



**Mohamed & Samnakay v Bogha (Miscellaneous Application
35 of 2020) [2024] KEHC 8091 (KLR) (Family) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8091 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION 35 OF 2020**

MA ODERO, J

JULY 4, 2024

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

BETWEEN

MOHAMED & SAMNAKAY APPLICANT

AND

KARIM BOGHA RESPONDENT

RULING

1. Before this court for determination are two applications as follows;
 - i. Notice of Motion dated 7th May 2021 filed by the Advocate/Applicant Mohamed & Samnakay Advocates in which they seek the following orders:-
 - “ 1. That judgement be entered for the sum of Kshs. 301,259.10 for costs as certified by the Deputy Registrar of this court on 29th April, 2021.
 2. That judgment on interest be entered on the said sum of Kshs. 301,259.00 at the rate of 14% per annum from the 13th December 2018 being one month after service of the Bill of costs on the Respondent until payment in full”
2. The Respondent/Client Karim Bogha opposed this application through the Replying Affidavit dated 14th June 2020 sworn by Dondo Joseph an Advocate of the High Court of Kenya.



- ii. Chamber Summons dated 18th May 2021 filed by the Client/Respondent Karim Bogha seeking the following orders:-

- “ 1. That the time within which to file this reference be enlarged and this Application be deemed as duly filed.
2. That the decision of the Taxing Master delivered on 24th February 2021 in so far as the same relates to the reasoning and determination pertaining to the taxation of the Bill of costs dated 3rd March 2020 be set aside.
3. That in the alternative to prayer 2 the Honourable court exercises its inherent jurisdiction and be pleased to strike out the entire Bill of costs dated 3rd March, 2020.
4. Spent.
5. That the costs of this Reference be provided for.”

3. The summons was opposed by the Applicant/Advocate through the Replying Affidavit dated 31st May 2021 sworn by Zul Mohamed.
4. Directions were given that the two applications be canvassed together.
- The Applicant/Advocate filed the written submissions dated 4th May, 2022 whilst the Client/Respondent relied upon their written submission dated 23rd May 2022.

Background

5. The two applications under consideration arise from the Advocate/Client Bill of costs dated 3rd March 2020. The ruling on said Bill of Costs was delivered on 24th February 2020 by Hon. P. W. Mbulikha the Taxing Master. In that ruling the Bill was taxed at Kshs. 301,259.00.
6. The Client/Respondent challenges the bill as taxed. He denies that the Advocate/Applicant had instructions to represent him in his personal capacity in the matter in question. The client also disputes the finding by the Taxing Master that the value of the subject matter was Kshs. 8,500,000. He avers that the correct value of the subject matter was actually Kshs. 100,000.

Analysis And Determination

7. I have carefully considered the application before this court, the Replies filed thereto as well as the written submissions filed by both parties. The issues which arise for determination are:-
- (a) Whether time to file the reference ought to be enlarged.
- (b) Whether the issue of retainer had been determined.
- (c) Whether the Bill as taxed ought to be set aside.
- (b) Issue of Retainer
8. The Advocate asserts that the Client/Respondent had instructed the Advocate to act on his behalf in a dispute between himself and his Co-Administrator.



9. The client on the other hand insists that the Advocate was retained to act for the estate and not for the client personally. That it was agreed that the Advocates fees would be paid out of the estate.
10. In the case of *Onyango, Kibet & Ohaga Advocates versus Akiba Bank Limited* the court held that:-

“The retainer is the foundation upon which the relationship of Advocate/client rests. Without a retainer the relationship cannot come into being. Retainer is the mode and method in which the Advocate accepts the offer of employment by the client. It can be express or by implication. The advocates undertake to fulfill certain obligation and binds himself to protect, preserve and safeguard the interest of the client in a particular matter. It is the position of the law that if there is no evidence of retainer except the oral statement of the advocate which is contradicted by the client, the court will treat the Advocate as having acted without authority/permission” [own Emphasis]
11. The client has not tendered any evidence to prove that he was instructing the Advocate to act on behalf of the estate.
12. The Advocate relies on client attendance records which indicate the name of Karim Bogha as the client. The subject is clearly indicated to be Estate of Salim Brenji Virji of which Karim Bogha was an Administrator.
13. These attendance sheets are evidence of instruction, issued to the Advocate by the clients.
14. I have looked at the dispute in which the client was involved being Succession No. 95 of 2012: Amin Mohamed Ismail -vs- Karim Bogha (Annexure KB’8’ in respect of an application dated 7th May 2021. This was a matter in which the client Karim Bogha had been sued by the Co-Administrator of the Estate. The dispute involved two warring Co-Administrators. In those circumstances the Advocates could only have been acting for the client personally.

(a) Enlargement of time

15. In the case of *Nicholas Kiptoo Arap Kori Salt -vs-independent Electoral And Boundaries Commission And 7 Others* [2014] eKLR the Supreme Court of Kenya laid down the principles governing the exercise of discretion in application for extension of time as follows:-
 - “(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 the discretion to extend time is a consideration to be made on a case to case basis.
 - (4) Whether there will be any prejudice suffered by the Respondent if the extension is granted.
 - (5) Whether the application has been brought without undue delay and
 - (6) Whether in a certain cases like election petitions public interest should be a consideration for extending time.”



16. In this case the impugned ruling was delivered on 24th February 2020. The application seeking enlargement of time was not made until May 2021 more than one full year after the ruling was delivered. This in my view amounts to inordinate delay. As such I am not inclined to allow for extension of time to file a reference.

(c) Value of the subject matter

17. The client challenges the value given to the subject matter by the Taxing Officer being Kshs. 8,500,000. The client relies upon the ruling delivered by Hon. Justice A. Muchelule (as he then was) in which he claims that the subject matter was valued at Kshs. 100,000. In the said judgement the Hon. Judge states as follows:-

“....Both parties field their submissions which I have considered. I note that both administrators are in agreement that the property be sold and the proceeds distributed among the beneficiaries. Although the applicant accused the respondent of non-cooperation and refusal to sign the transfer documents, it is the respondent’s position that he wished to sell the property for a better price than what was being proposed by the applicant. I have seen the valuation report, the current market value of the property is Kshs. 8,600,000.00. I have also looked at the sale agreement by the applicant in which the property was to be sold for Kshs. 8,500,000.00. Although the respondent produced a valuation report valuing the property at Kshs. 8,600,000.00 he did not demonstrate that there was an available buyer for the price in the valuation report. The applicant on the other had has a ready buyer, willing to buy the property for a decent amount of only Kshs. 100,000/= less than the market price. [own emphasis]. I do not see the point of putting of the sale any longer in anticipation of a future buyer who is not known....”

18. The Client is misinterpreting the ruling of the Judge. In my understanding the Hon. Judge did not by this ruling give the value of the subject matter as Kshs. 100,000. The Judge accepted the current market value as Kshs. 8,600,000, he merely stated that there was a buyer ready and willing to buy the property at Kshs. 100,000 less than the market value (i.e at Kshs. 8,500,000).

19. On the whole I find no merit in the application dated 18/5/2021. The same is hereby dismissed in its entirety with costs to the Advocate.

20. On the other hand having perused the Ruling delivered by the Taxing Master on 24th February, 2021 I am satisfied that the Taxing Master considered each item in the Bill of costs, in reaching the conclusion that she did. I do not find any error evident in the said Ruling. The Notice of Motion dated 7th May, 2021 filed by the Advocate is allowed in terms of Prayers (1) and (2)

DATED IN NYERI THIS 4TH DAY OF JULY, 2024.

.....

MAUREEN A. ODERO

JUDGE

