



**Keyonzo v Olenja (Miscellaneous Application E066 of 2020)
[2024] KEHC 9664 (KLR) (7 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS APPLICATION E066 OF 2020
SN RIECHI, J
AUGUST 7, 2024**

BETWEEN

S.M. KEYONZO APPLICANT

AND

CHARLES KHAKALI OLENJA RESPONDENT

JUDGMENT

1. This a ruling on two applications that were consolidated. The first application is an application dated 16.2.2023 by client on review of judgement of taxing officer and the second application is dated 16.2.2023 by Advocate seeking judgement to be entered against the client.
2. In the application for dated 16.2.2023 the applicant/client Charles Khakali Onjenja is seeking orders that:
 1. That the Honourable Court be pleased to review the decision of the Honourable Deputy Registrar issued through the ruling delivered on the 14th October, 2022.
 2. That pending the hearing and determination of this present Application this Honourable Court be pleased to grant interim orders of stay against further proceedings of this taxation, to wit, the execution and/or satisfaction of the Certificate of Taxation.
 3. That this Honourable Court be pleased to set aside the ruling of the Taxing Officer dated the 14th October, 2022.
 4. That this Honourable Court be pleased to re-assess the fees and/or award issued by the Honourable Deputy Registrar with respect to the relevant Bill of Cost by reason that the subject value applied to calculate the instruction fee was overturned and/or dismissed by the Court of Appeal as a hypothetical figure.



5. That in the alternative and without prejudice to the foregoing, this Honourable doth be pleased to remit the impugned items of the Bill of Costs to the taxing officer for review and/or reconsideration accordingly.
6. That costs of this application be provided for.
3. The application is premised on the grounds on face of it and supporting affidavit sworn by the applicant on even date.
4. The respondent/Advocate in response filed a ground of opposition dated 21st February 2023.
5. It is the applicant's case that on the 3rd February, 2023, the Court of Appeal rendered its decision on Civil Appeal Number 560 of 2019, which appeal arose from HCCC 55 of 2015 (O.S) the suit subject of the impugned Bill of Costs. The applicant stated that in the said decision, the Court of Appeal dismissed, sum of Kenya Shillings One Hundred and Forty-Eight Million One Hundred and Fifty Seven Thousand Four Hundred and Fifty Six and Fifty Cents (Kes. 148, 157, 456.50/-) as a hypothetical figure and that there was no demonstration and/or proof of its existence. The applicant referred to a certified copy of the said decision annexed to the application.
6. It is the applicant's case that the value of the subject matter applied in computing the instruction fees of the Respondent comprised of the figure of Kenya Shillings One Hundred and Forty Eight Million One Hundred and Fifty Seven Thousand Four Hundred and Fifty Six and Fifty Cents (Kes. 148, 157, 456.50/-) that was dismissed and/or overturned by the Court of Appeal.
7. It is applicant's case that the consequential effect of the decision by the Court of Appeal is that the award for costs demands reevaluation and/or reassessment as the value of the subject matter has been reduced by the value of Kenya Shillings One Hundred and Forty Bight Million One Hundred and Fifty-Seven Thousand Four Hundred and Fifty-Six and Fifty Cents (Kes. 148, 157, 456.50/-).
8. The client averred that the awarded costs cannot be allowed to stand because it will render the final decision fatally flawed as it shall be a determination predicated upon errors of principles and fact contrary to provisions of *the Constitution* and Statute. The client stated that upon dismissal of the aforementioned figure, the amounts computed under the Bill of Costs need to reevaluated because the instruction fees shall be altered and/or be revised.
9. The client averred further that the decision of the Court of Appeal was initially scheduled for delivery on the 4th November 2022 and thereafter on the 3rd February 2023. He referred to attached certified copies of the relevant notices. The client averred that the decision of the Court of Appeal was delivered on the 3rd February, 2023, during which period he had been taken ill and incapable of earnestly reviewing and issuing consonant instructions to his firm of advocates on record. The client referred to certified copies of medical transcripts to demonstrate medical attendance attached to the application.
10. The client averred that upon sufficient convalescence, he issued instruction to his current firm of advocates to file the present Application seeking the review of the decision of the Taxing Officer and/or reevaluation and reassessment of the Bill of Costs in the taxation cause. He deponed that the application has been filed without delay and it will not be prejudice of any party. He deponed further that following this decision, the entire taxation proceedings ought to be reviewed and/or reevaluated in order to abide by the finding of the Court of Appeal.
11. The respondent/Advocate in response raised grounds of opposition on the following grounds;



- i. There is no provision under the *Advocates Act* and the Advocates (Remuneration) Order for Deputy Registrars/Taxing Masters rulings on taxation to be reviewed by the Deputy Registrar/Taxing Master.
 - ii. The provisions of the *Civil Procedure Act* and the Civil Procedure Rules relating to review do not apply to taxations of Bills of Costs under the *Advocates Act* and the Advocates (Remuneration) Order.
 - iii. There are clear provisions under the *Advocates Act* and the Advocates (Remuneration) Order as to how a person aggrieved by the Deputy Registrar's ruling on taxation is to challenge the ruling.
 - iv. There is no error on the face of the record in the ruling on taxation and neither is there new and important matter which existed at the time the ruling was given and which the Applicant has now discovered, which the Applicant would wish to bring to the attention of the Deputy Registrar for the purpose of the review.
 - v. The Application is ill advised and misconceived.
12. The Advocate also filed a replying affidavit sworn on 23rd February 2023 in which he briefly stated that if the Respondent wished to file a Reference against the Deputy Registrar's decision on Taxation given on 14th October, 2022 to a judge in accordance with the provisions of Rule 11 of the Advocates (Remuneration) Order, he had every opportunity to do so, but he has not done so and the issue of him having been taken ill on 21st January, 2022 cannot be an excuse for him not having done so. He deponed that the Respondent wishes to use Orders 45 and 51 of the Civil Procedure Rules to approach the Deputy Registrar to review her decision on Taxation but the Civil Procedure Rules do not apply to Taxations of Bill of Costs.
 13. The respondent deponed further that the Respondent also wishes to use a Court of Appeal decision given on 3rd February, 2022 as the basis for seeking a review. This decision was not before the Deputy Registrar on 14/10/2022 when she made her decision and cannot be then used as a basis for review.
 14. Simultaneously, the respondent/ Advocates have filed an application dated 16.2.2023 seeking orders that;
 1. That judgment be entered for the Applicant against the Respondent in the sum of Kenya Shillings Six Million One Hundred and Fourteen Thousand, Nine Hundred and Eighty Seven and Seventy Six Cents (Kshs. 6,114,987/76) with interest thereon at fourteen per cent (14) per annum from 4th November, 2022 till payment in full.
 2. That the costs of this application be paid by the Respondent.
 15. The application is premised on the grounds on face of it and the supporting affidavit of the advocate.
 16. The respondent/client opposed the application through a replying affidavit dated sworn on 23rd February 2023.
 17. It is the advocate's case that the Advocate's/Client's Bill of Costs was taxed by Court on 4th November, 2022 in the sum of Kshs. 6,114,987/76. That the Certificate of Taxation has not been altered or set aside and the said sum is the amount due and owing from the Respondent to the Applicant. The Advocate stated further that the Certificate of Costs remains unsatisfied and judgment should be entered for the Applicant against the Respondent in the said sum.
 18. From court record the client did not file a response to he Advocates application.



19. By consent of parties, both applications were canvassed by way of written submissions. The Advocate filed written submissions dated 13th February 2024 and the client filed written submissions dated 28th March 2024. In their submissions the parties reiterate the averments in their affidavit and I don't need to reproduce the same. I have carefully analyzed and considered the submissions and case law in support.
20. This court will determine the two applications together and from the applications, respective affidavits and submissions, the main issues arising for determination 3hare;
- i. Whether or not this court should review and or set aside orders of the Deputy Registrar issued through ruling delivered on the 14th October,2022.
 - ii. Whether or not this court should entered Judgement for the Advocate against the client for a sum of Kshs.6,114,987/6 with interest.
21. On the first issue the legal provision governing lodging objection to a Taxing Master's decision is contained in Clause 11 of the Advocates Remuneration Order which stipulates that: ‘
- (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) far 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.’
22. In the instant application filed by the client and dated the 16th February ,2023 the client seeking to review and or set aside, the Taxing Master's Ruling dated 14th October, 2022 as well as this court to re-assess the fees and/or award issued by the Deputy Registrar,on the ground that the subject value applied to calculate the instruction fees was overturned and/or dismissed by the Court of Appeal.
23. I have analyzed the client's application and In so far as the Applicant raises pertinent issues in the instant application, I opine that this is not the right forum for it as it involves reviewing of a Ruling and not an administrative function. It is my considered view that it ought to have filed a Reference as stipulated in Rule 11 of the Advocates (Remuneration) Order instead of seeking for review of the Taxing Master's decision under Order 45 of the Civil Procedure Rules. To my mind the Application as it is, is defective. I find that the Applicant has not met the threshold set for review by this Court. In the circumstance, I will decline to review the Order emanating from the Ruling of the Taxing Master dated the 16th February,2023. Since I have declined to review the said Ruling and order emanating therefrom, I will not proceed to handle the issue of stay of execution of the said Ruling.



24. I note that although the applicant has premised his application on section 45 of the *Advocates Act*, it appears that what he intends to achieve is a variation of the ruling by the Taxing Master on the respondent's bill of costs. A challenge to the decision of the Taxing Master properly takes the form of a reference under paragraph 11 of the Advocates Remuneration Order. In making such reference, a party is required to show that its case meets the principles set in jurisprudence for interference with the exercise of discretion by the Taxing Master. These principles were succinctly enunciated in *First American Bank of Kenya v Shah and Others* [2002] E.A.L.R. 64 at 69 in which Ringera J (as he then was) observed as follows:

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... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him..."

25. In associating myself with the parameters set in the case of *James Wangalwa & Another V Agnes Naliaka Cheseto* (2012) eKLR, I find that since the taxed costs have not been entered as a judgement of the court, execution has not been put in motion hence there is no substantial loss the Applicant stands to suffer. I do hereby direct that the applicant files an appropriate application by way of reference within 60 days from today.

26. On the 2nd issue whether this court should enter judgment for the Advocate against the client sum of Kshs.6,114,987/76 with interest. I find that the client has raised pertinent issue in regard to the amount awarded and the same can only be entered as a judgement once issues raised by client are heard and determined on merit. I hereby decline to issue orders in respect to Advocates application dated 16.2.2023.

DATED AT NAIROBI THIS 7TH DAY OF AUGUST 2024.

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S. N. RIECHI

JUDGE

