



Kitindo Musembi & Company Advocates v Mbevi (Civil Miscellaneous Application E680 of 2023) [2024] KEHC 12747 (KLR) (Civ) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E680 OF 2023
AN ONGERI, J
OCTOBER 17, 2024**

BETWEEN

KITINDO MUSEMBI & COMPANY ADVOCATES APPLICANT

AND

PATRICK MUSYOKI MBEVI RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 18/8/2023 brought under Article 159 of *the Constitution*, Section 1A, 1B, 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, Order 50 rule 6 of the Civil Procedure Rules, 2010, Section 48 of the *Advocates Act*, Rule 11 of the Advocates (Remuneration) Order 2009 and all other enabling provisions of the law seeking the following orders;
 - i. That this matter be certified urgent and heard ex-parte in the first instance.
 - ii. That this honourable court be pleased to set aside the ruling of the Deputy Registrar C. Ng'ang'a delivered on 11th August 2023 in the matter of the advocate-client bill of costs dated 25th April 2023 between the aforementioned parties.
 - iii. That this honourable court be pleased to order that the advocates-client bill of costs dated 25th April 2023 be placed before another taxing master for taxation.
 - iv. That the costs of this application be provided for.
2. The application is based on the following grounds;
 - i. That the applicant filed an advocate/client bill of costs under schedule 5 part II being subject of an election under paragraph 22 of the Advocates Remuneration Order.



- ii. That by a ruling dated 11th August 2023 the honourable Deputy Registrar C. Ng'ang'a dismissed the advocate/ client bill of costs for the reason that the court had no jurisdiction to tax the bill of costs dated 25th April 2023 as per the provisions of Section 45(6) of the Advocates Remuneration Order.
 - iii. That the taxing master erred in fact and in principle by dismissing the bill of costs and failing to tax item numbers 2 – 35 of the applicant's bill of costs and the disbursements listed thereof.
 - iv. That the ruling delivered on 11th day of August 2023 is wholly flawed and unjust for being founded on the wrong principles of law.
 - v. That due to the aforesaid and in the interest of justice and fairness the certificate of taxation and all consequential orders must be set aside.
 - vi. That the honourable Deputy Registrar C. Ng'ang'a misdirected herself by dismissing the applicant's bill of costs without any supporting documents.
 - vii. That the honourable Deputy Registrar took into consideration issues that she shouldn't have and failed to consider issues she ought to have in the circumstances.
 - viii. That no prejudice will be occasioned to the respondent if the orders sought herein are granted.
 - ix. That it is in the interests of justice and fairness that this honourable court do grant the prayers sought herein.
3. The respondent filed a replying affidavit sworn on 18/12/2023 as follows;
4. That he is an Advocate of the High Court of Kenya practicing as such in the law firm of Kiluva A. K. & Co. Advocates on record and with conduct of this matter on behalf of the Respondent and therefore competent to make and swear this Replying Affidavit.
 5. That he has read and understood the contents and import of the Chamber Summons application dated 18/08/2023 together with the Affidavit in support thereof sworn by the Advocate Applicant and he replies as hereunder:
 6. That first and foremost, the present Application is un-merited because the Advocate-Applicant herein has NOT candidly or openly, frankly, forthrightly, and straightforwardly explained or stated or demonstrated or pointed-out how the Taxing Master erred, or misdirected herself or wrongly applied the applicable principles or did not rightly employ the discretion bestowed upon her in the decision dated 11/08/2023.
 7. That additionally, the Advocate-Applicant herein has not authoritatively drawn to the attention of this Honourable court the flaws, the wrongs, the unjustness or the un-reasonableness or un-tenability of the decision dated 11/08/2023 by the Taxing Master.
 8. That further, the record of the entire Miscellaneous Application is in-complete because the Advocate-Applicant herein has deliberately not attached the Respondent's Replying Affidavit sworn on 08/06/2023 in opposition to the Bill of Costs so as to enable this Court, which is now sitting as an Appellate Court, to make a just and fair determination of the matter once and for all (attached herein and marked annexure .AKK-he finds the said Replying Affidavit sworn on 08/06/2023).



9. That by dint of the foregoing, all factors duly considered, there is no mistake, wrong or error or flaw(s) in the Taxing Master's Ruling/ Decision of 11/08/2023 and he urges this Honourable court to confirm/ affirm the same in the interest of justice:
 10. That furthermore, it has been the practice of this Honourable court to dispense substantive justice and the Advocate Applicant was afforded a Fair Hearing before the Taxing Master.
 11. That he swears this affidavit in total opposition to the Chamber Summons Application dated 18/08/2023 and deny all other averments in the affidavit of Advocate Applicant sworn on the same date save as is hereinabove expressly admitted.
 12. That in view of the above, it is in the interest of justice that the Chamber Summons Application dated 18/08/2023 be dis-allowed with costs.
 13. That what is deponed herein is true to the best of my knowledge, belief and understanding.
4. The parties filed submissions as follows;
 5. Respondent:- It is trite law that Jurisdiction is everything as guided by the locus classicus and celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [19891 KLR 1 where Justice Nyarangi of the Court of Appeal held that (in paraphrase) Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. As pertains the Chamber Summons application dated 18/08/2023, this court, being the High Court of Kenya, is sitting on its appellate jurisdiction.
 6. It is also trite law that, in our current adversarial court system, parties are bound by their pleadings and it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality. Each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made and the court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. The parties themselves set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.
 7. By dint of the above position of our law, the Applicant in the Chamber Summons application dated 18/08/2023 is bound by its contents together with the Affidavit in support thereof. Indeed, to show how serious the doctrine of pleadings is, the Respondent herein responded to the specific issues raised in the Chamber Summons application dated 18/08/2023 as drawn and filed in court. The Court is also bound by the same as it is.
 8. The Chamber Summons application dated 18/08/2023 is opposed by the Respondent vide the Replying Affidavit dated 18/12/2023. It is the Respondent's position that the Application is un-merited, because the Advocate-Applicant has NOT candidly or openly, frankly, forthrightly, and straightforwardly explained or stated or demonstrated or pointed-out how the Taxing Master erred, or misdirected herself or wrongly applied the applicable principles or did not rightly employ the discretion bestowed upon her in the decision dated 11/08/2023. Additionally, that the Advocate-Applicant has not authoritatively drawn to the attention of this Honourable court the flaws, the wrongs, the unjustness or the unreasonableness or urn-tenability of the decision dated 11/08/ 2023 by the Taxing Master.



9. It is also the Respondent's contention in the Replying Affidavit that, the record of the entire Miscellaneous Application is in-complete because the Advocate-Applicant deliberately did not attach the Respondent's Replying Affidavit sworn on 08/06/2023 in opposition to the Bill of Costs so as to enable this Court, which is now sitting as an Appellate Court, to make a just and fair determination of the matter once and for all. To this effect the Respondent attached as annexure AKK-I the said Replying Affidavit sworn on 08/06/2023.
10. It is thus the Respondent's position that, all factors duly considered, there is no mistake, wrong or error or flaw(s) in the Taxing Master's Ruling/ Decision of 11/08/2023. Ultimately, the Respondent urged this Honourable court to confirm/ affirm the same in the interest of justice, that is, the Taxing Master's ruling.
11. From the court's record, the Applicant did not file a Supplementary/ Further Affidavit to challenge the above averments in the Replying Affidavit. As such, the Replying Affidavit is un-controverted.
12. It is trite law that, he who alleges must prove. This is the import of Section 107 of the Evidence Act Chapter 80 of the laws of Kenya which provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
13. It is thus trite that in civil cases like the one before the court, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue. Sections 109 and 112 of the Evidence Act, Chapter 80 of the laws of Kenya provide for the evidential burden of proof which binds this court.
14. On the standard of proof, the Black's Law Dictionary, (9th Edition, 2009) at page 1535 defines 'the standard of proof' as '[t]he degree or level of proof demanded in a specific case in order for a party to succeed.' The standard of proof in civil cases is proof on the balance of probability.
15. The defendant submitted that, as pointed out in paragraphs 3 & 4 of the Replying Affidavit in opposition to the present Application, there is no mistake, wrong or error or flaw(s) in the Taxing Master's Ruling/ Decision of 11/08/2023. The Taxing Master provided the reason(s) behind her ruling.
16. Further that as submitted herein above, this court is sitting as an appellate court. The Applicant has not denied that he had deliberately omitted the Respondent's pleadings before the Taxing Master notably the Replying Affidavit sworn on 08/06/2023 which is now in this court's record having been availed by the Respondent. We have carefully perused all the annexures in the Affidavit in support of the Chamber
17. Summons application dated 18/08/2023 and note that the record as filed by the Applicant in this court is bereft of the following core and/or critical documents notably:
 - i. Notice of Objection to the Taxing Master's Ruling as required under Rule 11(1) of the Advocates Remuneration Order.
 - ii. Certified copy of the proceedings before the Taxing Master. The Applicant did not even bother to request for the same since there is no letter to that effect addressed to the Taxing Master.
 - iii. Certified copy of the Ruling of 11/ 08/2023.



18. In view of the in-controvertible fact that, this court is sitting on Appellate Jurisdiction and the Applicant in the Chamber Summons application dated 18/08/2023 did NOT file a Notice of Objection under Rule 11(1) of the Advocates Remuneration Order and (he) also did not avail certified copies of the proceedings before the Taxing Master, the Chamber Summons application dated 18/08/2023 is in-competent and can only be struck out with costs.
19. Be the above as it may, even if the application was properly lodged in court, it is un-merited, because there is no mistake, wrong or error or flaw(s) in the Taxing Master's Ruling/Decision of 11/08/2023.
20. That the Advocate — Applicant was afforded a Fair Hearing before the Taxing Master and substantive justice commends that the Chamber Summons Application dated 18/08/2023 be dis-allowed with costs.
21. The sole issue for determination is whether the taxing master was right in dismissing the bill of costs.
22. The taxing officer found that there was a written consent signed by both parties and dismissed the bill of costs.
23. The taxing master relied on the case of *Kakuta Maimai Mahise V Peris Pesi Tobiko & 2 others* (2017) e KLR.
24. In the current case, the Taxing master found that there was an instruction note signed by both parties as follows;

“I Patrick Musyoki Mbevi hereby instruct the firm of Kitindio Musembi & CO. Advocates. I undertake to pay their fees at 25% of the damages recovered on my behalf and disbursements i.e V.A.T all stationery, photocopies, transport, telephone, emails and to attend to service of routine documentation and any other incidentals thereof.

I confirm I have not instructed any other advocate.

I also give them authority to negotiate an out of court settlement on my behalf where necessary”

On the 14th February 2023, the firm of Isinta & CO. Advocates representing the defendant in MCC E419 of 2021 wrote a letter to the Executive Officer Milimani Commercial Court requesting the court to record a consent order in the following terms;

By consent

1. The matter be and is hereby marked settled at ksh.650,000.
 2. That each party to bear its own costs.
 3. That in default execution to issue upon expiry of 30 days.
25. The applicable law on agreement on fees between an advocate and client is section 45 of the [Advocates Act](#).
 26. Section 45 (1) of the [Advocates Act](#) in this respect provides as follows:-
 - “(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—



- (a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;
- (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;
- (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf".

27. I find that the taxing master was right in dismissing the bill of costs.

28. There was an agreement stating that each party to bear its own costs.

29. The agreement is valid and binding on the parties since it is in writing and signed by both parties.

30. I dismiss the reference dated 18/8/2023 with no order as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

