



REPUBLIC OF KENYA



**Liya ME Contractors Limited v OM Robinson & Company Advocates (Miscellaneous Civil Application E006 of 2021) [2024] KEHC 8013 (KLR) (3 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8013 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS CIVIL APPLICATION E006 OF 2021**

**SM GITHINJI, J**

**JULY 3, 2024**

**BETWEEN**

**LIYA ME CONTRACTORS LIMITED ..... APPLICANT**

**AND**

**OM ROBINSON & COMPANY ADVOCATES ..... RESPONDENT**

**RULING**

1. This Ruling relates to a notice of motion application dated 28/11/2022 brought under section 1A, 1B and 3A of the Civil Procedure Act and Order 22 rule 22 (1) of the Civil Procedure Rules, for the orders framed as follows:
  1. Spent.
  2. That this honourable court be inclined to discharge or set aside the decree given on the 20/9/2022 and any further proceedings against the Applicant including the proclamation dated 18/11/2022 more particularly by Kameta Enterprise Auctioneers pending the hearing and determination of this application.
  3. That costs of this application be in the cause.
2. According to the Applicant, *vide* an affidavit deposed on 28/11/2022 on their behalf by George Mwimali who is stated to be the director of the Applicant, they engaged the services of the Respondent to pursue a claim against the Kilifi County Government for recovery of some contractual amount Kshs. 838,279.80/-. Along the way, the relationship between the parties soured forcing the Applicant to withdraw the Respondent's services. As a result, the Respondent filed a bill of costs that was ultimately taxed on 25/5/2022 at Kshs. 388,904/-. A decree was issued on 20/9/2022 to that effect. The Applicant's claim is that they were not properly served with the taxation proceedings and only became aware of the same when they were served with a proclamation notice dated 18/11/2022.



3. In a replying affidavit sworn by counsel Robinson Onyango Malombo on 3/3/2023, the Respondent stated that the bill of costs dated 5/11/2021 was filed in court on 26/11/2021. Thereafter, the court issued a notice of taxation on 1/12/2021, which the Respondent proceeded to serve the applicant with on 24/1/2022. Counsel exhibited a copy of the bill of costs, notice of taxation and affidavit of service sworn by one Fredrick Omondi Osino, marked ROM 1 a, b and c respectively. That on 1/3/2022 when the taxation was scheduled, the court did not sit and parties consented to have the bill taxed on 5/4/2022. That the Applicant did not file any objection therein and the taxing master delivered her ruling on 25/5/2022. Subsequently, a certificate of taxation was issued which the Respondent served to the Applicant on 21/6/2022 *vide* a forwarding letter dated 31/5/2022. An affidavit of service to that effect was equally filed.
4. According to Mr. Robinson, the Applicant's failure to pay the sums under the certificate of taxation prompted the Respondent to file an application to have the certificate of taxation adopted as a decree. The Applicant was equally served with that application which they did not challenge and it was ultimately allowed on 20/9/2022. To Mr. Robinson therefore, the present application is bereft of merit.
5. The application was canvassed by way of written submissions. As at the time of writing this ruling however, only the Applicant had filed their written submissions, which I have carefully perused, understood and considered. The facts leading to the present application are undisputed. A ruling on the Respondent's bill of costs was delivered on 25/5/2022 at the sum of Kshs. 388,904/- and judgment entered on 20/9/2022 to that effect, both in the absence of the Applicant herein. The central issue for determination therefore, is whether the judgment entered on 20/9/2022 should be set aside.
6. The guiding provision of the Law with regards to setting aside of an *ex-parte* Judgment such as the one in this case is to be found in Order 10 Rule 11 of the [Civil Procedure Rules](#) which provides: -

Setting aside judgment [Order 10, rule 11.]

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

7. It is also trite that there are two type of *ex-parte* judgments: regular and irregular. The difference between the two was highlighted by the Court of Appeal in [James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another](#) [2016] eKLR, where the learned Judges of Appeal explained: -

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v Shah* (supra), *Patel v. EA. Cargo Handling Services Ltd.*”



8. In the present case, what seems to be in dispute is the issue of service. The Applicant's contention is that the bill of costs was never served to them as the address of service in the affidavit of service belongs to a stranger to these proceedings. Looking at the affidavit of service sworn by Fredrick Osino on 24/1/2022, it is evident that the Applicant is not truthful. The Applicant was indeed served on 24/1/2022 at its place of operations. The said Lucas Victor who accepted service was described as the Applicant's site manager and he acknowledged service by signing a copy of the notice of taxation and affixing the Applicant's rubber stamp thereon. I have no doubt that service was properly done.
9. Having said so, I must point out that the present application as framed seeks to set aside the judgment of this court following an application to adopt the taxing master's decision as a decree. The application that resulted into the impugned judgment was dated 4/7/2022 filed by the Respondent herein. Again, looking at an affidavit of service sworn by Paul Odhiambo Outah on 18/7/2022, the Applicant was duly served but failed to file any response or attend court.
10. It follows therefore that the decree is a regular one and it is for this court to determine whether the Applicant has met the requirements for setting aside such a decree.
11. The decree sought to be set aside was issued on 20/9/2022 and the present application instituted after two months, on 28/11/2022. The reason given for this delay is that the Applicant only became aware of the same upon being served with the proclamation dated 18/11/2022. The Applicant did not however state when they were served with the said proclamation. In the circumstances, I am of the view that the delay is inordinate and insufficiently explained. No plausible reason is given for failure to file a response to the application.
12. The Applicant's argument is that the amount taxed is excessive since the agreed legal fees was Kshs. 250,000, which the Applicant alleged they had since paid to the Respondent. This claim is not substantiated with any evidence, it therefore remains just that, an allegation.
13. Moreover, the principles of setting aside the decisions of a Taxing Master were well established in the cases of *Premchand Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] E.A 162, *First American Bank of Kenya v Shah and Others* [2002] EA 64 and these include: -
  - a. That there was an error of principle.
  - b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy.
  - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred.
  - d. That so far as practicable there should be consistency in the award.
14. Further, in *First American Bank of Kenya v 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".
15. The Applicant has failed to demonstrate any of the aforementioned principles and the application dated 28/11/2022 must fail. For this reason, the application is hereby dismissed with cost to the Respondent.



**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 3RD DAY OF JULY, 2024.**

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**S.M. GITHINJI**

**JUDGE**

In the Presence of: -

1. Mr Mohamed holding brief for Mr Mbarongo for the Applicant
2. Mr George Mwimali for the Respondent

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**S.M. GITHINJI**

**JUDGE**

**3/7/2024**

