



**Kenyariri & Associates Advocates v Kenyariri (Miscellaneous Case E002 of 2021)
[2023] KEHC 33 (KLR) (Commercial and Tax) (13 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 33 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CASE E002 OF 2021
A MABEYA, J
JANUARY 13, 2023**

BETWEEN

KENYARIRI & ASSOCIATES ADVOCATES ADVOCATE

AND

JAMES BICHAGE KENYARIRI CLIENT

RULING

1. Before court is an application dated 17/6/2022. It was brought under section 51(2) of the *Advocates Act*, Order 51(1) of the Civil Procedure Rules and sections 1A, 1B and 3A of the *Civil Procedure Act*.
2. The application sought orders that judgment be entered in favor of the applicant as against the respondent for Kshs 501,215/= as indicated in the certificate of taxation issued on 13/6/2022 and that the applicant be at liberty to execute.
3. The grounds for the application were set out on the face of it and in the supporting affidavit of dr Christopher Orina Kenyariri dated 17/6/2022. It was contended that the applicant's bill of costs was taxed at Kshs 501,215/= on 23/5/2022 being costs for the advocate-client.
4. That the certificate of taxation annexed as COK1 and issued on 13/6/2022 was final as per section 51(2) of the *Advocates Act*. That the respondent was truly indebted to the applicant thus the applicant was entitled to execute in recovery of the taxed costs.
5. The application was opposed *vide* the replying affidavit of James Bichage Kenyariri sworn on October 24, 2022. He contended that he had lodged an appeal against the taxation *vide* a memorandum of appeal dated 4/10/2022 and an application to review, vary or set aside the taxation in case number HCCCOMMMISC/E763/2022.



6. That the matter was to be heard on 8/12/2022. That his application for review and setting aside of the taxation was merited and had a high chance of success.
7. That the respondent had challenged the taxed amount and there was need to stay execution pending the determination of the appeal which similarly had a high chance of success as it contested the instruction fees of Kshs 12,479,177.70 against his proposed fees of Kshs 1.2 million. That if execution proceeded, he would suffer great prejudice and execution ought not to proceed when the taxed amount was an issue in contention before court. That the applicant would not suffer any prejudice.
8. The court has considered the record. The main issue for determination is whether the certificate of taxation herein ought to be adopted as an order of the court and execution to issue.
9. The court notes that the applicant had filed a similar application dated 13/8/2021. *Vide* a ruling dated 28/1/2022, the court set aside the certificate of taxation therein on grounds that the respondent's replying affidavit was not considered by the taxing master and ordered that the taxation be held afresh before a different taxing master.
10. The bill of costs was considered afresh by hon EM Nyakundi who similarly found the taxed the amount at Kshs 501,215.55 *vide* ruling delivered on 23/5/2022 which is now the subject of this suit.
11. The applicant averred that he was aggrieved by that ruling and has appealed against it in HCCCOMMMISC/E763/2022. However, the pleadings therein were not produced before this court and the respondent admitted to not having served the applicant with that application as at the time he swore the replying affidavit dated October 24, 2022. There was however produced an affidavit of service in that matter indicating that the respondent was served with an application on October 24, 2022 *vide* his email.
12. I note that under section 107 of the *Evidence Act*, cap 80 of the Laws of Kenya, it is he who alleges that must prove. The respondent alleges that he has challenged the taxation *vide* a memorandum of appeal dated 4/10/2022 and an application to review, vary or set aside the taxation in case number HCCCOMMMISC/E763/2022. There is no such evidence before this Court. It is also not clear whether any reference to the taxation was ever lodged and if so, when.
13. At the same time however, there was no denial on oath by the applicant that there was a possibility that the certificate of taxation had been challenged in some proceedings that are not before this court.
14. In the circumstances, so that there is no confusion before those other proceedings are determined, I am reluctant to allow the orders sought at this time. I stay the matter in the interim and give further directions as follows: -
 - a. This matter be mentioned on 9/2/2023 together with HCCCOMMMISC/E763/2022 for further directions.
 - b. The costs to await the final ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JANUARY, 2023.

A. MABEYA, FCIArb

JUDGE

