



Mwasuna v Kilonzo (Suing as the Legal Representative of Estate of Isaac Maingi Nzioka – Deceased) (Civil Miscellaneous Application E179 of 2021) [2023] KEHC 17222 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION E179 OF 2021**

FR OLEL, J

MAY 10, 2023

BETWEEN

NICHOLUS MUTUKU MWASUNA APPELLANT

AND

PATRICIA MUENI KILONZO (SUING AS THE LEGAL REPRESENTATIVE OF ESTATE OF ISAAC MAINGI NZIOKA – DECEASED) RESPONDENT

RULING

1. Before court is the notice of motion application dated February 15, 2023, brought before court pursuant to provision of Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 45 Rule 1, Order 51 Rule 1 of the *Civil Procedure Rule* and all other enabling provision of law. The applicant seek for an order that his Honourable court to review and set aside the ruling of Hon EM Analo (RM) dated February 9, 2023. The application is supported by the grounds on the face of the said application and the supporting affidavit of Francis M Masika.
2. This application was opposed by the Respondent who relied on their replying Affidavit dated February 27, 2023 and sworn by one Alex Kyalo Mutua.
3. The applicant deponed that the Respondent did file their bill of cost dated October 26, 2022 which bill was taxed at Ksh 44,450/- by Hon EM Analo vide his ruling dated 9/2/2023. The applicants are dissatisfied with the said ruling and stated that the taxing master erred in taxing the subject application on grounds that interlocutory applications ought to be taxed at the conclusions of the Appeal as provides for in law (Orders 51 Rule 11(2) of the *Civil Procedure Rules* 2010). That there was clearly an erred apparent on the face of the record and prayed that this application be allowed and the ruling set aside.



4. The Respondents did oppose this application and brought forth better background facts relating to the taxation in question. On September 17, 2021 the applicant filed notice of motion application dated the same date for stay of execution and leave to appeal out of time. On October 14, 2021 the said application was dismissed for want of prosecution. On October 15, 2021 the applicant filed another notice of motion dated October 14, 2021 to reinstate the initial application dated September 17, 2021 which had been dismissed on October 14, 2021. The subsequent motion was allowed by consent and the Respondent paid thrown away cost of Ksh 5,000/-. Further on March 7, 2022 the notice of motion dated September 17, 2021 was allowed and the Respondent were awarded costs of the said applications.
5. Pursuant to the said Ruling of March 7, 2022 the Respondent did file their bill of costs which was taxed at Ksh 64,050 on 19/5/2022. The applicants paid this amount on October 19, 2022. Earlier on April 13, 2022, the applicant filed another notice of motion application seeking extension of time to comply with the Ruling dated March 7, 2022 and the same was allowed on July 28, 2022 with costs again awarded to the Respondent who subsequently filed their bill of costs dated October 26, 2022 and which was eventually taxed on February 9, 2022 at Ksh 44,450/-.
6. The Respondent submitted that there was no error apparent on the face of the record, there was no new evidence that was not within the knowledge of the applicant and the bill of costs was filed in the miscellaneous application and not in the main appeal. The miscellaneous application was thus distinct and separate from the appeal and there was no need to wait for the appeal to be heard and determined. The appellant had also paid the previous cost taxed and could not be heard to refuse to pay the costs as awarded. Finally no reference had been filed to challenge the taxation and there was therefore no basis of reviewing the said Ruling.
7. Both parties made oral submission before court where they basically reiterated what had been deponed upon in the respective affidavits.

Analysis and Determination

8. Having gone through the filed application the response considered the oral submissions made before court I do form the opinion that only two issues fell for determination namely;
 - a. Whether this court is vested with the requested jurisdiction to entertain this application which seek review and set aside the order dated February 9, 2023 made by the taxing master Hon EM Analo (RM)
 - b. Who should bear costs
9. The substantive law in respect of review of an order or decree is set out under section 80 of the [Civil Procedure Act](#) which provides that;

Any person who consider himself aggrieved.

 - a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is allowed by this Act, may apply for review of judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.
10. Order 45 Rule 1 of the [Civil Procedure Rules](#) provides that the court can only review its orders if the following grounds exists;



- a. There must be discovery of new and importance matters which after the exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
 - b. There was a mistake or error apparent with face of the record; or
 - c. There is sufficient reason; and
 - d. The application had been brought without undue delay
11. The court is of the view that there is no error apparent on the face of the record or new evidence or important matter that has come up that was not within the knowledge of the applicant. Further, there are no circumstances that consist of sufficient reason to warrant a review of the impugned ruling dated February 9, 2023.
12. Secondly, the jurisdiction of this court is to hear and determine appeals from matters determined by the Magistrate courts tribunals etc and not to hear and determine the same through application for review of the trial court Ruling and/or judgement. The application for review ought to primarily be heard by the trial court as prescribed by order 45 rule 1 of the Civil Procedure Rules. This court thus lacks jurisdiction to entertain this application as “jurisdiction is everything without it a court has not power to make one more step” See *owners of motor Vessel ‘Lilians’ vs Caltex (oil Kenya) ltd* (1989)
13. Finally the only way the High Court can interfere with any grievance arising from a taxation is through a reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order and not through an application of review. In *Machani and Co Advocates vs Magugu* (2002) EA 248 at paragraph 422 Ringera J Succinctly stated that;

“...secondly, as I understand practice relating taxation of bills, any complainant about any decision of the taxing offer whether it relates to a print of law taken with regard to taxation or to a grievous about the taxation of any item in the bill of costs in ventilated by way of a reference to the judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

Disposition

14. Accordingly, the court find that;
- a. The notice of motion application dated February 15, 2023 lack merit and the same is dismissed.
 - b. Costs are awarded to the Respondent and is assessed at Ksh 30,000/- all inclusive

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 10TH DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 10TH DAY OF MAY, 2023.

In the presence of;

.....**for Appellant**
**for Respondent**
**Court Assistant**

