



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC CASE NO. 183 OF 2019

MUIRURI & WACHIRA ADVOCATES.....APPLICANT

- VERSUS -

NICOLA FARMS LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The Ruling herein is in respect of two Applications dated the **17th March 2021**, filed by the Applicant and the one dated the **18th March 2021**, the latter which is filed by the Respondent, respectively.
2. The Notice of motion application dated the **17th March 2021**, and which is filed by the Applicant/Advocates seeks the following Reliefs;
 - i. The Honourable court be pleased to enter judgment for the Applicant/Advocates against the Respondent for the sum of Kes.4, 999, 281.92/= (4,999,281.92) as it appears in the certificate of taxation dated the 1st of march 2021.
 - ii. The Respondent do pay the Applicant/Advocate interest on the certified costs at the rate of 14% per annum from the 27th February 2021, until payment in full.
 - iii. Costs of this application be assessed at kes.3,000/= payable by the Respondent
3. The subject application is supported by the affidavit of Samuel Wachira Gichuki, which is sworn on the **17th March 2021**, and to which the deponent, has attached various annexures inclusive the bill of costs and the certificate of taxation, the latter which was issued and signed on the 1st of March 2021.
4. The second Application, which has been filed by the Respondent and which is dated the **18th March 2021**, seeks the following Reliefs;
 - i.spent
 - ii. An order of injunction be and is hereby issued against the Respondent from proclaiming, auctioning, selling or in any way whatsoever, dealing with the Applicant's (Respondent) property pending the hearing and determination of the instant application.
 - iii. An order of injunction be and is hereby issued against the Respondent from proclaiming, auctioning, selling or in any way whatsoever, dealing with the Applicant's (Respondent) property pending the hearing and determination of the reference against the taxing master decision dated the 25th February 2021.
 - iv. Costs of this application be provided for.
5. The Notice of Motion application herein, that is the one dated the 18th March 2021, is supported by the affidavit by one June Wahinya Karuga, who avers that same is a director of the Respondent and that same is authorized to swear the affidavit on behalf of the Respondent.
6. The subject matter came up before the Hon. Justice K. Bor, Judge on the 1st of July 2021, when an order was made that the two application shall be canvassed and/or otherwise be heard together. Besides, it was also ordered that the two applications be disposed of by way of written submissions.

7. Owing to the foregoing, the parties herein have since proceeded to and file their respective submissions, touching on and/or concerning the two applications.

DEPOSITIONS BY THE PARTIES

The Applicant's case

8. The Applicant herein which is a firm of Advocates have averred that the Respondent herein retained and/or instructed same on or about the year 2016, with a view to carrying out the conveyance pertaining to and in respect to property known as Nginda/Samar/Block 287.

9. The Applicant further aver that pursuant to and in line with the instructions received from the Respondent, same proceeded to and rendered legal services to the Respondent and thereafter same forwarded a fee note in the sum of kes.5, 027, 881.92/= only, to the Respondent for the purposes of payment.

10. However, the Applicant avers that despite forwarding the fee note for purposes of attention and consideration by the Respondent, the Respondent herein failed, neglected and/or otherwise refused to liquidate and/or settle the fee note.

11. Owing to the foregoing, the Applicant contends that same was constrained to and proceeded to craft a bill of costs and thereafter was lodged before this honourable court for purposes of taxation.

12. It is the applicant further position, that the advocate's/ client bill of costs, which was filed, was thereafter taxed and certified in the sum of kes.4, 999, 281.92 only, vide Ruling rendered on the 25th February 2021.

13. Following the taxation of the Advocate client bill, the Applicant herein proceeded to and extracted the certificate of taxation, confirming the amount that was dully and lawfully certified.

14. It is similarly the applicants position that after the extraction of the certificate of taxation, the same was forwarded to the Respondent under cover of the letter dated 1st March, 2021 and in respect of which the Applicant sought for the liquidation of the decretal sum.

15. Never the less, the Respondent herein failed to pay and/or service, the amount which was certified to be due and owing.

16. Consequently, and as a result of the failure, the applicant herein, was therefore constrained to file the subject application, in respect of which, the applicant seeks the entry and/or endorsement of judgment in terms of the certificate of taxation.

The Respondent's case

17. On her part, the Respondent herein does not deny and/or dispute having engaged and/or instructed the applicant law firm, to carry out and/or undertake conveyance in transaction for and on her behalf, in respect of L.R No. Nginda/Samar/Block 287.

18. It is the Respondent's further averment, that even though the applicant worked for her the fees by the applicant are exaggerated.

19. The Respondent confirms that a bill of costs was lodged and/or presented by the applicant and which bill was thereafter subject to taxation at the instance of the applicant.

20. It is the Respondent's further contention, that the bill of costs, was taxed and/or certified in the sum of kes.4, 999, 021.92 only.

21. The Respondent states that the taxation of the bill was erroneous and in any event same felt aggrieved. In this regard, the Respondent avers that same instructed her advocate to file a notice of objection and thus lodged a notice of objection thereby indicating her desire to appeal/filed Reference.

22. It is the Respondent further position, that following the taxation, same was aggrieved and in this regard the Respondent filed a notice of objection to taxation. For clarity, the notice of taxation was lodged with the registrar on the 27th February 2021.

23. Nevertheless, even though the Respondent has averred that same has filed a reference. However, no such reference has been filed and/or lodged to date.

24. On the other hand, the Respondent has also filed another Application and in respect of this application, the Respondent now seeks for an order of temporary injunction.

25. It is the Respondent's further averment that unless the Applicant herein is enjoined, the Respondent's properties are bound to be proclaimed, attached, alienated and/or otherwise sold, towards the liquidation of the taxed costs.

26. In the premises, whilst opposing the application by the applicant, the Respondent herein seeks leave of the court to have interim orders of injunction, to be granted in favor of himself and another.

SUBMISSIONS BY THE PARTIES

27. Following the directions which were granted by the honourable court, the parties herein proceeded to and filed their respective submissions. In this regard, the Applicant filed his submissions on the 30th June 2021, whereas the Respondent filed her submissions on the 18th June 2021, respectively.

28. The two sets of submissions, filed by the parties herein are on record and I have reviewed same and taken into account the two application, as well as the contents of the affidavits on record.

ISSUES FOR DETERMINATION

29. Having reviewed and examined the two Applications on record and having perused the submissions filed by and/or on behalf of the parties, I come to the conclusion that the following issues are worthy for determination.

i. Whether the notice of motion application dated the 18th March 2021, which on the face of it has been brought pursuant to order 22 Rule 51 & 52 and order 40 respectively, is competent.

ii. Whether the honourable court has jurisdiction to grant an order of temporary injunction to restrain execution of a lawful court order and/or decree.

iii. Whether the Respondent has filed and/or lodged any reference challenging the taxation carried out on the 25th February 2021.

iv. Whether the certificate of taxation has been set aside and/or otherwise varied.

v. Whether the Applicant is entitled to judgment in line with Section 51 (2) of the Advocates Act.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

30. As pertains to the first issue herein, it is worthy to note that the provisions of which an application is premised and or founded, are important, in determining whether the application is competent or better still, whether the application has met the competency threshold.

31. Before venturing to ascertain whether the subject application by the Respondent is competent, it is imperative to reproduce the relevant sections pursuant to which same has been premised.

32. In this regard, it is worthy to reproduce the provision of Order 22 Rule 51 & 52 of the Civil Procedure Rules, which provided as hereunder;

“Objection to attachment [Order 22, rule 51.]

(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.

(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.

(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties

52. Stay of execution [Order 22, rule 52.]

Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”

33. Other than the foregoing provision, the subject application has also been anchored on the provision of **Order 40 Rule 1 & 2 of the Civil Procedure Rules**, which provide as hereunder;

1. Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

(2) *Injunction to restrain breach of contract or other injury* [Order 40, rule 2.]

(1) suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

34. From the reproduction contained in the preceding paragraphs, it is evident and/or apparent that the provisions of **Order 22 Rule 51 & 52 of the Civil Procedure Rules** relate to and/or concerns objection to attachment, which are commenced by an objector, against the attachment of the objector's property, founded on a judgment which does not relate to the objector.

35. However, in the instant case there is no attachment that has since been commenced and which affects the properties of a third party, namely, an objector, who is therefore capable of lodging and/or taking out the objection proceedings. Clearly, the invocation of Order 22 Rule 51 & 52 of the Civil Procedure Rule, is misadvised.

36. In any event, the Respondent herein was a party to the subject proceedings from the onset and to the extent that same was and has been a party, same cannot commence objection proceedings in her own cause.

37. Objections proceedings aside, the subject application has also been brought on the basis of order 40 Rule 1 & 2 of the Civil Procedure Rules, which relate to and/or concern the grant of temporary injunction, for purposes of preserving and/or conserving the status of a property, which is in dispute, pending the determination of the suit.

38. In my humble view, an application for temporary injunction, grounded and/or premised on the provisions of Order 40 Rule 1 & 2 of the Civil Procedure Rules, envisaged the existent of a suit, filed by the applicant and upon which the application for injunction is thereafter grounded. For clarity, the suit can be commenced either by Plaint, counter claim, Petition or cross Petition, subject to the provisions of the applicable laws.

39. Nevertheless, in the instant case, it is worthy to note that the subject proceedings, were commenced by the applicant and hence it is only the applicant herein, who can attract precipitate and/or substantive relief and not otherwise.

40. At any rate, I hold the opinion and/or position that before a litigant can seek or apply for an order of temporary injunction, the parent suit, which anchors the application, must contain a prayer for permanent injunction, which prayer would thereafter provide the foundation for the application for temporary injunction, during the intervening period.

41. However, as pertains to the subject matter, I have noted herein before that there is no suit filed by the Respondent, upon which the application for temporary injunction, can be grounded. Consequently, the subject application seeking for temporary injunction ,albeit in the absence of a suit, has been made in vacuum.

42. Notwithstanding the foregoing, even if the Respondent would want to argue that the application for temporary injunction is based on the reference, I beg to point out that contrary to the confusing averments contained in the submissions by the Respondent, No reference has ever been filed and/or lodged. In fact, non-does exists, save for the speculation or the anticipation of the Respondent.

43. In the premises and taking into account the observations alluded to herein, it is my humble opinion that the Notice of motion application by the Respondent herein, does not meet the competency threshold and thus same is stillborn.

44. Having observed as much, I am alive to the argument that procedural technicalities should not defeat substance. But in my humble view, the issues deliberated hereinbefore go to the heart of the subject application and same is therefore vitiated.

45. In any event, I am also alive to the decision of the Supreme Court in the case of **Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR**, where the Supreme Court in quoting the decision in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** states:

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

[38]We are persuaded by this dictum of the learned judge. The notice of appeal ought to be served as provided by the law and all subsequent legal procedures followed.

46. In my humble view, litigants and advocates, who are not prepared to comply with and/or adhere with the procedure rule and indeed pay scant respect for same, should not be heard to cry wolf if the application of the law, drive same from the seat of justice. For clarity, in this case the Respondent cannot ignore the import and tenor of the provisions quoted and still anticipate to procure an order, which is contrary to the provisions involved.

ISSUE NUMBER 2

47. It is common ground that the application by and/or on behalf of the Respondent herein, is seeking an order of injunction to restrain and/or prohibit the execution of the Ruling and consequential orders issued by the taxing masters, following the taxation of the Advocate/ client bill of costs.

48. The question that must be addressed and/or answered is whether an order of injunction can issue to injunct a judicial decision, which was generated after hearing both parties.

49. However, before endeavoring to answer the foregoing question, it is worthy to note that the certificate of taxation, issued after taxation of advocate client bill of cost, cannot be the subject of execution. For clarity, such a certificate can only be executed after judgment has been entered and not otherwise.

50. In support of the foregoing observation, I find support in the decision in the case of professor **Tom Ojienda v County Government of Meru (2021) eKLR**, where the Honourable court stated as hereunder;

“When is a decision on taxation enforceable? Section 51 (2) of the Advocates Act provides.

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs” (emphasis added)

The provision tells me that a decision of the taxing master on taxation is not a final judgment cable of execution and the court, as defined by the Act, must be resorted to pronounce a judgment. I further read and understand the statute to say that a judgment would only be entered by the court where there is no contention as to retainer of the advocate. Where there is dispute as to retainer, the recourse is a suit in which retainer is to be proved.”

51. In respect of the subject matter, it is common ground that no judgment has been entered on the basis of the certificate of taxation and, in any event the entry of judgment, is the subject of the applicant’s application dated the 17th March 2021.

52. In the premises, even if an order of injunction could issue against a ruling and/or judgment, (*which I will address shortly hereafter*), it is sufficient to note that the current status of the subject matter, does not avail of any order or decree, that is capable of execution, so as to warrant the order sought.

53. Be that as it may, I am of the considered view that where a court of competent jurisdiction has granted an order or decree, any aggrieved party, in this case, the Respondent can only seek for an order of stay of execution, where appropriate either pending appeal or reference.

54. To my mind, an order of injunction cannot suffice to restrain execution of a lawful court judgment and/or decree, either in the manner sought by the Respondent or at all.

55. Having made the foregoing observations, it is my humble view that this honourable court has no jurisdiction to grant an order of temporary injunction, (which is distinct from an order of stay of execution), in the manner sought by the Respondent.

56. In any event, the subject proceedings were commenced pursuant to and in line with the Advocates Act and the Advocates Remuneration Order, 2009, the latter which contains a comprehensive code of regulations and/or rules, which apply to taxation proceedings.

57. In my humble view, the Advocates Remuneration Order 2009, and in particular Rule 11 thereof, which touches on the filing of the notice of objection to taxation and filing of a reference, provide a complete code to be applied and which does not admit of the invocation and reliance on the Civil Procedure Act as well as the Civil Procedure Rules, 2010.

ISSUE NUMBER 3

58. The Respondent herein, has sought for an order of injunction pending the hearing and determination of the reference against the taxing master’s decision dated 25th February 2021. In this regard, the prayer presupposes that a Reference has already been filed and/or there is one in existence.

59. In any event, the Respondent herein has also made submissions, whose import and tenor, is that a Reference has already been filed. However, the truth of the matter is that no such reference has been filed.

60. At any rate, it is worthy to note that the only document which has been filed is an omnibus notice of objection to taxation, which does not allude to the items of taxation, in respect of which the Respondent is aggrieved.

61. Suffice it to say, that the notice of objection to taxation alluded to herein may not legally anchor a valid reference, but this issue is not ripe for deliberation herein and will have to await for the opportune time for deliberation.

62. Nevertheless, it is important to take cognizance of the decision of the court of appeal in the case of **Machira & Company Advocates v Arthur K Magugu & Another (2012) eKLR**, where the honourable court observed as hereunder;

As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1st August 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.

63. I must come back to track and address the pertinent issue under the deliberation herein and this is whether a Reference has been filed.

64. In conclusion, I have said enough to show that other than the omnibus Notice of Objection to Taxation, dated the 26th February 2021, no formal reference has been filed.

ISSUE NUMBER 4

65. Upon the lodgment of the advocate client bill of cost, same was set down for taxation and it was indeed taxed vide ruling rendered on 25th February 2021.

66. Subsequently, the taxing master proceeded to and issued a certificate of taxation, whereby the costs were assessed and certified in the sum of kes.4, 999, 281.92 only.

67. It is important to note that once a certificate of taxation has been issued and/or executed, same is final in terms of the quantum of costs awarded, subject of only to variation and/or setting aside on the basis of a reference.

68. It is also worthy to note, that before same can be set aside and/or varied, the Reference if any, shall have been heard and determined, culminating into a decision of the judge or otherwise.

69. Nevertheless, in respect of the subject matter, I have pointed out that no reference has ever been filed and/or lodged, let alone being heard and/or finalized.

70. To the extent that no reference has been lodged and non-has been heard and finalized, it is not fusible for the certificate of taxation to be set aside and/or varied.

71. In answer to issue number four herein, I therefore return a finding that the certificate of taxation, which was issued in favor of the applicant of the 1st March 2021, has neither been set aside, impeached nor varied, whatsoever.

ISSUE NUMBER 5

72. Following the extraction and/or issuance of the certificate of taxation, the applicant herein has filed an application predicated on Section 51 (2) of the Advocates Act Chapter 16 Laws of Kenya. For clarity, the said Sections provides as hereunder;

“(2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

73. From the foregoing provision, an applicant who seeks for judgment to be entered on the basis of the certificate of taxation must satisfy three pre-conditions, namely

i. There must be a certificate of taxation

ii. The certificate of taxation must not have been set aside and/or varied

iii. There must be no dispute as to retainer

74. As pertains to the subject matter, it is common ground that the applicant has met and/or satisfied all the three conditions and in this regard, there is nor bar to entry and/or endorsement of judgment in favor of the applicant based on the certificate of taxation.

75. In support of the foregoing proposition, I take guidance from the decision of **Gachiri Kariuki & Co. Advocates v Invesco Assurance Co. Ltd [2014] eKLR**, where the court observed as hereunder;

From a reading of the two section of the Advocates Act it is clear that where there is no dispute as to a retainer and the certificate of cost has not been set aside or altered by court, then court has jurisdiction to make any orders including summary judgment in a miscellaneous application. In this I find support in the ruling by Ringera J as he then was in the case of **HEZEKIA OGAO ABUYA t/a ABUYA & CO ADVOCATES vs KIGURU FOOD COMPLEX LTD HCCC APPL. NO. 400 OF 2001 NAIROBI MILIMANI** where the judge had this to say.

“An Advocate duly instructed is retained and where there is no dispute that the advocate was duly instructed by the client in any matter, the retainer cannot be disputed... it matters not that the instructions were given on behalf of some one else..... As the certificate of taxation has not been set aside or altered by court and as there is no dispute with regards to the retainer, it is not necessary for the Advocate to file suit by plaint for recovery of his duly taxed cost” *emphasis added.*

76. In the premises and the Respondent having not disputed the Retainer the applicant’s Application dated 17th March 2021, is meritorious.

FINAL DISPOSITION

77. Having discussed all the issues adverted to herein above, I am compelled to make the following orders;

- a. The Notice of Motion Application dated 18th March 2021, be and is hereby dismissed.**
- b. Costs of the Application dated 18th March 2021, assessed in the sum of kes.10, 000/= only be and is hereby awarded to the applicant.**
- c. The Applicant’s Notice of Motion Application dated 17th March 2021 be and is hereby allowed.**
- d. Costs of the said Application are assessed and certified in the sum of Kes. 3, 000/= only shall be borne by the Respondent**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT,

MILIMANI.

In the Presence of;

June Nafula Court Assistant