



Saimanga v George Gilbert & Mombo Advocate (Miscellaneous Civil Cause E020 of 2021) [2024] KEHC 6010 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6010 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MISCELLANEOUS CIVIL CAUSE E020 OF 2021**

JN NJAGI, J

MAY 23, 2024

BETWEEN

LESIRMA SIMEON SAIMANGA CLIENT

AND

GEORGE GILBERT & MOMBO ADVOCATE ADVOCATE

RULING

1. The Client/Applicant has filed a Notice of Motion application dated 30/03/2022 seeking for:
 - (1) Spent
 - (2) This Honourable court be pleased to grant leave to the Applicant to lodge a reference out of time.
 - (3) That in furtherance to prayer number 2, this Honourable court be pleased to grant leave to the Applicant to file further bank documents relating to court payment which will clearly show the advocate that had been instructed by the client.
 - (4) That this Honourable court be pleased to stay certificate of costs and impending execution of the rulings and orders granted on 16th March 2022 pending the hearing and determination of the reference.
 - (5) That the decision of the Taxing Master as well as the consequential orders dated 16th March be stayed, varied and/or set aside upon hearing of this reference.
 - (6) That the costs of the application be provided for.



2. The application emanates from a bill of costs dated 29th November 2021 filed by the Advocate/ Respondent which bill was taxed vide a ruling dated 3rd February 2022 and a certificate of costs issued on 16th March 2022.
3. The application is based on grounds stated on the face of the application and supported by the affidavit of the Applicant. The grounds thereof are that neither counsels for the applicant nor himself were served with proceedings leading to the impugned decision dated 16/3/2021. That the matter was compromised by way of a consent between the instructed counsel, Mr. Mombo, Senior counsel Martha Karua, and Mr. Steve Biko which consent was recorded in court settling the matter, hence, the court became functus officio and the matter is res judicata and not available for reopening. That the Applicant stands to suffer due to an irregular taxation. That the taxed amount is exorbitant, unproven, marred with irregularities and errors and is incapable of rational enforcement.
4. The Advocate/Respondent has opposed the application vide a lengthy replying affidavit sworn on the 5th May 2022 in which he deposes that the application does not reveal any justification for granting leave to file a reference out of time. That this court has no jurisdiction to make an order for admission of new evidence as it is not a taxation court.
5. It was deposed that the applicant was served with the processes of the court through his email. The respondent attached various documents to show service on the applicant.
6. It was deposed that the lawyers mentioned by the applicant as not having been served with the processes, Martha Karua, SC, and Steve Biko Osur, never entered appearance for the applicant and as such there was no obligation to serve them. That in any case where a decision is made by a court in absence of other parties, it is not a subject of reference but an application before the same court that made the impugned decision. Therefore, that this court lacks jurisdiction to entertain such allegations.
7. On the consent, it was deposed that the same was set aside by the trial court vide a ruling dated 25/11/2022 and there has neither been an appeal nor review against the decision and as such the decision remains unchallenged.
8. The respondent deposed that the reasons for taxation are clear from the ruling of the taxing master dated 3rd February 2022. That the grounds challenging the taxation are not specific.

Submissions

9. The Applicant filed submissions dated 21st July 2022 which were however in respect to a bill of costs dated 11th December 2020. The respondent filed documents showing that the bill of costs dated 11th December 2020 was struck out in a ruling delivered on 25th November 2021, subsequent to which the advocate filed the bill of costs dated 29th November 2021 which is the subject of taxation herein. I therefore find that the submissions by the applicant dated 21st July 2022 are not relevant for purposes of the application dated 30th March 2022.

Respondent's submissions

10. The respondent submitted that there was no Notice of Objection to taxation as required by paragraph 11 of the Advocates Remuneration Order. That the purported notice dated 21/3/2022 is not for this matter. Further that the purported notice raises only one issue of instruction fees. That the other issues raised in the application such as service, consent and retainer are not in the purported notice. Therefore, that there is no proper reference before the court.



11. It was submitted that the appellant did not file any supplementary affidavit in response to the replying affidavits of the respondent's advocates, George Gilbert and Arnold Oginga. Therefore, that the averments in the replying affidavits are unchallenged.
12. The respondent submitted that the firm of Odhiambo & Odhiambo Advocates is not properly on record and has not filed a Notice of Appointment to act for the applicant. Neither have they sought for leave to come on record after judgment. That their participation in these proceedings are contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules. That the application is incompetent, proceedings are defective, null and void and ought to be struck out. In support of this proposition the respondent relied on the case of S.K.Tarwadi v Veronica Muehleemann (2019) eKLR.
13. It was submitted that the applicant has not demonstrated any reasons for failure to file the reference within 14 days statutory period. That the record shows that the applicant was served and was aware of the taxation proceedings and deliberately chose not to attend. That the parties at all times communicated and exchanged pleadings through email correspondence and the applicant in fact admits in paragraphs 15 and 25 of his supporting affidavit of being served with court documents. Therefore, that the applicant has not made out a case to warrant the exercise of any discretion of the court in his favour.
14. The respondent submitted that the Applicant has not demonstrated the manner in which the Taxing Master erred in assessing the figures awarded and as such he has not made out a case to warrant setting aside of the Taxing Master's ruling.
15. It was submitted that the issue of representation by George Gilbert and Ochieng Oginga was not an issue placed for determination before the Taxing Master. Therefore, that the same cannot form the basis of a reference before this court.
16. On the prayer to adduce additional evidence, it was submitted that the applicant has not demonstrated that the evidence was not available to him and the same could not be obtained after due diligence. The respondent in this respect cited the Supreme Court decision in the case of Institute of Social Accountability & another v National Assembly of Kenya & 3 others (2021) eKLR.
17. The respondent submitted that the application has been filed merely to defeat the pending execution proceedings. That the application for extension of time is an afterthought and an attempt to frustrate the respondent from enjoying its fruits of a lawful judgment. The respondent urged the court to dismiss the application with costs.

Analysis and Determination

18. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions. The issues for determination in the application are:
 - 1) Whether the firm of Odhiambo & Odhiambo is properly on record in the matter.
 - (2) Whether the application for leave to file reference out of time is merited.
 - (3) Whether the application to adduce additional evidence is merited.
 - (4) Whether Stay of execution should be granted.

Whether the firm of Odhiambo & Odhiambo is properly on record



19. The respondent submitted that the firm of Odhiambo & Odhiambo Advocates is not properly on record for failure to file notice of appointment of Advocate and have not sought leave to come on record after judgment in line with Order 9 rule 9 of the Civil Procedure Rules. The said firm did not dispute this averment.

Order 9 rule 9 provides as follows;

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
20. It is clear from the provisions of this section that where judgment has been entered, any change of advocate has to be with the leave of the court.
21. The effect of failing to file a Notice of Appointment of advocate was considered by Mutungi, J. in *Ngitimbe Hudson Nyanumba v Thomas Ongondo* [2018] eKLR where the learned Judge treated failure to comply with Order 9 Rule 9 CPR as a mere technicality and held that:

“ 19. The appellant’s Notice of Motion dated 8th July 2013 was predicated on the view that the firm of Nyamori Nyasimi came on record for the respondent after judgment without leave of the court and therefore was irregular, null and void and all orders emanating and/or ensuing thereafter were a nullity and ought to be cancelled. The appellant had every opportunity to challenge the appointment but did not do so. Instead the appellant participated in the proceedings and did not raise any issue regarding the irregularity of the Notice of Change of Advocate that placed Nyamori Nyasimi advocate on record. One may ask what injustice was occasioned to the appellant by the appointment of Nyamori Nyasimi advocate after judgment allegedly without leave? I discern none, the appellant continued to participate in the proceedings without raising any objection. The idea/objective behind amending the Civil Procedure Rules to provide that where judgment had been entered any change of advocate was to be with the leave of the court was essentially for the protection of the advocates to safeguard their fees from their clients. The amendment was aimed at preventing mischief whereafter an advocate worked tirelessly for a client upto obtaining a judgment, the advocate is not debriefed by merely another advocate filing a notice of change or the client filing a notice to act in person so that execution of the decree is by another advocate who did not participate in the trial and/or by the client directly with the object of denying the advocate his fees or costs.

20. Although I agree with the learned magistrate that there was an inordinate delay in bringing this application challenging the notice of change of advocate without leave, my view is that no leave was required as at the time and that even if it was required I would nevertheless not have been persuaded to annul the subsequent and consequential orders from the date the notice of change was filed. The appellant suffered no prejudice at all by reason of such



change of advocate. The appellant participated and/or was not prevented from participating in the proceedings and there was no miscarriage of justice. The court is enjoined under Sections 1A and 1B of the *Civil Procedure Act*, Sections 3(1) and 19(1) of the *Environment and Land Court Act* and Article 159 2(d) to administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that this is such a case where the court would have been entitled to disregard the strict rules of procedure in order to do substantive justice.”

22. In my view, failure to file a Notice of Appointment in the circumstances of this case is a mere technicality which should not be used to defeat the application herein. Article 159 2(d) of *the Constitution* require courts of law to administer justice without undue regard to procedural technicalities. The respondent herein has not shown to have suffered any prejudice by failure by the said firm of advocates to file a Notice of Appointment. I therefore do not find any merit in the argument and dismiss the same.

Leave to file reference out of time

23. The Applicant is seeking leave of this court to file a reference out of time against the ruling of the taxing master. Paragraph 11 of the Advocates’ Remuneration Order is clear that the Court has discretion to extend time for lodging a reference notwithstanding the expiry of the 14 days period prescribed for filing the reference from the taxing master’s decision on costs. The same provides 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 to which he objects.
2. The taxing officer shall forthwith record and forward to the objector the reasons for 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 subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
4. The High Court shall have power in its discretion by order 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 interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

24. The Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & Others* [2014]eKLR set the following guidelines for consideration in an application for enlargement of time:

“

- “(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;



- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- (3) Whether the court should exercise discretion to extend, is a consideration to be made on a case to case basis;
- (4) Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;
- (5) Whether there will be any prejudice suffered by the Respondent if the extension is granted;
- (6) Whether the application has been brought without undue delay; and
- (7).....”

25. The taxation ruling was delivered on 3/2/2022. The Applicant filed a Notice of Objection dated 21/03/2022. By dint of the above provision, the Applicant was required to file a notice of objection within 14 days of the delivery of the ruling by the Taxing Master. The same ought to have been filed on or before 17/2/2022. The instant application was filed on 7/4/2022, hence there was a delay of two months in filing the application.
26. The reason given by the Applicant for the delay in filing the application is that he was not served with the proceedings before the taxing master. The Respondent on the other hand stated that service was effected to the Applicant through his known email and thus he cannot claim that he was not served.
27. I have perused the email correspondences sent to the Applicant by the Respondent. It is clear that on 3/12/2021, the Applicant was served with the bill of costs, the written submissions and the taxation notice. On 18/12/2021, the Respondent through email informed the Applicant that the matter was scheduled for hearing on 13/01/2022. A hearing notice was also attached.
28. At one point, the Applicant’s advocate, Steve Biko Osur wrote an email to the Respondent’s Advocate stating that he was informed by the client/Applicant that the matter was before the court on that day and requested to know the position since they had not been served with notices.
29. Paragraph 25 of the Applicant’s supporting affidavit also suggests that he was aware of the proceedings as he stated as follows;
- “That I had also written numerous correspondences to the court to inform me of the ruling but none was ever responded to not even an email to inform me of the ruling date as had been happening when the matter started.”
30. From the foregoing, it is clear that the Applicant was aware of the proceedings. The Applicant did not challenge the service in his supporting affidavit. At first, he claimed that he was not served with the proceedings. He further claimed that he was in hospital but did not challenge the mode of service through email. He did not state that being hospitalized hindered him from accessing his emails. He was aware the matter was ongoing but placed the duty to court to inform him of the progress of the matter instead of following up on the progress of the same in court. It is thereby clear that the Applicant just slept on his rights and was only jolted into action when he was served with execution proceedings.
31. It is a principle of law that any delay for doing what is required by law must be satisfactorily explained and an applicant seeking the court to exercise its discretion to extend time must give a plausible explanation and sufficient reasons why he should be allowed to file a reference out of time. I find that the Applicant was in this case served with the taxation notice and the hearing notice. He deliberately



decided not to participate in the proceedings. There is no plausible explanation for failing to file the reference within the time stipulated by the law.

32. That notwithstanding, the argument that the applicant was not served with the process of the court cannot be the subject of the intended reference. Where a party is not served with the process of the court and ex parte judgment is entered against him/her, the procedure of the court is for the person to apply for setting aside of the exparte judgment. To allow a reference to be filed in this case would be allowing the Applicant to raise issues on taxation before this court when he did not raise the issues before the Taxation Master as he did not take part in the proceedings.
33. The Notice of Objection by the Applicant indicated that he was only challenging the instruction fees awarded by the Taxing Master. The supporting affidavit however enumerates other grounds of reference such as that the award is replete with arithmetical errors, is unequivocal, ambiguous, and incapable of rational enforcement. Further that the sum of Ksh.3,480,000/= as taxed by the Taxing Officer is erroneous and manifestly excessive. I have noted that there were no specifics on these claims. More importantly, I do not think that the applicant can raise any other issue that was not raised in the Notice of Objection.
34. I have gone through the ruling of the Taxing Master. He did not award specific amount as instruction fees. He only adopted the award on costs made by the electoral court of Ksh.2,000,000/=, increased that figure by half and added VAT to make the figure of Ksh. 3,480,000/=.
35. The grounds of objection set out by the applicant do not challenge the award as made out by the Taxing Master. There are no grounds on how the Taxing Master erred in awarding the sum of Ksh.3,480,000/=.
36. In view of the foregoing, the applicant has not shown that he deserves the discretion of this court to be granted leave to file a reference out of time. The Applicant was served with notice of the date fixed for taxation and failed to appear. He did not challenge the emails filed by the respondent showing that he was so served. The grounds of objection do not show how the Taxing Master erred in making the award. I find no merit in the application for leave to file a reference out of time.

Whether the application to adduce additional evidence is merited

37. The Applicant is further seeking that he be allowed to adduce further evidence in the form of bank documents to show the advocate who was instructed in the case.
38. The principles under which a party may be allowed to adduce further evidence during appeal are well settled. The Supreme Court in the case of Institute of Social Accountability & another v National Assembly of Kenya & 3 others (2021) eKLR held as follows on the issue:

All the parties rightly appreciate the principles on admission of additional evidence as set out by this court in Mohamed Abdi case. These are that:

.....(c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

.....(g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

.....(i) the court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The court must find the further evidence needful;



....(j) a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;

39. In this case, the Applicant did not adduce any evidence in the taxation proceedings. It is therefore a misnomer for him to seek to adduce “additional evidence” in the case when he in actual fact did not tender any evidence during the hearing before the Taxing Master. In my view, the application ought to have been made before the Taxing Master and not in this court.

40. The applicant further says that the respondent firm of advocates is not the one which was representing him during the election petition. That it is one Mombo advocate who was representing him in the said petition. It is clear that the consent between the applicant and Mr. Mombo Advocate was set aside by the trial court before the taxation proceedings commenced. The applicant has not appealed against that order. That being the case, the issue whether or not the respondent was the applicant’s advocates during the election petition was not an issue during the taxation proceedings. It cannot be raised in the intended reference as it was not an issue placed for determination before the Taxing Master. It would amount to new evidence.

41. In view of the foregoing, I find no merit in the prayer to adduce additional evidence in the intended reference.

Stay of execution

42. The Advocates Remuneration Order does not provide for stay of execution pending the hearing of a reference. However, I should think that the principles applicable are similar to those in an application for stay of execution pending appeal which is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which obligates an applicant to demonstrate that:

1. The application was brought without unreasonable delay.
2. The applicant will suffer substantial loss unless the orders sought are granted.
3. The applicant has given security for due performance of the decree as may be binding on him.

43. Though the instant application was filed without unreasonable delay, the applicant has not shown that he will suffer substantial loss if stay is not granted. Execution is a lawful process and so a party seeking stay of execution has to show that he will suffer substantial loss if stay is not granted. The applicant herein has not demonstrated that. Neither has he offered security for due performance of the decree. In face of my finding that the applicant has not given a plausible reason for failing to participate in the taxation proceedings, it is my considered view that stay of execution is not deserved.

44. Having considered the issues raised in the matter, the upshot is that I do not find any merit in the application dated 30th March 2022. The same is consequently dismissed with costs to the Respondent.

Written and signed by

J. N. NJAGI

JUDGE

Delivered, dated and signed at NANYUKI this 23rd day of May 2024

By:



A K NDUNGU

JUDGE

In the presence of:

.....for Applicant

.....for Respondent

Court Assistant -

30 days Right of Appeal.

