

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL AND TAX DIVISION**

**MISC. APPLICATION NO. E448 OF 2019**

**EDWARD BITOK**

.....**APPLICANT/CLIENT**

**-VERSUS-**

**KTK**

**ADVOCATES.....RESPONDENT/ADVOCATE**

**RULING**

1. This matter was placed before me pursuant to the directions issued by the Honourable Justice Mabeya on 23<sup>rd</sup> September, 2024, requiring that the file be referred to this Court for clarification and further directions in relation to the ruling dated 19<sup>th</sup> March, 2024 and delivered on 10<sup>th</sup> September, 2024.
2. I have carefully perused the record and considered the letters filed by counsel for both parties, namely the Applicant's

letter dated 13<sup>th</sup> September, 2024 and the Respondent's letter dated 26<sup>th</sup> March, 2025.

3. It is necessary to state from the outset that although the ruling dated 19<sup>th</sup>

March, 2024 was intended to determine the **Notice of Motion** dated 17<sup>th</sup> October, 2022, the Court, through inadvertence, addressed itself to the application dated 26<sup>th</sup> April, 2022, which application had in fact already been conclusively determined by a ruling rendered on 14<sup>th</sup> October, 2022 and this confusion arose because certain parts of the proceedings were not available in the court record at the time of preparing the said ruling.

4. This Court sincerely regrets the inadvertent error, the attendant delay, and any inconvenience occasioned to the parties. In the circumstances, and in the interest of justice, this Court hereby sets aside and or revokes the proceedings and ruling dated 19<sup>th</sup> March, 2024, which was delivered on 10<sup>th</sup> September, 2024, in so far as it purported to determine

the application dated 26<sup>th</sup> April, 2022. The Court shall now proceed to consider, on its merits, the proper application before it, which is the **Notice of Motion** dated 17<sup>th</sup> October, 2022.

5. The said application is expressed to be brought under **Article 159(2)(d) of the Constitution, Section 95 of the Civil Procedure Act (Cap 21, Laws of Kenya), Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, and Rule 11 of the Advocates (Remuneration) Order**. The Application seeks the following orders: -

*a) Spent.*

*b) That the Honourable Court be Pleased to grant the Applicant leave to file a reference against the ruling of the Honourable Deputy Registrar, S.A Opande delivered on the 5<sup>th</sup> February, 2020 out of time.*

*c) That the leave granted in prayer (b) above do operate as stay of execution of the ruling of the Honourable Deputy Registrar, S.A Opande delivered on the 5<sup>th</sup> February, 2020 and all consequential orders arising therefrom pending*

***the hearing and determination of the of this application inter-parties.***

***d) That the application for reference annexed hereto be deemed as duly filed and served upon payment of requisite fees.***

***e) The Costs of this application be provided for.***

6. The Applicant's case, as outlined in both the motion and the Supporting Affidavit sworn by **Edward Kipkemboi Bitok**, is premised on the assertion that the taxation proceedings culminating in the ruling delivered on 5<sup>th</sup> February, 2020 were conducted ex-parte, without affording him an opportunity to be heard. That the taxation resulted in the assessment of the Respondent's Advocate/Client Bill of Costs dated 30<sup>th</sup> September, 2019, wherein the sum of **Kshs.1,760,370.00** was awarded in favour of the Advocate.

7. The Applicant contends that he had no knowledge of the said proceedings as he was never served with any pleadings herein and or the taxation notice or the Bill of Costs. He avers that the Advocate deliberately and strategically adopted a defective mode of service, hence serving him by Registered

Post vide a postal address that the Applicant had long ceased to use, despite being in active communication with him through other more reliable channels. It is the Applicant's position that this was a calculated move by the Respondent to deny him the right to be heard and thereby obtain an ex-parte Judgment against him.

8. The Applicant states that he only became aware of the matter on 26<sup>th</sup> April, 2022 when he was served with ***Proclamation Notices and Warrants of Attachment*** in execution of the taxed costs. He subsequently filed an application seeking a stay of execution, which was dismissed, leaving him vulnerable to imminent execution. But upon perusal of the court file, the Applicant established that the suit was a taxation matter wherein the Advocate's Bill of Costs had been taxed unopposed and a Certificate of Taxation issued. He further learnt that the Advocate had obtained Judgment by adopting the certificate of costs as a decree of the court under **Section 51(2) of the Advocates Act.**

9. The Applicant has gone on to aver that had he been served and granted a hearing, he would have challenged the existence and scope of the retainer, which forms the very foundation upon which any claim for legal fees must be anchored. The Applicant has annexed to his affidavit a **draft reference** together with a **copy of a draft Memorandum of Understanding (MOU)** alleged to have been drafted by the advocate, which, according to him, was never executed and therefore could not give rise to an advocate-client relationship in law. He argues that the legal instruction forming the basis of the Bill of Costs was never completed, and no enforceable contract for legal services existed. In essence, he submits that the Deputy Registrar erred in taxing a bill arising from a non-existent or disputed retainer, whereas proof of retainer is a jurisdictional prerequisite to the taxation of an Advocate/Client bill.
10. The Applicant also argues that the delay in filing the reference was not occasioned by indolence or lack of diligence on his part, but rather by lack of notice or awareness of the

taxation proceedings. He then urges the Court to invoke its discretionary powers to consider that the delay is excusable and that the Applicant has a credible and arguable case to be ventilated through the reference.

11. Moreover, the Applicant has invoked the provisions of **Articles 47 and 50(1) of the Constitution**, in urging the Court to uphold his right to fair administrative action and the right to a fair hearing before an adverse decision is made against him. He pleads with the Court to intervene and set aside the taxation on account of procedural irregularity and denial of the right to be heard which is a fundamental tenet of natural justice.

12. In opposition to the application, the Respondent filed a Replying Affidavit sworn on 28<sup>th</sup> November, 2022 by **Donald B. Kipkorir**, a **Partner of KTK Advocates**. He depones that the Advocate/Client Bill of Costs was duly filed on 1<sup>st</sup> October, 2019 and taxed on 5<sup>th</sup> February, 2020 after due service.

That a Certificate of Taxation was then subsequently issued and adopted as the judgment of the Court on 9<sup>th</sup> June, 2021.

13. The Respondent further contends that the Client filed the instant

application in bad faith, having unsuccessfully filed an earlier application dated 24<sup>th</sup> November, 2022 seeking to set aside the Judgment. The Advocate maintains that the current application is an abuse of the court process which is aimed at frustrating the legitimate process of execution and evading payment of legal fees.

14. It is also the Advocate's position that the application is fatally defective, lacking merit both in fact and law. The Respondent asserts that the Applicant has neither shown good faith nor taken any steps to settle the debt since 2019, and has only moved the Court belatedly to forestall execution. In the circumstances, the Respondent prays for the dismissal of the application with costs.

## **Submissions**

15. With leave of the Court, the parties canvassed the application through written submissions. The Applicant's submissions are dated 9<sup>th</sup> December, 2022, while those of the Respondent are dated 30<sup>th</sup> July, 2023. The Court has considered the arguments advanced in those submissions and shall refer to the same in the context of the issues arising for determination.

## **Analysis and Determination**

16. Having carefully considered the Applicant's **Notice of Motion** dated 17<sup>th</sup> October, 2022, the affidavit in support thereof, the Respondent's Replying Affidavit sworn on 28<sup>th</sup> November, 2022, the parties' respective submissions, and the applicable law, this Court distils the following as the key issue for determination:-

***a) Whether the Applicant has provided sufficient cause to warrant the grant of leave to file a reference out of time pursuant to Rule 11(4) of the Advocates (Remuneration) Order.***

17. The Applicant seeks enlargement of time to file a reference under **Rule 11(4) of the Advocates (Remuneration) Order**, which provides that:-

*“The High Court shall have power 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 party to the taxation not less than three clear days’ notice thereof.”*

18. The Applicant’s case is that he was unaware of the taxation proceedings, and only became aware of them upon service of proclamation notices and warrants of attachment on 26<sup>th</sup> April, 2022. The record confirms that the taxation was conducted ex-parte and that the ruling by the Deputy Registrar was delivered on 5<sup>th</sup> February, 2020. The Certificate of Taxation was subsequently adopted as a judgment of the court on 9<sup>th</sup> June, 2021 pursuant to **Section 51(2) of the Advocates Act.**

19. Although earlier in another ruling this court made a decision that it

suffices for the Advocate to establish that he served via email and postal addresses not contested by the Client/Applicant, courts have consistently held that the discretion under **Rule 11(4)** is wide but must be exercised judicially based on sufficient cause. In the case of **Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, the Supreme Court enumerated the guiding principles for extension of time, including:-

- a) The length and reason for the delay;*
- b) Whether the delay was inordinate and inexcusable;*
- c) Whether there is an arguable case;*
- d) The degree of prejudice to the Respondent;*
- e) Whether there is public interest involved.*

20. In the present case, the Applicant has explained the delay in filing the reference, attributing it to his lack of notice or awareness of the taxation proceedings. According to the affidavit evidence filed in support of the application, the Applicant avers that the Advocate/Respondent purportedly served the Taxation Notice via Registered Post to a postal

address that he had long ceased to use at the time of service. The foregoing raises doubt as to whether the Applicant actually received service and having considered the record, I have not seen anything on the said record to imply that although properly served by registered post, the Client/Applicant was at all material times aware of the taxation. Accordingly, this Court is persuaded that the delay in filing the reference is excusable and does not amount to inordinate or inexcusable delay that would bar the Applicant from accessing the doors of justice.

21. Having considered the draft reference annexed to the Applicant's supporting affidavit, the Court is satisfied that the intended reference raises substantial and arguable issues, particularly with respect to whether there existed a valid retainer between the parties. The Applicant contends that the legal fees taxed were premised on a draft **Memorandum of Understanding (MOU)** that was never finalized

or executed, and as such, no binding retainer came into existence. He further argues that no actual legal services were

rendered to him pursuant to any contract or instruction. On the other hand, the Respondent merely contends that the Client has failed or refused to settle the fees since 2019, but does not expressly demonstrate or provide evidence of a signed retainer or clear instructions issued by the Applicant. However, this is a question to be determined in a different forum other than in this ruling.

22. In this Court's view, the existence of a retainer is the foundational basis upon which a taxation of an Advocate/Client Bill of Costs must rest. Therefore, a Taxing Master cannot be clothed with jurisdiction to tax a bill unless there is a retainer. Where the existence of a retainer is disputed, the Court must first determine that issue before proceeding with taxation. Better still, the question on whether there existed a retainer is not a mere technicality, it is in this Court's view a jurisdictional fact, and without it, an Advocate has no lawful basis to present a Bill for Taxation under the **Advocates Act**.

23. The question of whether a retainer existed in this case is therefore not a procedural or technical matter; it is a

jurisdictional one that goes to the very root of the Advocate's entitlement to fees. If indeed no valid instructions were ever issued and no services rendered, then the taxation conducted by the Deputy Registrar would be rendered a nullity, as it would be premised on a non-existent Advocate-Client relationship. Therefore, this Court finds that the draft reference raises a *prima facie* case with reasonable prospects of success so that if the Court were to deny the Applicant leave to ventilate its case as contained in the draft reference on merit, it would risk sacrificing justice on the altar of technicality.

24. Moreover, the prejudice that the Client/Applicant stands to suffer if leave is denied far outweighs any prejudice that the Advocate/ Respondent may suffer if the application is allowed. The Client risks being subjected to execution for a sum exceeding Kshs.1.7 Million without being afforded a chance to challenge the very basis upon which that figure was arrived at. In contrast, the Advocate, if ultimately successful on the

merits of the reference, would still be entitled to recover the taxed costs, with interest accruing in the meantime.

25. It is a cardinal principle of our justice system that **substantive justice must take precedence over procedural formalities.** Article 159(2)(d) of the **Constitution** obliges this Court to administer justice without undue regard to technicalities. In the case of **Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, the Supreme Court reiterated that:-

*“A party should not be denied justice merely because of a technicality, particularly when such a party has taken steps to approach the Court promptly upon discovering the alleged procedural unfairness.”*

26. In the instant matter, the evidence presented before this Court shows that upon learning of the taxation proceedings and resultant Judgment, the Client/Applicant immediately took steps and this Court is duty-bound to give effect to the spirit of justice, fairness, and equality for all before the law.

27. In the final analysis, this Court finds that the delay in filing the reference is neither unreasonable nor unexplained. The issues raised in the intended reference are weighty, legally arguable, and deserving of judicial interrogation. Therefore, this Court is satisfied that the Applicant is entitled to have his grievance determined on merit and to deny him that opportunity would be to affront the principles of natural justice and constitutional due process.

28. Accordingly, and in keeping with the Court's constitutional mandate under **Article 159(2)(d)** to administer justice without undue regard to procedural technicalities, and in furtherance of the right to be heard under **Article 50(1)** and the right to fair administrative action under **Article 47**, this Court is persuaded to exercise its discretion in the Applicant's favour and in the resultant, proceeds to make the following orders:-

- a) The Applicant is hereby granted leave to file a reference out of time against the ruling of the Deputy Registrar, Hon. S.A. Opande, delivered on 5<sup>th</sup> February, 2020.***
- b) The draft reference annexed to the Applicant's affidavit shall be duly filed and served within seven (7) days from the date of this ruling.***
- c) The matter shall be mentioned before the Presiding Judge of the Commercial & Tax Division at Milimani Law Courts on 1<sup>st</sup> October, 2025 for purposes of issuing directions on the hearing of the reference since this court is now on transfer.***
- d) Costs of this application shall be in the cause.***

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT  
KIAMBU THIS 12<sup>TH</sup> DAY OF SEPTEMBER,  
2025.**

**D. O. CHEPKWONY**  
**JUDGE**

In the presence of:

M/S Anyango holding brief for Mr. Kiokorir for counsel for  
Advocate/Respondent

No appearance for and by Applicant/Client

Court Assistant - Kinyua

ORIGINAL