



REPUBLIC OF KENYA



**Owino Kojo & Co. Advocates v RMG (Miscellaneous Application  
E103 of 2022) [2023] KEHC 21782 (KLR) (Family) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21782 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E103 OF 2022  
PM NYAUNDI, J  
JULY 21, 2023**

**BETWEEN**

**OWINO KOJO & CO. ADVOCATES ..... APPLICANT**

**AND**

**RMG ..... RESPONDENT**

**RULING**

1. By Notice of Motion dated April 29, 2023 and presented under Section 51 (2) of the *Advocates Act*, Order 51 (2) of the *Civil Procedure Rules* and Article 159 (2) of the *Constitution* the Applicant Owino Kojo & Co Advocates seeks the following orders, that: -
  1. Judgment be and is hereby entered for the Applicant against the Respondent for a sum of Kshs 326,428 with interest of 14% pa from May 4, 2022 till payment in full.
  2. Pursuant to the entry of judgment hereinabove, a decree be issued in respect of the said amount and the Applicant be at liberty to execute for recovery of the same in such manner as a decree of this Honourable Court.
  3. Costs of this Application together with incidental costs of executing the decree be borne by the Respondent.
2. The Notice of Motion is supported by the Applicant's Affidavit sworn on April 29, 2023. The Respondent opposes the Application and has sworn an affidavit in Opposition on June 14, 2023.
3. Parties agreed to canvass the Application by way of written submissions. The Applicants submissions are dated June 17, 2023 whilst those of the Respondent are dated June 14, 2023.



### Summary Of Applicant's Submissions

4. The Applicant submits that the fee note is in respect to representation of the Respondent in Nairobi Children's Case Number 1435 of 2015, WK v RMG.
5. It is submitted that the Advocate- Client bill of costs was taxed at Kshs 326,428 and certificate of costs issued on April 25, 2023. The Applicant submits that the Advocate- client Bill of costs was delivered to the Respondent on May 4, 2022. The Applicant contends that the Ruling of the taxing officer has not been challenged.
6. The Applicant dismisses the averments in the Respondents Replying affidavit terming them as a restatement of issues raised before the taxing master and the taxing master resolved them in favour of the Applicant.
7. The Applicant relies on the decision in *Aminga, Opiyo Masese & Co Advocates v Sifa Insurance Brokers Limited* H.C. Nrb (Commercial & Tax Division) Misc. Application No. E1083 of 2020 in support of the contention that the Respondent has not opposed the Application.

### Summary Of The Respondent's Case

8. The Respondent avers that they have settled accounts with the Applicant and no fee is owing. And relies on the decision in *Gichuki King'ara & Company Advocates vs Mugoya Construction & Engineering Limited* [2015] eKLR on principles Rto guide the court in entering judgment.
9. He pleads that the given his earnings the fees being demanded is well out of his reach.
10. On interest he contends that he was served on June 20, 2022. Reliance is placed on the decision in *Amondi & Co. Advocates vs County Government of Kisumu* [2022] eKLR.

### Analysis And Determination

11. Upon reviewing the pleadings filed herein, submission and authorities I discern the following as the issues for determination
  - a. Whether the Applicant is entitled to judgment as prayed?
  - b. Who should pay costs

### Whether the Applicant is entitled to judgment as prayed

12. It is common ground that the Applicant represented the Respondent in the Children's Court and that subsequent thereto the Applicant presented his Advocate Client Bill of Costs for taxing before the taxing master and that the Bill was taxed at Kshs 326,428.
13. In her ruling the taxing master found that there wasn't an enforceable fee agreement. In citing the Gichuki King'ara & Compnay Advocates Case (Supra), the Respondent contends that the costs are disputed and that therefore a certificate of costs could not properly issue.
14. In pursuing this line, the Respondent has misinterpreted the law as the only way a party can challenge the taxation is via a reference. In this regard I agree with the decision of Mongare L J in the Aminga, Opiyo Masese & Co. Advocates Case (Supra)
15. The Respondent states that he was served on June 20, 2022 and not May 4, 2022 as alleged. This averment by the Respondent is not backed up by any evidence. The Applicant on the other hand states



that he delivered the bill of costs via email on May 4, 2022 and submits the email print out dated May 4, 2022 forwarding the bill of costs.

16. On the balance of probabilities, I find that the Applicant did deliver the bill of costs to the Respondent on May 4, 2022 and further that the Respondent has not presented a competent challenge to the Bill of costs
17. For the reasons above, I proceed therefore to enter judgment for the Applicant against the Respondent for a sum of Kshs 326,428 with interest of 14 % pa from May 4, 2022 till payment in full.
18. Who should pay costs?

By virtue of Section 27 of the Civil Procedure Act, which provides-

“(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”,

it is trite law that the issue of costs is a discretionary award that is awarded to a successful party.

19. In the case of Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others (2013) eKLR which cited with approval the words of Murray C J in Leoben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227 that it stated:

“It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

20. In Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ibururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 Mativo J.(as he then was) held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party.
21. The import therefore is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party
22. Guided by the above authorities I award costs to the Applicant.
25. Accordingly and in conclusion the Application dated April 29, 2023 is allowed with costs to the Applicant.

It is so ordered

**SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 21<sup>ST</sup> DAY OF JULY, 2023.**



**P M NYAUNDI**  
**HIGH COURT JUDGE**

**In the presence of:**

Court Assistant Sylvia

