



**Kibatia and Company Advocates v Kings Group of Schools Limited & another  
(Miscellaneous Application 57 of 2020) [2023] KEHC 21590 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21590 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
MISCELLANEOUS APPLICATION 57 OF 2020  
SN MUTUKU, J  
JULY 19, 2023**

**BETWEEN**

**KIBATIA AND COMPANY ADVOCATES ..... APPLICANT**

**AND**

**MARY NYAWIRA CHOMBA ..... 1<sup>ST</sup> RESPONDENT**

**KINGS GROUP OF SCHOOLS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. This Ruling relates to two applications, the Notice of Motion dated August 11, 2020 (Notice of Motion) brought by Kibatia & Company Advocates (the Applicant) and the Chamber Summons dated January 18, 2021 (Chamber Summons) brought by Kings Group of Schools Limited and Mary Nyawira Chomba (the Respondents).
2. The Applicant and the Respondents were advocate and client, respectively, in Kajiado High Court Civil Case No 7 of 2018 *Kings Group of Schools & another v Kenya Women Microfinance Bank Limited*.

**Notice of Motion**

3. The Notice of Motion seeks to have judgment entered in the sum of Kshs 7,620,159/= as taxed and certified by the Deputy Registrar as due to the Applicant and an order that the Applicant be at liberty to execute against the Respondents as well as costs of this Application. The Notice of Motion arises from a taxed bill of costs in the sum claimed as a result of services rendered by the Applicant for the Respondents.
4. The Notice of Motion is supported by the Affidavit of Karuga Maina, an advocate in the firm of Kibatia & Company Advocates, sworn on August 11, 2020 in which it is deposed that the Applicant received instructions from the Respondents to institute a suit on their behalf in Kajiado HCC No



7 of 2018 *Kings Group of Schools & another v. Kenya Women Microfinance Bank Limited*; that after determination of the case the Respondents declined or neglected to pay legal fees necessitating filing of advocate/client bill of costs dated April 13, 2019 which bill was taxed before the Deputy Registrar at Kshs 7,620,159/= and that no reference had been filed seeking to review, vary or set aside the Ruling by the Deputy Registrar.

5. The Notice of Motion is opposed by the Respondents through the Replying Affidavit of the 2<sup>nd</sup> Respondent sworn on January 28, 2021. She has deposed that the Notice of Motion has no merit, is vexatious and has been brought in bad faith; that the Supporting Affidavit to the Notice of Motion contains blatant lies, contradictions, fabrications, and material non-disclosure calculated to mislead the court.
6. The 2<sup>nd</sup> Respondent has deposed that there was an express and oral agreement between her and the Applicant that legal fees would be paid after a successful sale of parcels of land bearing title numbers Kajiado/Kaputei-North/22309, 26295, 25524, 23249 and 26290; that the Respondents were not served with the Bill of Costs dated April 12, 2019 and that taxation of that bill of costs proceeded ex parte on an unknown date and the Applicant obtained an ex parte Certificate of Taxation for Kshs 7,620,159/=.
7. The 2<sup>nd</sup> Respondent, further, deposed that the Respondents only learnt of the said bill of costs had been taxed *ex parte* on or about January 8, 2021 after they were served with a mention notice dated January 5, 2021; that it would be oppressive to the Respondents and against natural justice to grant the prayers sought because the bill of costs was taxed ex parte and that the Applicant has been paid a substantial amount of money as legal fees.

### **Chamber Summons**

8. The Chamber Summons is dated January 18, 2021 and seeks to suspend and or stay the execution of the Certificate of Costs and the Ruling thereto pending the hearing and determination of the Chamber Summons; enlargement of time for the Applicant in the Chamber Summons to file a Notice of Objection to the taxation proceedings together with a Reference against the Certificate of Costs and the Ruling on Taxing Master delivered on July 29, 2019; that this Chamber Summons be admitted as a Reference against the taxation proceedings and that this court be pleased to vary/review and or set aside the Certificate of Costs and the Ruling of the Taxing Master delivered on July 29, 2021 and in its place strike out and or dismiss the advocate/client bill of costs dated April 12, 2019.
9. The grounds in support of the Chamber Summons are found on the face of it and in the Supporting Affidavit sworn by Mary Nyawira Chomba on January 18, 2021. It is deposed that the Advocate/Respondent proceeded to file a bill of costs which was taxed ex parte at Kshs 7,620,159/= and a Certificate of Taxation obtained; that the Applicant in the Chamber Summons came to learn of the taxation after they were served with a mention notice for the Notice of Motion seeking orders to enter judgment in the taxed amount.
10. The main ground in support is that the Applicants in the Chamber Summons were not served with the Bill of Costs and that the same proceeded ex parte; that they have paid a substantial amount as legal fees and that the Certificate of Taxation and the Ruling were issued in error and ought to be set aside.
11. The 2<sup>nd</sup> Applicant in the Chamber Summons files a Supplementary Affidavit in reply to the Respondent's, in the Chamber Summon, Replying Affidavit in which she has denied the averments contained in the Replying Affidavit of Karuga Maina sworn on March 15, 2021. She deposed that the Applicant in the Chamber Summons permanently closed down the school in 2017, a fact that was known to the Advocate/Respondent and shortly thereafter the Postal Office Address Box No



53818-00200 Nairobi used by the 1<sup>st</sup> Client/Applicant was closed for non-payment and therefore the Applicants never received the bill of costs dated April 12, 2019 and hearing notice for taxation of the bill of costs sent through registered post.

12. She deposed that the process server did not call her on June 27, 2019 as alleged in the Replying Affidavit nor did she agree with the process server that he would send her a copy of the hearing notice through WhatsApp or promise to send someone to collect documents from the advocate/respondent's office.

### **Submissions**

13. I have perused the proceedings before my brother Justice Mwita, who handled this matter before I took over the same. I may be challenged with the handwriting, but I did not come across an order directing that both applications be determined together. For good order and to avoid any vacuum in the proceedings, it is my view that both applications be determined together given that parties were directed to file submissions on both applications.
14. I have noted that the Respondents in the Notice of Motion did not file submissions on the Notice of Motion but on their Chamber Summons. The record of the court shows that on October 4, 2022, Mr. Mugo appearing for Kings Group of Schools Limited & another is on record telling the court that their submissions dated December 15, 2021 be applicable in both Notice of Motion and Chamber Summons.

### **Advocate/Applicant's Submissions**

15. The Advocate/Applicant submitted that there was no agreement that legal fees would be paid after successful sale of the Client/Respondent's property as claimed in the Replying Affidavit dated January 18, 2021. It was submitted that the taxing officer had jurisdiction to tax the bill contrary to the claim that he did not.
16. Secondly, it was submitted that it is untrue that the Client/Respondent was not served; that the process server's affidavit of service states that service was done both through registered post with leave of the court to the postal address contained in the Client/Respondents' Letterhead and by WhatsApp message on the 2<sup>nd</sup> Client/Respondent's phone which was received as indicated by two blue ticks.
17. It is submitted that the Certificate of Taxation has not been challenged and that the application for leave to file an opposition to the taxation has been filed after taxation has been concluded; that the Certificate was issued in September 2019 and has not been honoured to date; that the delay to settle the taxed bill is deliberate and therefore the present application by the Client/Respondents is made with the aim of denying the Advocate/Client the chance to enjoy the fruits of taxing master's decision and should not be tolerated.
18. The Advocate/Applicant cited *Ndungu Githuka & Company Advocates v Geoffrey Mariaso Ole Mailyo* [2019] eKLR where the court stated that:

“As I have already explained herein above, the advocate/client bill of costs was in December 2018 and a certificate of costs issued. That certificate was not challenged and has not been set aside or altered. The respondent was served with the present application but did not respond to it. He also failed to attend court during the hearing despite being served which leaves the application unopposed.”
19. In respect to the Client/Respondents' application dated January 18, 2021, the Advocate/Applicant submitted that the period allowed under Paragraph 11 (1) of the *Advocates' (Remuneration) Order*



to file an objection to a taxation decision is 14 days but the instant application was filed 16 months after taxation and that this delay is not explained in any way. They relied on Supreme Court of Kenya decision in *County Executive of Kisumu v County Government of Kisumu & 8 others* (2017) eKLR where the Court held that:

“23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon.

They court delineated the following as: the underlying principles that are court should consider in the exercise of such discretion:

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to one deserving party.
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- iii. Whether the court ought to exercise discretion to extend time is a consideration to be made on a case-to -case basis.
- iv. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the court.
- v. Whether there would be any prejudice suffered by the respondent if the extension was granted.
- vi. Whether, the application had been brought without undue delay, and
- vii. whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”

20. They submitted that on the first and second principles alone, the Respondents’ application must fail as they are not deserving of the orders sought, and the basis of delay, the alleged failure to serve and not being aware of the proceedings are blatant lies; that such extension of time will greatly prejudice the applicant given that the suit for which the costs arise was concluded in November 2018 and any attempts to have the Respondent pay legal fees have failed. They asked this court to dismiss the application dated January 18, 2018 and allow the applicant dated August 11, 2018 with costs.

### **Client/Respondents’ Submissions**

21. They have raised and submitted on the following issues:

### **Whether the court may stay execution of the certificate of taxation of costs pending the hearing of the reference.**

22. While relying on Order 42 Rule 6 of the *Civil Procedure Rules*, they submitted that they are apprehensive that if stay is not granted and they pay the taxed amount they may not be able to recover the money from the advocate in the event they were to succeed in their appeal for reasons that the taxation proceeded without their presence for failure to be served and secondly that they have paid



the advocate some substantial amount as legal fees. They relied on *National Industrial Credit Bank v Aquinas Francis Wasike & another* [2006] eKLR, where the court stated as follows:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by respondent or lack of them. Once an applicant expresses a responded would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

23. They submitted that the amount involved is substantial and in the event that the advocate is unable to pay the sum, the client will be exposed to irreparable damage. They submitted that they have satisfied the condition that they stand to suffer substantial loss if the order for stay is not granted.
24. They submitted that they the application was made without undue delay, 10 days after the bill had been taxed ex parte and that the advocate has all the security in this matter and stands to suffer no prejudice because the advocate has been paid substantially.

**Whether the court may extend the time for filing of a reference under the Advocates’ (Remuneration) Order in the circumstances of this case.**

25. They submitted that under Paragraph 11 of the *Advocates (Remuneration) Order*, courts have discretion to extend time for lodging a reference notwithstanding expiry of 14 days prescribed for the reference. They submitted that the delay in filing the Notice of Objection together with the reference was not in bad faith as the same arose from the fact that the Advocate did not notify the client of the date of taxation and or the date of delivery of the ruling in respect of the bill of costs.
26. It is their prayer that this court allows the client’s Chamber Summons dated January 18, 2021.

**Analysis and Determination**

27. I have considered the two applications. The Notice of Motion dated August 11, 2020 simply seeks judgment for the sum of Kshs 7,620,159/= being the amount taxed in the advocate/client bill of costs, that the advocate be at liberty to execute against the client and costs of the application. On the other hand, the Chamber Summons dated January 18, 2021 seeks stay of execution of certificate of costs pending hearing of this application, extension of time to file objection to taxation and reference against the certificate of costs and that the Chamber Summons be admitted as a reference and the court to vary/review and/or set aside the certificate of costs and ruling to the taxing master.
28. I have considered the evidence presented by the parties by way of affidavits as well as the submissions of parties as well as the authorities cited. I have also read Kajiado High Court Misc Application No 33 of 2019, *Kibati & Company Advocates v Kings Group of Schools Limited & Another*. The matter was before the Deputy Registrar on June 3, 2019. The Applicants were granted leave of 30 days to serve the Respondents with the Bill of costs.
29. The record shows that by an affidavit of service dated June 27, 2019 sworn by Vincent Mambuya Sabatia and filed in court on July 1, 2019, the Process Server deposed that he received from the Applicants the Hearing Notice dated June 4, 2019 which gave the date for hearing on July 1, 2019, with the advocates bill of costs dated April 12, 2019 attached to it and he effected service through registered post. There is a certificate of postage annexed dated June 21, 2019. However, when the matter came



up for hearing on July 1, 2019, there was no appearance for the Respondents despite service. Taxation proceeded and the court gave a ruling date for July 29, 2019 for taxation.

30. The client/respondent claims that at the time stated for service, their postal address had been closed in 2017. They did not provide evidence to support that statement that their postal address was closed for lack of payment. They did not provide evidence to show that service by WhatsApp messaging was not received.
31. Secondly, I find no evidence to show that there existed any agreement, oral or otherwise, that the advocate and the client had agreed that legal fees will be paid after the properties named in the clients' documents were sold. There is no evidence provided to show the current status of the properties named other than what the advocate has submitted that those properties have been sold.
32. Further, the client has failed to provide evidence to support their claim that the advocate has been paid a substantial amount as legal fees. There is no evidence as to how much, if any amount, was paid to the advocate.
33. It is clear from the record of the court that the ruling of the taxing master was on July 29, 2019. The Certificate of Taxation is dated September 12, 2019. From that date up to the time the Notice of Motion dated August 11, 2020 was filed on September 11, 2020, a year had elapsed. No action had been taken by the client to settle the taxed bill. Their application dated January 18, 2021 about 16 months after taxation as stated by the advocate. There is nothing in their evidence to explain this delay.
34. While I agree that this court has discretion to extend time, that discretion must be judiciously exercised and only deserving parties can benefit from that discretion. A party cannot sit on their rights and rush to court to seek extension of time to file an application which ought to have been filed earlier had the party been vigilant.
35. Guided by the principles in Order 42 Rule 6 of the *Civil Procedure Rules*, I find that the client/respondent has failed to demonstrate that they stand to suffer substantial loss if stay is not granted. Their claim that the advocate/applicant will not be able to repay the money given that the advocate has already been paid a substantial amount has not been supported by evidence. As shown above in this ruling, the client has failed to demonstrate how much money he has paid as legal fees, if any.
36. The client has also failed to explain the delay in bringing up the application. Their claim that they were not aware of the taxation of the bill is not sufficient given the two methods used to serve them with the hearing notice. The taxing master was satisfied that service had been properly effected and I, too, have considered the matter and I find that the affidavit of service clearly showed that they were served with the notice through registered post using the address in their letterhead and by way of WhatsApp message. I have stated that they have not provided evidence to show that their postal address had been closed. Further, the legal fees paid, if any, cannot be said to be sufficient security given that there is no evidence to prove what was paid.
37. My determination of this matter leads me to the conclusion that the Chamber Summons dated January 18, 2021 lacks merit and the same must fail. It is hereby dismissed with costs to the advocate. The Notice of Motion dated August 11, 2020 is allowed with costs to the Applicant, the advocate.
38. For avoidance of doubt, the Application by the Client dated January 18, 2021 is hereby dismissed and the Notice of Motion dated August 11, 2020 is hereby allowed. In both applications, costs shall be paid by the Client to the Advocate.
39. Orders shall issue accordingly.

**DATED, SIGNED AND DATED THIS 19<sup>TH</sup> DAY OF JULY, 2023.**



**S. N. MUTUKU**  
**JUDGE**

