



Chepkwony & Associates Advocates v Masciantonio (Miscellaneous Civil Application E037 of 2022) [2023] KEHC 17653 (KLR) (9 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION E037 OF 2022**

SM GITHINJI, J

MAY 9, 2023

BETWEEN

CHEPKWONY & ASSOCIATES ADVOCATES ADVOCATE

AND

LUISA MASCIANTONIO CLIENT

RULING

1. Following a ruling delivered on July 27, 2022, on the Advocate-Client Bill of Costs dated June 2, 2022, the Client/Respondent filed a notice of motion application dated September 20, 2022 under Sections 3 and 3A of the *Civil Procedure Act*; Order 10 rule 11, Order 22 Rules 22 (1) and Order 51 Rule 1, 3 and 15 of the *Civil Procedure Rules 2010*. The orders sought were tailored as follows; -
 1. Spent.
 2. Spent.
 3. Spent.
 4. That this Honourable Court be pleased to set aside the proceedings, the ruling, the certificate of taxation, the decree, the notice to show cause any subsequent orders issued by this Court for the matter to be heard and determined on merit.
 5. That the Honourable Court be pleased to grant the Respondent/Applicant herein leave to file its/her response out of time and deem the response filed herein as properly on record and thereby be granted an opportunity to be heard on merit.
 6. That costs of this application be provided for.
2. The motion is premised on the grounds enumerated on its face and the supporting affidavit of Luisa Masciantonio. According to her, she was never served with any of the pleadings in this miscellaneous



cause and was utterly shocked to be served with a certificate of taxation, decree and notice to show cause via email on July 29, 2022, September 7, 2022, and September 9, 2022, respectively. Luisa deposed that the amount on the certificate of costs was exaggerated given that she had agreed to pay the advocate Kshs 850,000/- being the balance of the agreed legal fees.

3. In response, the Advocate/Applicant filed a Replying Affidavit sworn on September 26, 2022 by Advocate Jackline Chepkirui Chepkwony who deposed that the application ought to be dismissed for offending the rules on affidavits; - the supporting affidavit was not notarized and the Client/respondent's signature is scanned and not original.
4. She explained that upon receiving instructions from the client to transfer her file Malindi High Court Succession Cause No 25 of 2021, to another advocate identified as Waiyaki and Company Advocates, she wrote to the client/respondent on May 18, 2022 requesting for payment of the outstanding legal fees, failure to which she would proceed to file a bill of costs. The Client/respondent failed to respond. This prompted the Advocate to file the bill of costs. That she served the Client/respondent with the same together with the notice of taxation via email on June 6, 2022.
5. When the Bill of Costs came up for taxation on June 28, 2022, the Client/respondent's then advocate, Mr Waiyaki, sought more time to obtain instructions from the Client/Respondent. The Bill was then slated for mention on July 5, 2022 but there was no appearance by either the Client/Respondent or Mr Waiyaki. The court proceeded to issue a ruling date which was delivered on July 27, 2022, taxing the Bill at Kshs 5,801,322/-.
6. Ms Chepkwony added that the Client/Respondent ought to have filed a Reference when she became aware of the certificate of taxation and not the present application which is an abuse of the court process.
7. Parties agreed to canvass the application by way of written submissions which I have considered. I find that the following issues arise for determination; -
 1. Whether the Ruling delivered on July 27, 2022, subsequent Certificate of Taxation dated July 28, 2022, decree dated September 1, 2022 and Notice to Show Cause issued on September 9, 2022 should be set aside.

Analysis and Determination

8. To determine the issues herein I am guided by the reasoning in *M S Shariff & Co Advocates v Omari Mbwana Zonga* [2020] eKLR, where the court faced with a similar situation held; -

“ 12. being an application to set aside a default judgment, I do appreciate the law to be that if there be on record a regular judgment, then I do consider if there be a triable issue but if the judgment is irregular on account of no service or defective service then the court has no discretion to exercise but must set aside as of right^[1]. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. He has had the rules of natural justice affronted to his disadvantage and such a judgment flies on the face of every attribute of a justice system. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. That I hold to be the law even in a dispute like this one being a dispute on costs between an advocate and a client. It would not, to me, be the law that taxation



conducted and a certificate issued without due service of a notice of taxation will stand merely because no reference was lodged within the time prescribed by the Advocate Remuneration Order...

14. The principle of law that even where there is a regular and validly entered judgment the applicant is still entitled to an order for setting aside, whenever a triable issue is disclosed, is founded on the principle of law that where a judgment or determination has been made not on the merits but on account of some explicable or justifiable default, the court reserves the right to revisit the matter, not for anything else but to establish the truth in the dispute by allowing the litigants to agitate their respective position. In ordinary litigation a triable issue can be shown in a draft defence or some other evidence to that effect. Here the dispute is about costs due to an advocate and the only consideration is whether there is demonstrated a material that would have disentitled the advocate to a judgment had the client participated at the hearing of the notice of motion dated the 25.07.2016. I understand the law to be that once a certificate of costs has become final on account of lack of challenge, the advocate is entitled to judgment unless there be a dispute as to retainer.”

9. In the case of *James Kanyita Nderitu & Another -v- Marios Philotas Ghikas & Another* [2016] eKLR the Court of Appeal explained as follows: -

“In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173).

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right.”

10. One of the grounds cited by the Client is that the Bill of costs and subsequent proceedings were never served to her hence unaware of the taxation. I have perused the record herein and established that the Bill of Costs and Notice of taxation were served upon the Client via email on June 6, 2022 pursuant to the provisions of Order 5 Rule 22 B and C of the *Civil Procedure Amendment Rules, 2020*.
11. When the matter came up before the Deputy Registrar on June 28, 2022, Mr Waiyaki appeared for the Client. He prayed for more time, which was granted and the matter was then scheduled to be mentioned on July 5, 2022 to record a settlement. On that date, there was neither appearance for the client nor any settlement recorded. A ruling was subsequently delivered on July 27, 2022 taxing the Bill at Kshs. 5,801,332/- and a certificate of taxation issued on July 28, 2022. The same was served upon the Client via the same email on July 29, 2022.



12. Thereafter, the Advocate filed an application to convert the certificate of taxation to judgment dated August 31, 2022, and judgment was entered on September 1, 2022. Thereafter, there was service upon the Client of the decree on September 7, 2022.
13. All these facts are in the proceedings and on record in the various affidavits of service. The Client cannot dispute service, since it is evident that the then advocate, Mr Waiyaki appeared once when the Client was served with the notice of taxation. The Client's only contention for failure to participate in the proceedings, it seems to me, is that she does not understand Kenyan Laws and the English language. I find no plausible basis in this argument since the taxation proceedings were not the first time the Client had been before the Court. She had legal representation and was at all times in a position to seek clarification from her advocates.
14. Accordingly, I find that the certificate of taxation and the ensuing judgment were regularly made and are not open to challenge on account of lack of service. This means that the judgment and decree on record are regular.
15. In setting aside a regular judgment, the court of Appeal in the James Kanyita Nderitu case [*supra*] set out the factors to be considered as highlighted above. There is no doubt that the application to set aside was filed within a reasonable time, 14 days after service of the judgment and decree. On whether the Client raises triable issues, or in the words of Otieno J in *M S Shariff & Co Advocates v Omari Mbwana Zonga* [*supra*], whether there is demonstrated material that would have disentitled the advocate to a judgment had the client participated at the hearing, the Client argued that the amount taxed was exorbitantly high compared to what the Advocate had pleaded in the Bill of Costs.
16. A perusal of the Bill of Costs dated June 2, 2022 establishes that the total amount sought was Kshs 2,854, 260/ less Kshs 310,000 amount previously paid by the Client. The balance due therefore being Kshs 2,544,260/-. The Bill was eventually increased and taxed at Kshs 5,801,332. Notably this increment was as a result of the taxing master increasing the value of the Estate from Kshs 94,000,000/- to Kshs 118,559,017/- where she stated as follows; -

“The value of the estate is worth more than Kshs 118,559,017/- which is the liquidated amount held in various banks as per the Affidavit in support of the Petition together with the Affidavit of Jackline Chepkwony sworn on June 21, 2022 and the attached details of the deceased's bank accounts and assets. There are various bank accounts whose value is unknown coupled with other assets whose value is yet to be ascertained. The estate is therefore much more than the Kshs 118, 559,017/-.”
17. I am unable to find any support to the Ruling made by the taxing master, when she embarked upon increasing the value of the subject matter shown and taken while taxing the Advocate-Client Bill of Costs. The said Advocate was at all material times aware of the amounts held in the accounts of the deceased person, yet selected to value the estate at Kshs 94,000,000/-. Having in mind that the Bill was uncontested at that point, I am of the view that the taxing master had no sound basis of increasing the value of the subject matter as she did. Accordingly, I do find that the Client has demonstrated triable issues that need to be addressed on merit. For this reason, I will allow the application and order that the Bill of Costs be reassessed.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9TH DAY OF MAY, 2023.

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S M GITHINJI



JUDGE

In the Presence of; -

1. Jackline Chepkwony for the Respondent

