



**Charo v Omagwa Angima & Company (Miscellaneous Civil Application
9A of 2010) [2022] KEELC 13310 (KLR) (3 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION 9A OF 2010
MAO ODENY, J
OCTOBER 3, 2022**

BETWEEN

JAPHET NOTI CHARO APPLICANT

AND

OMAGWA ANGIMA & COMPANY RESPONDENT

RULING

1. This ruling is in respect to an application dated April 30, 2021 by the seeking the following orders; -
 1. That the taxation of costs on December 22, 2010 and all consequential proceedings be set aside for being a nullity for want of service.
 2. That the costs of this application are in the cause.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

Applicant's Submissions

3. The application was supported by the affidavit of Japhet Charo Noti sworn on the April 30, 2021 whereby he deponed that he had never been served with the bill of costs hence was condemned unheard. That the affidavit of service by one Samson Nyangena filed on December 22, 2010 shows that the alleged notice of taxation was served on a M/S Kadzo who is not known to him and served at a place he has never lived.
4. That the proceedings on December 22, 2010 based on insufficient service of either the bill of costs or notice of taxation are voidable and a nullity and urged the court to allow the application as prayed.
5. Counsel submitted that although the proceedings sought to be set aside took place over 10 years ago, nothing significant has happened and/or morphed their character and that the record shows that they



- were taken in the absence of the client/ applicant and there is no affidavit of service of the bill of costs on the respondent, or that his advocates.
6. Mr Kimani submitted that in the absence of service of either a bill of costs or a sufficient notice of taxation on the applicant, the proceedings taken before the taxing master is a nullity as the applicant was denied an opportunity to be heard.
 7. Counsel relied on the cases of *Craig v Kanseen* (1943) 1 All ER 108 and *Macfoy v United Africa Company*, 3 All ER 1169 at 1172.
 8. It was counsel's submission that the passage of time cannot sanitize a nullity and that the affected party can apply to set aside the proceedings which are a nullity at any time as it is never too late for a court of justice to right a wrong in the interest of justice. Further that there is also no bar in the [limitation of Actions Act](#) which would render the present application untenable.
 9. On the issue of which court has jurisdiction to hear this application, counsel submitted that the court which made a null and void has inherent jurisdiction to set the record right in the interest of justice which he stated that it is the deputy registrar to deal with the application. Counsel further stated that no appeal was preferred and this application is an appeal/objection under section 11 of the [Advocates\(Remuneration\) Order](#).
 10. Mr Kimani also submitted that an appeal from a decision of the Taxing Master lies to a judge in chambers and that since the proceedings of December 22, 2010 were taken before a taxing master, the application to set aside the order which is not an appeal or an objection under section 11 of the [Advocates \(Remuneration\) Order](#), must go before the same court for hearing and determination, to prevent the loss of right of appeal under the said provision.
 11. Counsel therefore urged the court to allow the application as prayed.

Respondent's Submissions

12. Counsel submitted that the applicant never moved the court for hearing of the present application close to one year and only took a date upon realizing that the respondent was in the process of taking out a notice to show cause.
13. That on March 14, 2022 when the matter came before court, the applicant purported to raise a question on which court has the jurisdiction to hear the application but meanwhile the same was overtaken by events with the recording of a consent.
14. Counsel further submitted that applicant did not bother to explain why service of the bill of costs has never been disputed in the last 10 and that he was represented by an advocate.
15. Counsel relied on the cases of [Titus Muiruri Doge v Kenya Cannery Limited](#) (1988) eKLR and [Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited](#) (2014) eKLR.
16. Counsel submitted that the parties have since entered into a consent complete with a schedule of payment of the decretal sum in full.

Analysis and Determination.

17. This is an application to set aside the taxation of costs dated December 22, 2010 and all consequential orders. The parties filed submissions and I notice that The applicant's counsel brought a new angle on which court has jurisdiction to hear and determine this application of which counsel submitted that it is the taxing master to hear the application.



18. The issue for determination is whether this application is proper before this court and whether it is tenable.
19. The application essentially challenges the taxing master's decision on the ground of lack of service of the bill of costs which procedurally should be dealt with by way of a reference as provided for under paragraph 11 of the *Advocates Remuneration Order* as was held in the case of *Machira & Co Advocates v Magugu* [2002] 2 EA
- “As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a Reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order.”
20. The citing of articles 10, 50 of the *Constitution* and sections 1A & 3A do not change the procedural requirements that an aggrieved party to a taxation should file a reference within 14 days.
21. In the case of *Behan & Okero Advocates v National Bank of Kenya Kisumu* HCMA No 114 of 2004 Tanui, J held that: -
- “Rule 11 of the Advocates (Remuneration) Order clearly stipulates that any party who is aggrieved by the decision of the taxing officer whether the grievance is against some items of the bill of costs or against the entire bill, has to come to the High Court by chamber summons under rule 11(2) and an applicant who follows such a procedure would have a chance to appeal to the Court of Appeal should he be not satisfied with the decision of the Judge upon reference of the objection from the orders of the taxing officer. Therefore, an application seeking to set aside orders made on taxation under order 9 rule 8 CPR is incompetent and the Court does not have jurisdiction to entertain it”.
22. Similarly in the case of *Gacau Kariuki & Co Advocates v Allan Mbugua Ng'ang'a* [2012] eKLR
- “I must make it very clear that what is before me is not a reference from taxation but an application seeking to set aside the orders made on September 29, 2011 and October 27, 2011. The orders, which were made on September 29, 2011, were made by the Deputy Registrar when in her capacity as the Taxing Master taxed the Bill as presented. What is the procedure for challenging such a decision? In my view the only available recourse to a person aggrieved by a decision of a taxing officer is to lodge a reference”.
23. I find that the application before me is not merited as it has not followed the laid down procedures that obliges an aggrieved litigant to file a reference with 14 days. The impugned ruling was delivered in 2010 and the mischief that the applicant wanted to beat was the issue of not filing a reference within the stipulated period of 14 days. The applicant went on a deep slumber for 10 years.
24. The upshot is that the application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF OCTOBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave



of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

