



REPUBLIC OF KENYA



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**Mukabane & Kagunza Advocates t/a Mukabane & Kagunza Advocates v Kanda
(Miscellaneous Application 37 of 2020) [2025] KEHC 8349 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION 37 OF 2020**

E OMINDE, J

JUNE 12, 2025

BETWEEN

**MUKABANE & KAGUNZA ADVOCATES T/A MUKABANE & KAGUNZA
ADVOCATES APPLICANT**

AND

LUKA KIPLAGAT KANDA RESPONDENT

RULING

1. The Respondent/Applicant approached this Court vide a Notice of Motion dated 25/09/2024 seeking the following orders;
 - a. Spent
 - b. The ex parte ruling entered against the Applicant herein and all consequential orders be set aside in its entirety.
 - c. Spent
 - d. The Applicant be granted leave to file response to the Notice of Motion dated 5th March 2020.
 - e. Costs of this Application be provided for:
2. The Application is expressed to be brought under Order 10 Rule 11, Order 22 of the *Civil Procedure Rules* as read with sections 1, 1A, 3A and 63(e) of the *Civil Procedure Act*.
3. The Application is premised on the grounds on the face of it and the contents of the supporting affidavit sworn by Luka Kiplagat Kanda. In his affidavit, he deponed that the matter proceeded ex parte and he was never served with the Application. Further, that had he been served promptly, he would have responded. He additionally stated that the Respondent has commenced execution and that it is



trite law that a party to a suit should not be condemned unheard. He urged the Court to allow the Application in the interest of justice.

4. The Respondent opposed the Application vide a Replying Affidavit dated 25/10/2024 sworn by Stanley M Kagunza. Counsel deponed that the Application is anchored on the wrong provisions of law and is untenable. Further, that he was instructed by the Applicant to prosecute Eldoret CMCC No 641 of 2019 and subsequently, he acted for the Applicant and obtained orders in his favour. That it was agreed that the Applicant would pay his fees and disbursements arising from the suit. The Applicant however failed to pay the Respondent and the Advocate - Client bill dated 05/03/2020 was filed and taxed on 30/04/2021 in the sum of Kshs 212,849/-.
5. Counsel urged that the Applicant has approached the Court with unclean hands given that he was duly served with the Bill of Costs physically and through his WhatsApp and as such, he cannot claim that he was not served. Further, that the bill of costs was well considered and entered regularly by this Court. He deponed that the Application has not met the threshold for the orders sought and that the sae should be dismissed with costs.
6. As evidence of service of all the documents pertaining to the Taxation process that the Applicant states he was not aware of for reasons that he was not served, the Respondent to his Replying Affidavit annexed inter alia the following;
 - i. Hand Delivered Demand Letter for the taxed costs dated 16.01.2020 marked SNK-1
 - ii. Affidavit of Service dated 4th February 2021 marked SNK-4 annexing a Certificate of Postage dated 2nd February 2021
 - iii. Affidavit of Service dated 11th March 2021 Marked SNK-4b) annexing A Certificate of Registered Postal Article dated 5th March 2021
 - iv. Affidavit of Service dated 31st March 2021 Marked SNK4-d) annexing A Certificate of Registered Postal Article dated 24th March 2021
 - v. Affidavit of Service dated 20th September 2024 Marked SNK-4e) annexing a Postal Corporation Payment Receipt dated 10th June 2024 and a WhatsApp notification addressed to Luka Kiplagat double ticked as read

Applicants' Supplementary affidavit

7. The Applicant filed a Supplementary Affidavit dated 06/09/2024 in response to the Replying Affidavit. He stated that the Application is urgent as the Respondent had already obtained an ex parte ruling against him and commenced execution. Further that he is at risk of being committed to civil jail due to the execution and seeks relief to prevent this grave miscarriage of justice. He additionally stated that the cited provisions are the ones that give this Court its power to allow justice to be served and that the Respondent is trying to circumvent the wheels of justice by not properly serving him with the taxation proceedings.
8. The deponent averred that he contracted the legal services of the Respondent to represent him in Eldoret Civil Case No 641 of 2019 and there existed a verbal agreement for payment of legal fees to the advocate that amounted to Kshs 415,000/- of which Kshs 200,000/- was paid up front. The remaining balance of Kshs 215,000/- was to be deducted from the decretal sum upon payment of the decretal sum to the advocate's bank account. He refuted the allegations that he failed or neglected to pay the Respondent.



9. The Applicant reiterated that the Respondent proceeded to institute taxation proceedings without informing him and waited until the Notice to Show Cause to serve him, upon which he became aware of the taxation proceedings and instituted the present Application. He further stated that the service was not proper as there was no compliance with Section 48 of the *Advocates Act* as there is no delivery receipt attached as stated by the law. As such there is no proof that he was served with the hearing and mention notices for the taxation. He prayed the Court allow the Application in the interest of justice.

Hearing of the Application

10. The parties canvassed the Application vide written submissions. The Applicant filed his submissions dated 08/11/2024 whereas the Respondent filed submissions dated 24/02/2025.

Applicants' submissions

11. The Applicant submitted that he would rely on the contents of Application, Supplementary Affidavit sworn by Luka Kiplagat Kanda on 06/11/2024 and the submissions.
12. The Applicant urged that he was not aware of this taxation proceedings up until when the Notice to Show Cause was served upon him. That the main issue that has brought filing of the Application at hand is service of the taxation proceedings instituted by the Applicant/Respondent upon the Respondent/Applicant. He stated that the purpose of service is to inform the other party of the institution of a suit, citing the provisions of Section 48 of the *Advocates Act* that provides for service of Notice of Taxation and Bill of Costs. Further, that the same was not dispensed with by the Respondent herein and there is no proof of service as envisioned by Order 5 Rule 22C of the *Civil Procedure Act*.
13. The Applicant cited the case of *Odera Obar & Co. Advocates v Aly Enterprises Limited, Halal Meat Products Limited, Mohamed Ali Motha & Mafuta Products Limited* [2015] KEHC 555 (KLR) and the case of *Tom Ojienda & Associates v Speaker Kakamega County Assembly* [2022] KEHC 14542 (KLR) urging the Court to draw an inference that he was not aware of the suit and as such the Court should grant the orders sought.
14. The Applicant additionally cited the case of *Shah v Mbogo* (1967) EA 166 and the case of *Patel v East Africa Cargo Services Ltd* (1974) EA 75 on the Courts' discretion to set aside an ex parte ruling. He submitted that he has proved that there was no proper service of the notice of taxation as well as the Bill of Costs. Further, that this Court should note that the ruling would infringe on the right to be heard as envisioned in Article 50 of the *Constitution*. He stated that he has raised triable issues in his affidavit and that the amount in question is substantial therefore he shall be committed to civil jail if the orders sought in the Application are not granted. He prayed that the Application be allowed and costs be in the cause.

Respondents submissions

15. Learned Counsel submitted that the issues raised in the Replying Affidavit show clearly that the instant Notice of Motion is incompetent, abuse of the Court process, untenable in law and should be dismissed with costs. That the principles to be applied by the Court when seized of an Application to set aside Judgement or an Order under the *Civil Procedure Rules* 2010 is whether service was proper and effected upon the other party. Further, that the Respondent's action of feigning ignorance of the proceedings and allegations that the Bill of costs dated 5/03/2020 proceeded ex-parte is devoid of basis and aimed at misleading the Court and preventing the Applicants/Respondents from realising the fruits of litigation.



16. Counsel urged that the Respondent has approached this Court with unclean hands and is guilty of material non-disclosure thus, he is undeserving of the orders sought. Further, that the Applicant has failed to disclose to the Court that he was duly served with Advocate-Client bill of costs, and all taxation and mention notices through his postal address which was provided to the Respondents by the Applicant himself, physically and through his WhatsApp. He urged that the Applicant cannot be heard to claim that he was never served and further, that the Respondent has not even requested to cross-examine the process server on the contents of his affidavits of service on record. Additionally, that he has not disputed that the postal address through which service was effected through belongs to him.
17. Counsel submitted that the Application is made in bad faith and is aimed at delaying execution process. That the Applicant has not tendered any security or any proposal as required by the law on how to cater for the prejudice suffered by the Respondent. He urged that it is trite law that where it is a regular judgement or order as is the case hereto, the Court will not usually set aside the same unless it is satisfied that there is a defence on the merits. Further, that where the Court establishes proper service of all relevant Court documents, as the case may be, resulting in a regular judgement and/or order the Court will not set aside the judgement or proceedings unless it is satisfied that there is a defence on merits.
18. Counsel stated that the proceedings sought to be set aside are regular and thus, the next question for the Court is whether there is a defence on merits by the Applicant. Counsel urged that there is no draft computation that has been attached to the Application for the Court to determine whether the bill of costs was erroneously taxed. He reiterated that the Certificate of Costs dated 04/03/2021 was assessed correctly, citing the case of *Plantation Fertilisers Limited v Rioki Coffee* (1971) in support of this submission. He submitted that setting aside ex-parte judgment is a discretionary right of a Court as held in the case of *Bouchard International (Services) Ltd v M'mwereria* (1987) KLR 193. He additionally cited the case of *Shah v Mbogo* (1967) 1 EA 116 and urged the Court to dismiss the Application with costs.

Analysis & Determination

19. Having considered the pleadings as well as the submissions as herein summarised, I need to say from the very onset that there is no need to convolute this issue at all with all the extraneous issues raised as can be gleaned from the pleadings and submissions and particularly those of the Applicant. The issue here is simple. The Applicant alleges that he was not at all notified by the Respondent of proceedings that proceeded before the Deputy Registrar that culminated into the taxation ex parte of the Advocate-Client Bill of Costs therein presented and which is the subject of the execution proceedings the subject matter of this Application.
20. On his part Counsel Mr. Kagunza denies the assertion of want of service on his part and has pleaded and submitted that the Applicant was very much aware of the proceedings for reasons that he was duly notified at every stage of the taxation proceedings through his given address and phone number. In light of the above then the matter has nothing to do with the merits or otherwise of the Bill as taxed but is only about the process service that led to the taxation proceedings. In this regard then, the Court by dint of Article 159 (2)(d) of the *Constitution*, will proceed and handle this Application like any other Application seeking to set aside a decree or order of the court for reasons that a party thereto was not served, want of form notwithstanding as provided under Order 51 Rule 15 of the *Civil Procedure Rules*. This being the case then Sections 48 and 51 of the *Advocates Act*, CAP 16 LOK is not relevant.
21. It is therefore my considered opinion the issue for determination is as hereunder;
 - i. Whether the Applicant was served with the requisite notices



22. The dictum in setting aside judgements and/or orders granted ex parte was set out in the case of *Shah v Mbogo & another* [1974] EA 116. Therein, Harris J stated that: -

“I have carefully considered in relation to the present Application, the principles governing the exercise of the Court’s discretion to set aside a judgement obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”

23. In the instant case, I have considered the evidence of service of the pleadings and Court processes that eventually culminated to the taxation of the Bill by the Respondent upon the Applicant as demonstrated by the several annexures to his Replying Affidavit as herein summarised at paragraph 6 above. The court has noted that the facts as deposed were not at all controverted, rebutted and or denied by the Applicant who indeed had the occasion to and did file a Supplementary Affidavit. The Court also notes that the Applicant did not deny that the address cited as being the one to which the documents is his known address. The Court further notes that the Applicant has also not denied the phone number cited and to which WhatsApp messages were also indicated to have been sent.

24. Over and above this, the process server that was involved in the service of documents on behalf of the Respondent was constant. The Court has noted that the Applicant did not seek that he be availed for cross examination so as to test the veracity of the depositions made in his various Affidavits. It is also important to take into account the fact that the Postal Articles were recorded as sent and the WhatsApp messages were double ticked as read.

25. These being the circumstances of this case on the issue of service, I am very well satisfied that the Respondent has sufficiently demonstrated that contrary to the Applicant’s deposition that he was not served with the Bill of Costs, he was in fact served with the same from the very moment the process of taxation was initiated, and that service was subsequently done at every other stage of the process all the way up to its completion. In this regard therefore, I am also satisfied that the Applicant was very well informed of the process and as a consequence was well aware of the same but chose to ignore the same, only coming to court when execution was imminent.

26. In light of the dicta set out in the case of *Shah v Mbogo* herein above cited. The actions of the Applicant herein can be equated to those of the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice envisaged therein. He is therefore undeserving of the exercise of the Court’s discretion in his favour. For the above reasons, it is my finding that the Applicant’s Application lacks merit. The same is accordingly dismissed in its entirety with costs to the Respondent

READ DATED AND SIGNED AT ELDORET ON 12TH JUNE 2025

E. OMINDE

JUDGE

