



Kale Maina & Bundotich, Advocates v Coastal Kenya Enterprises (Miscellaneous Civil Application E202 of 2022) [2024] KEHC 12040 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12040 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E202 OF 2022
JWW MONG'ARE, J
OCTOBER 4, 2024

BETWEEN

KALE MAINA & BUNDOTICH, ADVOCATES ADVOCATE

AND

COASTAL KENYA ENTERPRISES CLIENT

RULING

Introduction And Background

1. On 1st December 2022, the court's Deputy Registrar delivered a ruling in respect of the Advocate's Bill of Costs in which she taxed the same at Kshs. 632,818.00/= and a Certificate of Taxation was issued that was subsequently adopted as a decree of the court. The Client has now filed the Notice of Motion dated 22nd June 2023 under sections 1A, 1B & 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) seeking to revise the decree by taking into account a sum of Kshs. 434,200.00/= as monies already paid to the Advocates and therefore deductible from the Certificate of Costs. This application is supported by the grounds on its face and the supporting affidavit of the Client's director, Swaraj Singh Bhogal, sworn on 23rd June 2023. It is opposed by the Advocates through the Notice of Preliminary Objection dated 20th July 2023 ("the Objection"). The court directed that the Objection be disposed by way of written submissions, which are now on record and which Objection is now the subject of the court's determination.
2. The Advocates state in the Objection that the Court lacks jurisdiction to grant any of the Orders sought as its jurisdiction lapsed after 14 days from the date when the Deputy Registrar rendered her Ruling on the Bill of Costs. That a dissatisfied party from a taxed Bill cannot file an application for review of the ruling of a Taxing Master vide a miscellaneous application and that the Client has failed to file a reference within the timelines prescribed by the law under Para. 11 of the Advocates Remuneration



Order("the Order"). As such the Advocates contend that the present application is incurably defective and amounts to a grave abuse of the court process and must be struck out with costs.

3. On its part, the Client submits that the present application is not a reference from the decision of the Deputy Registrar and admits that the time for filing such a reference has passed. It contends that it never intended to challenge the decision of the Deputy Registrar but, upon coming across proof that the Advocates had been paid colossal sums of money, which evidence it did not have at the time of arguing the Bill of Costs, it has decided to approach the Court to do justice and that it has explained in its supporting affidavit why it did not have the evidence and the explanation is plausible.
4. The Client submits that there is no provision in the Civil Procedure Rules or the *Advocates Act* that give the Court the procedure to adjust a Decree emanating from a certificate of taxation especially where it is shown that the advocates have already been paid sums of money. That when such circumstances exist, nothing stops the court from exercising its inherent powers to do justice by issuing a Decree less the amounts already shown to have been paid and that such justice is called for, even more, where the Advocates have fraudulently, with the intention to unjustly enrich themselves fails to disclose such a payment. It submits that such an advocate is in complete violation of his duty under sections 1A and 1B of the *Civil Procedure Act* and that not mentioning that such conduct is conduct unbecoming of an advocate and can lead to his being sanctioned by the Advocate Disciplinary Committee under the *Advocates Act*.
5. The Client submits that by granting the orders sought the Court will put right what would otherwise amount to great injustice and that by the Objection, the Advocates are simply telling the court to look the other way and aid them in committing what is patently a fraud and professional misconduct. The Client submits that the Court can at this stage order the matter to be returned to the Deputy Registrar to take into consideration the evidence that was not before him but this would be lengthening of the process which would come at a cost and also would take time. That deciding the issue at this stage would save time and would not prejudice the Advocates in any way.
6. The Client presents that the Advocates are attempting to avoid swearing an affidavit in which they have the choice of either swearing the truth of the matter that they have been paid colossal sums of money, or swear a false affidavit denying having been paid. That the Objection amounts to abuse of court process as the Advocates are trying to have the court aid them in getting more money than they deserve and also cover their fraudulent conduct.

Analysis and Determination

7. I have carefully considered the application and the responses filed thereto together with the rival submissions by the parties. I note that the Client has proffered that its application seeking a review of the Certificate of Costs and decree is not a reference. However, the Court of Appeal, in *Otieno, Ragot & Company Advocates v Kenya Airports Authority NRB CA Civil Appeal No. 39 of 2017 [2021] eKLR* held that a Certificate of Costs is conclusive as to the amount due unless the same is altered or set aside by way of a reference. Therefore, the Client cannot escape the fact that its application for review is a reference in disguise as it seeks to alter and set aside the Certificate of Costs issued and that this can only be done through a reference. This being the case and the Client having admitted that it is already time barred from filing a reference and no application to enlarge time was sought by it as provided under Paragraph 11 (4), its application cannot be sustained. The effect of such non-compliance in adhering to the timelines for filing a reference and not seeking leave to file it out of time is fatal as has been stated by this court and the Court of Appeal in a plethora of decisions (See *Charles Onyinge Abuso vs. Kenya Ports Authority & Another [2018] eKLR* and *Mario Rossi v Salama Beach Hotel Limited [2018] eKLR*).



8. For the above reason alone, the Advocates' Objection succeeds and in my view it will be moot to discuss the other grounds of the Objection.

Conclusion and Disposition

9. In the foregoing, I find that the Client's Notice of Motion dated 22nd June 2023 is incompetent and is hereby struck out with costs to the Advocates assessed at Kshs. 20,000.00/=.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 4TH DAY OF OCTOBER 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Obiri for the Advocate/Respondent.

Mr. Mungu for the Client/Applicant.

Amos - Court Assistant

