



REPUBLIC OF KENYA



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Trustees of Archdiocese of Kisumu v Nyauke t/a Nyauke & Co Advocates (Miscellaneous Application 2019 of 2018) [2025] KEHC 1750 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION 2019 OF 2018
MS SHARIFF, J
FEBRUARY 7, 2025**

BETWEEN

THE TRUSTEES OF ARCHDIOCESE OF KISUMU APPLICANT

AND

**SAMUWEL OWINO NYAUKE T/A NYAUKE & CO
ADVOCATES RESPONDENT**

RULING

1. On 26th September 2018, the Respondent herein filed a Notice of Motion application dated 30th August 2018, before this Court seeking orders to compel the Applicant/client to settle the Advocates fees from legal representation in Kisumu High Court Civil Commercial Case No 40 of 2018 formerly ELC No 204 of 2017.
2. Opposing the application, the Applicant (client) filed a Preliminary Objection dated 10th December 2018 on a point of law on the grounds that the Court lacked jurisdiction to hear and determine the application dated 30th August 2018. Also, a Replying Affidavit was sworn on 12th March 2024.
3. The Court under the guidance of my esteemed learned colleague, Justice Kamau, proceeded to overrule the preliminary objection and found merit in the application by the advocate/respondent. Subsequently, a decree directing that the certificate of costs dated 26th July 2023 be adopted as the decree of the Court was issued on 10th August 2023.
4. Subsequently, the Applicant herein filed a Notice of Motion dated 12th February 2024 wherein it craved for the following orders:-
 1. Spent



2. That the firm of N.A. Owino & Company Advocates be granted leave to come on record for the applicant herein in the place of Ken Omollo & Company advocates and Peter Warindu & Company Advocates.
 3. Spent.
 4. Spent.
 5. That this court be pleased to set aside the ruling of this honourable court adopting the decree as an order of this honourable court.
 6. That this honourable court be pleased to order for the respondents, client/advocates bill of costs dated 30th August 2018 set(sic) down for taxation afresh before the deputy registrar inter partes.
 7. That costs of this application be provided for in any event.
5. The application is predicated on the grounds on the face of it and the supposed Supporting Affidavit sworn by the Applicant's representative herein, Father Vincent Ouma Odundo, which affidavit was never filed in support of the application. Instead the client/ applicant purported to sneak in a post event affidavit titled supporting affidavit of one Lucy Marucha sworn on 19th February 2024. In a nutshell the client's application dated 12th February 2024 was not supported by any affidavit evidence
 6. The advocates/respondent responded to this application by way of a replying affidavit sworn by Samwel O Nyauke advocate on 12th March 2024. The respondent simultaneously filed a notice of preliminary objection which raised the following grounds :-
 - i. The prayers with reference to the Respondents/ Advocate are *res judicata*
 - ii. The Provisions of the Law cited are not relevant to the Respondent/advocate especially the ones under the *Advocates Act*.
 7. Vide Court directions given on 14.3.2024 the respondents/advocates preliminary objection was canvassed by way of written submissions. Both parties complied.
 8. I have considered the preliminary objection vis aviz the applicant's application as well as the replying affidavit while noting as already disclosed herein above that the application had no supporting affidavit and the purported future supporting affidavit sworn by Lucy Machura 7 days after the drawing of the application under consideration is of no consequence in this application. I have also considered the submissions of learned counsels. I find that the issues that emerge for determination are as follows :-
 - i. Whether the Notice of Motion application dated 12th February 2024 is *res judicata*.
 - ii. Whether the same offends the provisions of Rule 11 of the Advocates Remuneration Order.
 - iii. If the answers to the above are in the negative, then whether the same is merited.

Whether the application is *res judicata*

9. The doctrine of *res judicata* is enshrined in Section 7 of the *Civil Procedure Act* CAP 21 laws of Kenya which provides as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

10. A reading of the client/Applicant’s application herein reveals that save for prayer No 6, the rest of the applicant’s prayers are novel. I thus find that prayer No 6 is *res judicata* as the bill of cost was already taxed by a taxing master with competent jurisdiction.

Whether the application offends the provisions of Rule 11 of the Advocates Remuneration Order.

11. Courts abound with parties desirous of contesting taxed advocates/clients bill of costs. This situation often arises when a party believes that the amount taxed is excessive or unjustified. This situation is exemplified in the case of *Alfred Ochieng Opiyo t/a Ochieng Opiyo & Co Advocates v Export Hydro Pump and Services (Africa) Limited* [2018] eKLR, where the client contested the taxation of the advocate's bill of costs, claiming it was exaggerated and unfair.
12. The procedure for contesting a taxed bill of costs is outlined in the *Advocates (Remuneration) Order*, particularly in Paragraph 11, which provides a structured process for objections to taxation. The relevant provisions state thus:
 - i. A party objecting to the decision of the taxing officer must give notice in writing to the taxing officer within fourteen days after the decision, specifying the items of taxation to which they object.
 - ii. The taxing officer is required to record and forward the reasons for their decision to the objector.
 - iii. The objector may then apply to a judge by chamber summons within fourteen days from the receipt of the reasons, setting out the grounds of their objection.
 - iv. Any person aggrieved by the judge's decision may appeal to the Court of Appeal with the judge's leave.
13. In order to contest a taxed bill of costs, the client/ Applicant in the instant application, ought to have followed the above steps which ensure that the Applicant’s objections are properly considered and that the applicant gets the opportunity to challenge the taxed amount effectively.
14. On my keen perusal of the record before me, the taxing master in this case taxed the client/advocate bill of costs dated 30th August 2018 on 24th April 2023, and decreed that that Applicant herein pays the Respondent herein, Kshs 8,460,520/= and a certificate of stated costs was issued on 26th July 2023. It is imperative to note that the Respondent did not challenge the decision of the taxing master within the stipulated 14 days.
15. Further, in the context of client/advocate bills of costs, a party may seek a stay of execution of a ruling that has determined the amount of costs payable. For instance, in *Macharia Njeru t/a Macharia Njeru Advocates v London Distillers (K) Limited* [2008] eKLR, the advocate sought a stay of execution of a taxation ruling pending an appeal against the decision. The advocate argued that the taxation involved a substantial sum of over Kshs 3.7 million, and that without a stay, the appeal would be rendered nugatory.
16. In this instant application, it is my view that the Applicant failed to properly invoke the jurisdiction of the Court under Paragraph 11 of the *Advocates (Remuneration) Order* and this significantly impacts on the validity of its application to contest a taxed bill of costs and have the same order compelling it to pay the costs as awarded be stayed. The Courts have consistently held that the *Advocates (Remuneration)*



Order is a complete code governing the taxation of bills of costs, and any deviation from the prescribed procedure may lead to dismissal of the application.

Whether the application is merited

17. As regards the other prayers I wish to restate that no affidavit evidence was tendered in support thereof wherefore there is no basis for the prayers sought.
18. In these circumstances, I hereby sustain the objection raised as regards prayer No 6 and as regards the other prayers, I do find that the same lack merit wherefore the only order that commends itself to me is a dismissal.
19. The respondent/advocate is awarded costs of this application assessed at Kshs 25,000.
20. This file is hereby marked as closed.
21. The orders above shall apply mutatis mutandis to Kisumu HC Misc Application Nos 210/2018, 211/2018 and 212/2018.
22. Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 7TH DAY OF FEBRUARY 2025.

SHARIFF MWANAISHA SAIDA

JUDGE

In the presence of :

Mrs Owino for Applicant/Client

Nyauke for Respondent/Advocate

Diana Court Assistant

