



REPUBLIC OF KENYA



**Ruth Wambui Kinyanjui p/a Wambui K. & Company Advocates v Mburu (Miscellaneous Civil Application 49 of 2020) [2023] KEHC 3833 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3833 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION 49 OF 2020**

**HM NYAGA, J**

**MAY 3, 2023**

**BETWEEN**

**RUTH WAMBUI KINYANJUI P/A WAMBUI K. & COMPANY  
ADVOCATES ..... APPLICANT**

**AND**

**VINCENT KARIUKI MBURU ..... RESPONDENT**

**RULING**

1. Before court is the Applicant's Application dated 24<sup>th</sup> March, 2021 brought under Rule 11(2), 11(4) and 13(2) of the Advocates Remuneration Order, and Section 48(1) of the *Advocates Act* seeking for Orders: -
  1. Spent
  2. That pending the hearing and determination of this reference, the court be pleased to stay recovery/execution of the costs taxed on 1/12/2020 by Honourable M. Kyalo, Deputy Registrar, Nakuru.
  3. That the time for giving a notice of objection to the taxing officer herein and for filing a reference be enlarged and the notice of preliminary objection given and reference filed be deemed as duly and properly on record.
  4. That the proceedings leading to and the entire decision of Honourable M. Kyalo, Deputy Registrar, Nakuru, by way of the Ruling dated 1<sup>st</sup> December, 2020 and the Certificate of costs dated 1/12/2020; and all consequent executions be quashed and/or set aside.
  5. That the costs of this Application and ancillary expenses be awarded to the client.
2. The Application is premised on the grounds on its face and supported by an affidavit of Vincent Kariuku Mburu sworn on 24<sup>th</sup> March, 2021. He deponed that he retained and instructed the Applicant



to oppose the execution proceedings in Nakuru Miscellaneous Civil Application Number 231 of 2019-Geoffrey Ishua Kariuki t/a Direct 'O' Auctioneers Vs Vincent Kariuki Mburu (Primary matter).

3. That before the Advocate took over representation in the above matter, they had agreed on an all-inclusive fee of Kshs. 30,000/= and he remitted a deposit of Kshs. 20,000/= towards settlement of the same.
4. He averred that the Advocate proceeded to act in the said matter but failed to update him on the status, progress and/or outcome and also did not demand the balance of the agreed fees.
5. He asserted that all along he was under the impression that the primary matter was still ongoing and that the balance on the agreed fees was not due.
6. He deposed that he was utterly and sincerely shocked when an unknown man, purporting to be an auctioneer served him with a Notification of Sale of Movable Property and sought to attach Motor Vehicle Registration Number KCN 890 D Toyota Wish, among other unidentified properties, claiming that the attachment was to recover a sum of Ksh. 212,665/= awarded to the Advocate against himself herein in respect of the services rendered in the Primary matter.
7. He averred that it was at the point of service that he became aware of this matter since he had and has never been served with any document herein.
8. He contended that he resisted the attachment verily believing the same to be unlawful and unwarranted and proceeded to Lanet Police Post in the company of the auctioneer where he expressed his reservation on the intended attachment and the auctioneer upon being quizzed whether he had served him with a proclamation, he abandoned the process.
9. He averred that he immediately embarked on establishing the status of the primary matter as well as the instant one and he discovered that his case in the primary suit was successful and the costs assessed thereof of Kshs. 43,090/= had been recovered by his advocate.
10. It was his deposition that upon perusal of the file herein, he discovered that the Advocate had filed an Advocate- Client Bill of Costs dated 6<sup>th</sup> March, 2020 drawn in the sum of Kshs. 282,156/= which has never been served on him and the same failed to take into account the agreement on fees between him and the Advocate and the amount recovered in the primary suit.
11. He disputed being served with a Notice of taxation and an advocate-client Bill of costs by one Wilson M. Wanjohi on 17<sup>th</sup> September, 2020 and asserted that he was unaware of this matter and its outcome and further disputed being served with a certificate of costs by the George Rasugu on 14<sup>th</sup> January, 2021.
12. He asserted that the affidavits of service by the above persons are defective for failure to indicate the correct dates of the documents allegedly served and averred that it is clear that the taxing officer relied on misinformation and defective affidavits of service and proceeded to tax the bill in his absence and issue a certificate of costs.
13. It was his further deposition that the law and practice demand that for a certificate of costs to be executed, an application for adoption of the same as a judgement of the court has to be made and allowed but this was not done and it beats logic how the advocate was able to obtain warrants of attachment in execution of certificate of costs.
14. He also averred that the execution proceedings were flawed for want of service of a proclamation and/or notice of attachment as mandatorily required by the law.



15. He deponed that the intended attachment of the aforesaid Motor Vehicle cannot proceed as the same was sold to one Peter Mburu Kariuki on 3<sup>rd</sup> December, 2019 and transfer to the said person was paid for on 28<sup>th</sup> January, 2021 upon completion of the purchase price.
16. He urged this court to allow his Application.
17. The Application is vehemently opposed. The applicant Ruth Wambui swore a replying affidavit on 7<sup>th</sup> April, 2021. She averred that the application is not only bad in law, full of falsehood but is also mischievous, misleading, merely an afterthought and, moreover, that applicant/Client has approached the court with unclean hands.
18. She deponed that this is a ploy by the client and a fundamental abuse of the court process meant to defeat the Advocate's right to payment for work done.
19. She stated that a final fee note was sent to the Applicant/Client on 13<sup>th</sup> January, 2020 by registered post through Postal Corporation of Kenya to his address which he had provided as P.O.Box 171 Gilgil.
20. She averred that the Applicant failed to make payments as per the final fee note prompting her to draft an Advocate- Client bill of costs.
21. She asserted that at the time of the retainer, she informed the Applicant that fees are strictly charged as per the advocates Remuneration Order and he had no problem with that and disputed any existence of retainer agreement on fees between herself and the Client.
22. She stated that the Applicant deposited Kshs. 17,000/= on Mpesa and that he was physically present in court throughout the conduct of his matter and he was always informed and was aware of the progress of the case as evidenced by items no. 3 and 4 of the bill of costs.
23. In regards to the taxation matter, she deponed that the applicant could not be served with any mention or hearing notices as he had failed to enter appearance and stated that Equity aids the vigilant and not the indolent.
24. It was her deposition that the Applicant after being served by George Rasugu with a certificate of costs he called her and told her that he had also received the advocates bill of costs together with the notice of taxation dated 6<sup>th</sup> March, 2020 and he had been planning to go to the office and negotiate the payment and specifically how he would pay her fees in instalment.
25. She contended that on the 27<sup>th</sup> January, 2021 at 11.28 a.m. she got a message from the applicant asking to meet her at her office at 3.00 pm but later sent a text message cancelling the meeting.
26. She averred that the applicant/client had enough time to put an objection to the items of taxation as provided in rule 11 of the Advocates Remuneration Order and having not done so, cannot claim that the bill is inordinately high.
27. She averred that the application lacks merit and urged the court to dismiss it with costs.
28. The application was canvassed through written submissions.
29. Only the Applicant's submissions are on record.

### **Applicant Submissions**

30. The Applicant framed the following issues for determination: -
  1. Whether agreement between the Applicant and the Respondent for payment of fees exists



2. Whether service of the relevant court's documents has been rendered upon the respondent
  3. Whether error of procedure invalidates payment of advocates fees
  4. Mode of executing a decree
31. Regarding the first issue, the applicant submitted in the affirmative. She contended that it is indisputable that she acted for the respondent and therefore he is obligated to pay her fees.
  32. She argued that payment of advocates fees is provided and protected by the Advocates Remuneration order. To bolster this position, reliance was placed on the case of *Rachuonyo & Rachuonyo Advocate vs National Bank of Kenya Limited* [2020] eKLR
  33. On the second issue, the applicant submitted that affidavits of service on record prove the respondent was served and that there is no evidence by the respondent to show that the said affidavits are based on falsehoods.
  34. In regards to the third issue, the counsel submitted that the application for adoption of the certificate of costs as the judgement of the court was mistakenly omitted. She argued that this omission does not go to the root of the matter and does not take away her right to be remunerated.
  35. She further argued that Article 159(2)(d) requires courts to administer substantive justice as was approved by the court in *Africa Inland Church Kenya Registered Trustees vs Julius Mwanza & 2 others* [2021] eKLR.
  36. She argued that equity looks at the substance and/or intention as opposed to form and prayed that she should be allowed to proceed with execution.
  37. With regard to the last issue, the applicant submitted that this court is empowered in terms of Section 38 of the *Civil Procedure Act* as read with Order 22 Rule 26 to order execution of a decree by also ordering for payment of the decretal amount. She thus urged this court to find that she is deserving of having the decree executed for decretal amount of Ksh. 211,890/= together with accruing interests and costs.

### **Issues for Determination**

38. The following issues fall for determination: -
  1. Whether the certificate of costs was executable in the circumstances of this case.
  2. Whether the Court should enlarge time to enable the Applicant to lodge a Reference challenging the decision of the Taxing Master delivered on 1<sup>st</sup> December, 2020.
  3. Whether the warrants of attachment and proclamation should be stayed.

### **Analysis**

#### **Issue No.1- Whether the certificate of costs was executable in the circumstances of this case.**

39. Section 51 Advocates Act provides;

- “ 51. General provisions as to taxation
- (1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any



deeds, documents and papers by an advocate shall be made in the matter of that advocate.

- (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.”

40. In the instant case, it is undisputable that there was no judgement adopting the certificate of costs as a judgement of the court. The Advocate/Applicant did not make a formal application to the court for the certificate of costs to be converted to a judgment by this court in accordance with the above section.

41. It is trite law that a certificate of costs is not an executable instrument, as explained in *Rubo Kimngetich Arap Cheruiyot v Peter Kiprof Rotich* Civil case 193 of 1993 where Ibrahim J (as he then was) stated as follows;

“As far as the parties in a suit are concerned, a certificate of costs is not an executable legal instrument. A certificate of costs is not capable of being executed. Warrants of attachment and sale cannot in law be issued on the basis of a certificate of costs. There must be a decree first.”

42. In *Ndungu Gitbuka Advocates vs Geoffrey Moriaso Ole Mailoy* (2019) eKLR, Mwita J stated as follows;

“... subsection (2) is clear that the certificate of costs once issued by the Taxing Officer is final unless set aside or altered by the court. The court may also make an order that judgment be entered in terms of the amount in the certificate of costs.” That once a certificate of costs is issued, the court must enter judgement on it for execution to proceed.”

43. The Advocate contended that failure to comply with the above position was an omission which does not go to the root of the matter. I do not think so. Endorsement of a certificate of costs is not a mere technicality issue. It must be complied with and the Advocate cannot take umbrage in the provisions of Article 159(2) (d) of *the Constitution*. The court of Appeal in *Kakuta Marmai Hamisi vs Peris Pesi Tobiko & 2 others* (2013) eKLR stated that: -

“I do not consider that Article 159(2) (d) of *the Constitution* to be a panacea, nay a general white wash, that cures and mends all ills, misdeeds and defaults of litigation.”

44. The Court of Appeal in the above case cited with approval its earlier decision in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others CA 290/2012 that:

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Sections 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a hand maiden of just determination of case.”

45. For the reasons advanced above, this court finds that the certificate of costs was not executable.



**Issue No.2 - Whether the Court should enlarge time to enable the Applicant to lodge a Reference challenging the decision of the Taxing Master delivered on 1<sup>st</sup> December,2020**

46. Paragraph 11 of Advocates Remuneration Order (ARO) provides as follows:

- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”

47. Paragraph 11(4) of the ARO provides that:

“The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

48. In the case of *Republic v. Kenyatta University & another Ex parte Wellington Kibato Wamburu* (2018) eKLR the court ruled that;

“...This Court has a discretion to grant an extension of time for filing a reference, provided there are:- (a) good and substantial reasons for the failure to file the reference within the prescribed period, and (b) there are grounds in the application which, prima facie, show good cause why the applicant should be heard.”

49. The Client/Respondent averred that he was unaware of the taxation matter as he was not served with the taxation notice and an advocate-client bill of costs. He asserted that the affidavit of service sworn by one Wilson M. Wanjohi is based on falsehood and is defective for failure to indicate the correct dates of the documents allegedly served. The client did not adduce any evidence to prove that averments in the said affidavit are false. I have also perused the said affidavit together with the annexed notice of taxation and bill of costs and I have not seen any erroneous dates as alleged by the Client.

50. In the circumstances therefore I opine that the client was duly served with the taxation notice and the Advocate- Client bill of costs.

51. However, I note that the Advocate/Respondent has not demonstrated what prejudice she stands to suffer if time was enlarged. Further, Article 50 of *the Constitution* guarantees a right to fair hearing. In the interest of justice therefore, courts should be slow to deny a party who want to be heard a forum to be heard on such terms as may be just since the main concern of the court is to do justice to the parties.



52. In the Court of Appeal decision of *Philip Keipto Chemwolo & another vs Augustine Kubende*[1986] KLR 492-(1982-88)1KAR 1036 the court expressed itself thus concerning mistakes which are admitted:

“it must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.”

53. In light of the above and while relying on Article 50 of *the Constitution*, I opine that the court should proceed to enlarge time within which the client ought to have filed and served the Reference. I proceed to order so. Further I order that the notice of objection and reference are deemed as duly filed and properly on record.

**Issue No.3- Whether the warrants of attachment and proclamation should be stayed**

54. Flowing directly from the consideration on the 1<sup>st</sup> issue above, the court is satisfied that the respondent/ Advocate obtained the warrants of attachment and proclamation irregularly and unlawfully as the same arose from a non-existent judgement and/ or decree of this court.

55. Consequently, this court orders a stay execution of the attachment issued on 9<sup>th</sup> March,2021 pending determination of the client/ Applicant’s reference.

56. Further, the execution proceedings herein are hereby quashed/set aside for reasons set out above.

57. The reference to be listed for hearing at a date to be given shortly after the delivery of this ruling.

58. The applicant shall have costs of this application.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 3<sup>RD</sup> DAY OF MAY, 2023.**

**H. M. NYAGA**

**JUDGE**

**In the presence of;**

**C/A Jeniffer**

Ms Wambui for Respondent/Advocate

Mr. Gatonye for Client/Applicant

