 2023, the client/applicant sought the following orders;
 - a. Spent.
 - b. That this honourable court be pleased to grant leave to the client/applicant to file a reference out of the prescribed time in objection to the taxing officer's ruling delivered on 29th May 2023 by Hon. Anne Nyoike in Machakos ELC Misc Application No. 17 of 2022.
 - c. That costs of this application be in the cause.
3. The application is premised on the supporting affidavit sworn by Hussein Adan Mohammed, the acting Chief of Executive Officer of the client/applicant. The applicant's case is that the ruling in this



matter on taxation of the advocates bill of costs was delivered on 29th May 2023, although it had been scheduled for delivery on 25th May 2023 as per the cause list of that date which causelist contained the court's link to the virtual court session. He further stated that on 25th May 2023 at 9.00 a.m when the client's counsel attempted to log into the court's virtual platform, he was unsuccessful and on inquiry from the registry, he was informed that the court experienced technical challenges as a result of which the proceedings including delivery of rulings were to be done in the open court.

4. He stated that the ruling was not delivered on 25th, May 2023 but deferred to 29th May 2023 when it was delivered in open court in the absence of counsel for the client. He stated that the client's counsel was never notified of the new date by the court or the advocate/respondent but only learnt of the delivery of the ruling when he contacted the registry on 30th June 2023. That, aggrieved with the ruling that awarded the advocate Kshs. 35,505,007/- as costs, the client filed notice of objection dated 30th June 2023.
5. The applicant stated that time lapsed before filing reference as time lapsed before the client's counsel could secure a copy of the ruling, which was supplied to them on 30th June 2023. He maintained that the applicant being a public body operates on tax payers' money and on annual pre-approved budgets and stands to suffer great prejudice if condemned to pay the taxed costs without being given opportunity to challenge the same. It was the applicant's contention that their reference has merit and deserves to be considered by the court. He attached a copy of the taxation ruling; causelist for 25th May 2023; a letter requesting for a copy of the ruling; notice of objection and copy of draft reference.
6. Opposing the application, the advocate/respondent filed grounds of opposition dated 18th August 2023. He stated that the application was scandalous, frivolous, vexatious and an abuse of the court's process. He further stated that the application was an afterthought having been filed after an inordinate delay and that no sufficient explanation was given by the applicant for the delay to adhere to statutory timelines provided in law. He argued that the applicant was indolent and not vigilant and could not seek to be aided by equity.
7. In addition to grounds of opposition, the advocate/respondent filed a replying affidavit dated 7th November 2023. He stated that the applicant was not candid and that although the ruling was slated for 25th May 2023, it was delivered on 29th May 2023. He faulted the applicant's letter saying it was not stamped by court hence it was not received by court. He also stated that although the applicant had been made aware of the ruling, he failed to file reference in time and that the excuses given are not a sufficient explanation.
8. He further stated that the Deputy Registrar of the court had not provided reasons for the ruling and that the orders sought cannot be made in a vacuum. He stated that the application was served on 1st August 2023 when the advocate had extracted a certificate of costs and filed application dated 7th July 2023, hence, the application is meant to prejudice the advocate. He attached the certificate of costs and motion dated 7th July 2023. In a rejoinder, Hussein Adan Mohammed filed a further affidavit dated 23rd January 2024 wherein he stated that in a similar matter being ELC MISC. E009 of 2020, the taxing officer taxed costs of Kshs. 27,410,844/- and that it was unnecessary for the applicant to await the taxing officer's reasons before filing the instant application, as there was an error in principle.

Application dated 7th July 2023

9. In the application by motion dated 7th July 2023, the advocate/applicant sought the following orders;



- a. That this Honourable Court be pleased to enter judgment against the respondent for a sum of Kshs. 35,505,007.00 (Thirty five million, five hundred and five thousand and seven shillings) being the taxed and certified costs payable to the applicant by the respondent.
 - b. That this Honourable Court be pleased to award interest on the aforesaid sum of Ksh. 35,505,007.00 (Thirty five million, five hundred and five thousand and seven shillings) being the taxed and certified costs and court rates from the date of such award until payment in full.
 - c. That costs of this application be paid by the respondent.
10. The application is supported by the affidavit of Benjamin Nzei the advocate/applicant sworn on 7th July 2023. The applicant's case is that his costs were taxed and certified at Kshs. 35,505,007/- as per the attached certificate of costs and that the respondent has no commitment to pay the same hence, he sought that the judgment be entered in terms of the taxed costs.
 11. In response, Winnie Sang the respondent's Assistant Manager, Legal and Corporate Services swore a replying affidavit dated 16th April 2024. She stated that the legal fees raised by the advocate were not commensurate with the services offered. She averred that the client was aggrieved with the taxing officer's decision and filed objection notice dated 30th June 2023 and thereafter filed application dated 3rd July 2023 seeking extension of time to file reference, which application is pending. Further that the client filed application for stay of execution dated 18th January 2024 not being aware of application dated 7th July 2024 and that the court granted stay of execution on 18th January 2024 by the parties consent. She stated that until the application for extension of time is heard and determined, the prayers sought by the advocate cannot be granted.
 12. The parties filed written submissions in regard to both applications, which submissions have been duly considered by the court.

Analysis and determination

13. The court has duly considered the two applications; replies thereto and submissions made by both counsel. Two issues arise for determination, namely;
 - a. Whether the client deserves to be granted extension of time to file reference against the taxation ruling of 29th May 2023.
 - b. Whether judgment should be entered for the advocate for the taxed sum of Kshs. 35,505,007/- in terms of the certificate of costs at this stage.
14. Paragraph 11 (4) of the Advocates (Remuneration) Order grants the court the jurisdiction to enlarge time to appeal against the decision of the taxing officer and provides as following;

The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.
15. Extension of time is the discretion of the court and not an entitlement of a party and therefore, a party seeking extension of time is obligated to explain to the court's satisfaction the reasons for delay.



16. In the case of *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the Supreme Court stated considerations to be taken into account in the court's exercise of discretion in an application for extension of time as follows;
- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.'
17. In the instant case, the applicant explained that the delay was caused by the change of date of delivery of the ruling from 25th May 2023 to 29th May 2023 and the delay by court in furnishing the client with the ruling until 30th June 2023. The record shows that the client's advocate wrote a letter dated 29th June 2023 which was received in court on 30th June 2023 seeking for a copy of the ruling. That date is the same date Notice of Objection was filed. This is a delay of one month since delivery of the ruling. The client has expressed its dissatisfaction with the ruling and pointed out that in a similar matter, the taxing officer taxed the bill of costs at about Kshs. 27 million and therefore there was an error in principle.
18. It is clear that the client has raised a triable issue in regard to the taxation. The delay of one month in my view cannot be termed as inordinate in view of the fact that the client needed to obtain a copy of the ruling before it could decide on appealing against the same. In addition, the fact that there was a delay in furnishing the client with the ruling on taxation is not disputed.
19. In the premises, I am satisfied that the client deserves opportunity to challenge the taxation ruling and I therefore allow its application for leave to file reference out of time.
20. Regarding the application by the advocate, Section 51 (2) of the *Advocates Act* grants this court power to enter judgment in terms of a certificate of costs and provides as follows;
2. 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.
21. In this case, the certificate of costs is subject to challenge and the client has been given leave to file reference out of time. The application dated 7th July 2023 was filed on 25th July 2023 after the application for leave to file reference out of time had been filed on 5th July 2023. It would therefore not be in the interest of justice and would not be the best use of judicial time to enter judgment in terms of the certificate of costs at this point in time, before the determination of the intended reference, since the certificate of costs is subject of the intended appeal and may or may not be set aside. Therefore, it is in



the interest of justice that the application dated 7th July 2023 is held in abeyance pending determination of the intended reference.

22. Ultimately, I make the following orders;

- a. The client is granted leave to file reference out of prescribed time in objection to the taxing officer's ruling delivered on 29th May 2023.
- b. The client shall file and serve reference challenging the taxing officer's ruling delivered on 29th May 2023 within 14 days of this ruling.
- c. The hearing of the application dated 7th July 2023, is stayed, pending hearing and determination of the intended reference by the client.
- d. Each party shall bear its own costs.

23. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6TH DAY OF NOVEMBER 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Odhiambo holding brief for Mr. Burko for the client

Mr. Mundia holding brief for Mr. Nzei for the advocate

Court assistant – Abdisalam

