



Orege t/a Orege J & Associates v Nthiga (Miscellaneous Civil Application E367 & E368 of 2019 (Consolidated)) [2024] KEHC 103 (KLR) (Commercial and Tax) (11 January 2024) (Ruling)

Neutral citation: [2024] KEHC 103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E367 & E368 OF 2019 (CONSOLIDATED)**

**JWW MONG'ARE, J
JANUARY 11, 2024**

BETWEEN

JULIUS ORENGE T/A ORENGE J & ASSOCIATES ADVOCATE

AND

KENNEDY MILTON NTHIGA CLIENT

RULING

1. Before the Court for determination is the Appellant's Chamber Summons application dated 18th April, 2023 brought under Rules 11 & 61 of the *Advocates' Remuneration Order*, Order 42 Rule 6 of the *Civil Procedure Rules* and Sections 1A, 1B, 3 & 3A the *Civil Procedure Act*. The application seeks an order for a stay of execution of the decision/Order on taxation made on 21st March 2023, An order to set aside the decision of the Deputy Registrar or replace it with an order for dismissal of the advocate/ Respondent's bill of costs. An order directed to the Taxing Master to conduct an inquiry to determine the total amount of the money paid to the advocate and forward the same to the Judge, the Advocate be required to refund the monies due to the Appellant together with interest within 14 days as well as an order for costs and such other orders.
2. The Application is supported by the annexed affidavit of Kennedy Milton Nthiga. The gist of the application is that the Appellant engaged the Respondent Julius Orege as his advocate to represent him in court. Subsequently, a dispute arose as to the amount of legal fees payable which necessitated the Advocate to file its Bill of Costs which was thereafter taxed on 21st March, 2021. The Client/ Applicant being dissatisfied with the Deputy Registrar's decision of 21st March, 2021 on the said Bill of Costs and has preferred the present appeal on the same. The Applicant/Client contends that the Deputy Registrar failed to consider the advocate's professional misconduct despite the uncontested evidence by one John Wambua that the Advocate was compromised by the opposing side and therefore failed to adequately represent his interests in a professional manner and to the expected standards as an



Advocate. Further, the Applicant argued that funds received by the Advocate in trust as his Advocates were never transferred to him. Instead, the Advocate kept these funds despite having been paid by the client the agreed fees. The Applicant argued that the Taxing Master failed to take these factors into consideration in taxing the Bill of Costs.

3. Further and in addition to failure by the Taxing Master to consider the allegations of misconduct by counsel and alleged bribery, the Taxing Master awarded the Respondent monies not claimed in the Bill of Costs, the Taxing Master failed to consider the admitted amount paid of Kshs.700,000/= and hence erred in awarding the sum of Kshs.2,711,490/= in Misc. 367 of 2019.
4. The Applicant further argued that the Registrar did not avail the reasons for the decision it rendered making it impossible for the Applicant to file a reference as required by the law. The Appellant argues the Bill of Costs was filed contrary to Section 49 of the *Advocates Act*, and the Deputy Registrar failed to give credit to the monies paid to the advocate by the Appellant. The decision of the Taxing Master failed to address the pertinent issues raised at the hearing as the Taxing Master took over the conduct of the matter that she was not acquainted with.
5. In conclusion, the Appellant submitted that he was denied justice, by being condemned to pay for services not rendered as well as for being betrayed amounts to immorality and negates the principles of justice and fair play. He urged the Court to allow the application dated 18th April 2023 with costs.
6. The Advocate opposed the Notice of Motion and filed a replying affidavit sworn by Julius Orenge on 4th May 2023, in which he argued that the current application, though disguised as an Appeal, was actually a Reference challenging the taxation of his Advocate-Client Bill of Costs. The Advocate argues that the Appellant therefore lacked legal basis and the grounds introduce new matters not before the Taxing master. That the reasons for the Taxing master's decision are spelt out in the well-reasoned ruling delivered on 21st March 2023, the grounds of the application and supporting affidavit a piece of clear evidence the Appellant was aware of the reasons for the decision by the Taxing Master. That the reference was filed outside the 14 days-time frame and the same is an abuse of the court process and should be struck out.
7. On the alleged bribery, the Respondent argues the Taxing Master or this court lacks the jurisdiction to deal with the misconduct/misdeeds of an advocate unless such misconduct is against the Administration of justice or authority of the court. The Appellant has failed to adduce evidence to warrant the court interfere with the decision of the Taxing Master. The Respondent urged the court to dismiss the reference with costs assessed at Kshs.100,000/=.
8. The Advocate urged the Court to be guided by the decision of the Court in the case of *N.W. Amolo T/ A Amolo Kibanya & Co. Advocates vs Samson Keengu Nyamweya* Misc. App No. 480 of 2014 where the court held:-

“...having struck out the reference on account that it was incompetently filed out of time without leave of court, I do not wish to make any specific pronouncement on the merits of the reference as this decision does not necessarily foreclose any right of the applicant to apply for extension of time as far as the law may permit, which pronouncement might prejudice the parties respective positions.”
9. The Advocate urged the Court to find that the Court could only interfere with the Taxing Master's decision if the decision was premised based on an error of principle or when the amount awarded is manifestly excessive as to justify an interference on an error of principle. The Advocate urged the Court to find that the grounds adduced by the Appellant in the present case did not fall within the



said grounds upon which the Court could interfere as provided for by the Advocates Act, which is the enabling statute. Secondly, the impugned Bill of Costs was as a result of HCC No. E358 of 2017, the withdrawal of HCC 1 of 2015 was by consent of the parties and therefore the Appellant contradicted himself as he argues that no instructions were given while at the same time, he paid part payment of Kshs.700,000/= as legal fees. That the issue of instructions as raised in the reference was effectively dealt with in the ruling.

10. In conclusion the Advocate urged the court to find that the Taxing Officer was right in taxing the Bill of Costs and that the Appeal/Reference ought to be dismissed for having been filed out of time and allow the Applicant's application for entry of judgment as per the taxed costs that was still pending before the court.

Analysis and Determination

11. I have considered the application, the affidavits in support and those opposing, the submissions as well as the highlighted submissions. The issues that arise for determination are:-

- i. whether the reference/Appeal has been filed within the stipulated timelines?
- ii. whether the court should stay the execution of the taxation ruling?

i. Whether the reference was filed within the stipulated timelines

12. Paragraph 11 of the Advocates Remuneration Order (ARO) stipulates as follows:-

1. Should any party object to the decision of the Taxing Officer, he may within fourteen days after the decision give notice in writing to the Taxing Officer of the items of taxation which he objects.
2. The Taxing Officer shall forthwith record and forward to the objector the reasons or his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
3. Any person aggrieved by the decision of the Judge upon any objection referred to such Judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
4.

13. In his submissions before the Court, Counsel for the Appellant submitted that the Appellant, being dissatisfied with the decision of the Taxing Master, filed a Notice of Objection to Taxation on 26th March 2023 as required by Rule 11 of the Advocate's Remuneration Order, seeking reasons for the decision and up to the filing of the appeal the Hon. Registrar failed to respond to the Notice and provide reasons for her ruling which prompted to the filing of the instant application.

14. Counsel further dismissed claims that the instant application acts as a reference and insisted that the instant application was necessitated by the failure of the Taxing Officer to furnish the Appellant with reasons for the decision. On the other hand, counsel for the advocate submitted that the Taxing Master's decision contained a reasoned opinion and it well articulated the reasons for the decision and that there was no basis for the Taxing Master to duplicate the said ruling as a response to the Appellant request for reasons for the Ruling.



15. The impugned ruling was delivered on 21st March, 2023, while the Appellant filed a Notice of Objection to Taxation was filed on 26th March, 2023, The Appellant has filed a Notice of Preliminary Objection to the decision of the Taxing Master arguing that the Appellant ought to have filed the Notice of Objection together with the reference, instead of an Appeal. The Appellant argued that he requested for the reasons for the ruling and the same were not forthcoming, he filed the present appeal and that the same is properly before the Court.
16. In the circumstances this court finds that the application has not been filed outside the requisite period, the Appellant filed the Notice of Objection within 4 days after the delivery of the Ruling which falls within the 14 days' window allowed under Paragraph 11 of the *Advocates Remuneration Order*.

ii. Whether the Court Should Stay the Execution of the Taxation Ruling

17. In his Appeal before this Court, the Appellant urged the court to set aside and/or stay of execution of the Ruling of the Taxing master's decision. In *First American Bank of Kenya Vs Shah and Others* [2002] E.A.L.R 64 AT 69, the court held as follows:-

“First, I find that on the authorities, this court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle”.

18. I have considered the impugned Ruling, the issue before the court is whether the same amounted to wrong principles or was manifestly high to warrant the interference by this court. I do note the pertinent issues raised by the Appellant on representation and the amount of Kshs.700,000/- already paid to the Advocate as legal fees although the same was not denied was not considered by the Taxing Master in the Ruling herein. Having therefore, found that the Notice of Objection filed before this court was done within the requisite period, I find the issues raised by the Appellant require the intervention of this court and the Court should exercise its discretion and grant the orders of stay of execution. The Appellant also raises issues of integrity on the part of the Advocate which the Court notes were not denied or controverted and therefore this court cannot turn a blind eye to the same, seeing that they touch on the conduct of an officer of this court. The same should be examined and taken into consideration in the overall determination herein.
19. This court considers that denying the Appellant the orders sought will amount to driving the Applicant from the seat of justice, and he will be condemned to pay the taxed amount without being heard. On the other hand, allowing the application will allow this court to consider and ventilate all the issues in dispute and resolve them on merit.
20. This court will, in the interest of justice, allow the orders for a stay of execution of the ruling dated 21st March, 2022 on the following terms:-
 - i. The execution of the taxing Officer's Orders of 21st March, 2022 be stayed pending the hearing and determination of the reference.
 - ii. Each party to bear their own costs of the Application.
 - iii. The amount paid to the advocate to be determined during the hearing of the reference.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF JANUARY, 2024.

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J.W.W. MONG'ARE

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of

Ms. Achieng holding brief Mr. Orege for the Advocate/Respondent.

Mr. Mutuku for the Client/Applicant.

Amos - Court Assistant

