



Ajinja & another v Ohayo and Company Advocates (Miscellaneous Civil Case E009 of 2024) [2024] KEHC 15547 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15547 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS CIVIL CASE E009 OF 2024**

**DK KEMEL, J
DECEMBER 6, 2024**

BETWEEN

KEVIN AJINJA 1ST APPLICANT

ERICK OTIENO OWINO 2ND APPLICANT

AND

OHAYO AND COMPANY ADVOCATES RESPONDENT

RULING

1. The Applicants moved this court vide a notice of motion application dated 13th September 2024 seeking the following orders:
 - i. Spent.
 - ii. The court grants the Applicants leave to file this reference out of time.
 - iii. That an order of stay of execution of the Ruling of the taxing officer made on 27th August 2024 pending the determination of the intended reference.
 - iv. That the court be pleased to recall the proceedings of the taxing master under which the ruling of 27/8/2024 was made especially on the issue of whether there was a retainer and or advocate-client relationship between the Respondent and the Applicant.
 - v. That the court be pleased to recall the proceedings and make a finding on the issue of retainer between the Applicant client and the Respondent Advocate.
 - vi. Costs of the application be provided for.
2. The application was supported by an affidavit sworn on the 13th September 2024 by Kevin Ajinja Owino. It was averred inter alia; that they were sued as Respondents in Siaya Small claims Com. No. E024 of 2024 Peter Ochieng vs. Kevin Otieno & Eric Owino; that he instructed the firm of Ondego



Garo Advocates to enter appearance on their Defence against the said claim.(see copies of the responses and Notice of appointment marked KAO 1.); that the matter proceeded to its conclusion and at some point he saw the Respondent holding brief for the advocate on record; that at no point did the applicants give instructions to the Respondent to act for them as Counsel save for holding brief for their advocate on record; that they won the claim against the claimant; that while they enjoyed the fruits of their judgment they received an application from the respondent claiming fees on the notion that they had retained them as Counsel; that in opposition to the said application, they filed an application seeking the taxing officers intervention to make a determination as to the issue of retainer as between the respondent and the applicant herein (see the application marked KAO2); that the Respondent responded and eventually the court ruled that the Respondent had been retained; that he is now praying that this court does make a reference in this matter by looking at the proceedings of the primary claim while taking into account the concerns raised on the issue of retainer.

3. In response to this application, the Respondent filed a replying affidavit dated 14th October 2024 sworn by Ohayo Cynthia Mariam. It was averred inter alia; that the Applicants had admitted that the Respondent had initially represented them in the matter; that after Mr. Ondego Garo entered appearance and a notice of appointment dated 18/03/2024, he subsequently filed a Notice of Preliminary Objection dated 27th March 2024; that the Ruling on the Preliminary objection was rendered on 2nd April 2024, dismissing the Preliminary objection and directing that parties file their response to the statement of claim within 7 days from the date of issuance of the Ruling.(attached copy of Ruling on the P.O. marked CMO 1); that Counsel Ondego failed to adhere to the courts directives prompting the Applicants herein to go to her offices situate at Benchmark Building and she advised them on the need to respond to the said matter; that she advised them on the need to defend themselves because in her opinion Counsel Ondego was not desirous of prosecuting the matter as he remained of the opinion that the small claims court lacked the requisite jurisdiction to hear the matter before it; that the Applicants proceeded and gave her instructions to represent them in SIAYA SCCCOMM NO. 24 OF 2024; that she issued them with an instruction note and they agreed on legal fees of One hundred thousand (kshs 100,000/=) and that Mr. Kevin informed Eric to send a file opening fee of Kenya shillings Ten Thousand (Ksh 10,000/=) on condition that the balance would be paid later. (attached copy of WhatsApp screenshot between the applicant and the Respondent instructing her to proceed and promising to clear the balance.); that the Applicants gave her requisite instructions on 6th May 2024 while at her office at Benchmark building, which prompted her to file a response to the statement of claim dated 11th May 2024 together with the statement that the Applicants signed; that she argued the matter solely to conclusion and secured a win for the applicants, and that the applicants were celebrating by dint of the win she had achieved for them; that she was only demanding that which is owing to the firm. (attached and marked CMO 3 a WhatsApp screenshot of the said communique); that in paragraph 14 of the Ruling of the court, the trial magistrate proceeded to tax the bill after being satisfied by perusing the lower court file and indicated that the Respondent solely represented the Applicants in the defense and awarded her the costs. (attached and marked CMO-4 is a copy of the said Ruling highlighting the holding of the trial court.)
- 4 The application was canvassed by way of written submissions. The applicants submitted on two grounds; firstly whether this court has jurisdiction to extend the time frame for the reference and secondly, whether this court has the jurisdiction to interfere with the assessment of the taxing master. On the issue of the extension of time, they relied on the Court of Appeal case in Butt v Rent Restriction Tribunal (1982) KLR 417 to wit that the power of the court to grant or to refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



On the second issue on the courts powers to interfere with the assessment of costs, the Applicants placed reliance on several authorities including Mathiu Elijah Solo V. Joseph Murira (2009)EKLR And Ruto Vs Maru (Miscellaneous Application E001 of 2023 [2024]KEHC 2378 (KLR)(8 MARCH 2024)(RULING)

They submitted that this court has powers under section 27 of the *civil procedure Act* to check assessment of costs by the Magistrates court.

5. In conclusion, the applicants submitted that this court allows their application dated 13th September 2024 as prayed.
6. The Respondent submitted on two issues: firstly, whether the Applicant followed the laid down procedures in section 11 of the Advocates Remuneration Order of 2014 to warrant this honorable court to grant leave to file the Reference before it.

It was submitted that section 11 of the Advocates Remuneration Order talks about the procedural aspects that one ought to follow when lodging a Reference and /or objection to the decision of the taxing master and appeal to the appellate court and which succinctly provides that:

Objection to decision on taxation and appeal to Court of Appeal

- (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.
 - (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - (4) 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.
7. The Respondent submitted that from the foregoing, it is trite law that before a party approaches the High Court, they ought to give a written notice to the taxing master within fourteen days of the items of the taxation in which he/she objects and that the taxing master then records the same and forwards to the objector the reasons for his decision on those items and the objector within fourteen days from the receipt of the reasons apply to a judge by chamber summons setting out the grounds of his objection.

The respondent submitted that the Applicants did not give a written notice to the taxing master within the stipulated time the items objected to enable him be furnished with reasons for the said objection as the said objections have remained not produced by the applicants herein.

Ultimately, the Respondent implored this court to find that the Applicant has not followed the laid down procedures in section 11 of the Advocate Remuneration Order of 2014 nor a justifiable reason for the delay in making the application to warrant the honorable court to grant leave to file a Reference before it.



8. Secondly, on the issue of whether the proceedings of the taxing master that led to the issuance of the Ruling dated 27th August 2024 can be recalled, the Respondent relied on section 27(1) of the Civil Procedure Act and section 20(1) of the Small claims Court Act and submitted that the proceedings taken by the taxing master were proper and after a perusal of the lower court file, he was satisfied that indeed, the Respondent had sufficiently represented the applicants herein and she implored the court to find that the proceedings of the taxing master that led to the Ruling dated 27th August 2024 were proper and thus cannot be recalled.
9. I have given due consideration to the application, rival affidavits and the submissions filed herein. I find the following issues necessary for determination namely:
- a) Whether this court has jurisdiction to interfere with the Assessments of Costs made by the Magistrate's court.
 - b) Whether this court should enlarge time to enable the Applicants file their intended reference against the Assessment of costs by the Magistrate's court.
 - c) Whether this court should stay execution of the assessed costs.
10. As regards the first issue, the first port of call is section 27 of the Civil Procedure Act which governs the aspect of costs issued by the various costs to the parties who deserve those costs and that the cardinal principle is that the said costs are made at the discretion of the court and which must be in a judicious manner. The same provides as follows:

“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.”

There has been a fallacy to the effect that the High Court does not have jurisdiction to determine references arising from assessment of costs in the Magistrate's courts regarding party and party costs under the Advocates Act and Remuneration Order on the basis that those assessments had not been made by a taxing master to warrant a reference. In the case of Mathiu Elijah Solo Vs Joseph Murira [2009] eKLR Kasango J held that in view of the lacuna in the Advocates Act and Remuneration Order, the High Court has inherent power to check assessment from the Magistrate's courts and thus aggrieved parties are at liberty to file references so as to challenge the assessment of costs. I am inclined to agree with the sentiments of the learned judge since were the converse was true, then several litigants would be locked out of accessing justice before the High Court regarding assessments by the Magistrate's courts. In that regard, I find that this court has the requisite jurisdiction to determine the intended reference to be lodged by the Applicants.

11. As regards the second issue, the Respondent has challenged the application on the grounds that the period for lodging a reference, if any, has expired and as such, the same should be rejected. However, it is not in dispute that the High Court has power to enlarge time for filing of any pleading out of time as long as parties render a good explanation for the delay. I have noted the reasons advanced by the Applicants namely that they lacked fees for the purposes of filing the reference. Indeed, the Applicants have approached the court rather late in the day since they ought to have filed it within fourteen (14)



days after the impugned ruling. It is noted that the Applicants moved this court seventeen (17) days after the taxing master's ruling. I find the delay by four days not to be inordinate in the circumstances. Further, section 95 of the *Civil Procedure Act* provides that where any period is fixed or granted by the court for the doing of any act prescribed or allowed by the Act, the court may in its discretion from time to time enlarge such period, even though the period originally fixed or granted may have expired. I am satisfied that the Applicants have rendered a reasonable explanation for the delay and that they should not be denied the opportunity to present their reference to this court. In *Mutiso Vs Mwangi* [1997] KLR 630 it was held that the decision whether or not to extend time for appealing is essentially discretionary and that the court will consider such factors as the length of delay, reasons for the delay and the chances of success of the appeal and the degree of prejudice to the Respondent if the application for extension of time is allowed. Already, they have pointed out that the key issue in the intended reference is that there was no retainer as between the Applicants and the Respondent herein. That is a germane issue warranting this court to enlarge time so that the same can be determined. I have noted that the Respondent in her response and submissions has extensively dwelt on the intended reference which is yet to be admitted for determination and thus I find the Respondent's response is pre-mature. The Respondent should wait and to present them during the determination of the reference to be filed. As the Respondent has responded to the intended reference substantially, I find that she has unwittingly given this court the greenlight to allow the Applicants an opportunity to file their reference so that the same can be determined appropriately. Consequently, this court will grant the Applicants time within which to lodge their reference.

12. As regards the third issue, it is noted that the Applicants have sought for orders for stay of execution of the ruling of the taxing master as well as recalling of the proceedings conducted leading to the impugned ruling. I must point out at the outset that the prayer for recall of proceedings is premature in that the said prayer is subsumed in the reference to be filed and that once the reference is filed, the impugned ruling and proceedings will automatically be placed before the court for deliberation by the parties and hence, such a prayer is not feasible. As regards the issue of stay of execution, it is not in doubt that the costs have been assessed and or taxed and that the Respondent might proceed to execute thereon anytime. Since the Applicants have raised a germane issue namely that there was no retainer between the Applicants and Respondent, the same is a germane and arguable issue that this court requires to determine. There is a likelihood that the Respondent might proceed with execution to the detriment of the Applicants whose reference might turn out to be nugatory or for academic purposes only. There is need to determine the said issue of retainer as well as the costs due and thus an order for stay of execution in order to preserve the status quo is merited in the circumstances. As the claim at this stage is a money decree, it is proper for the Applicants to deposit the same in an interest earning account of both Advocates within a certain timeline while the parties canvass the reference. I find this will take care of the concerns by the parties herein.
13. In the result, the Applicants' application dated 13/9/2024 is allowed in the following terms:
 - a) The Applicants' reference herein is allowed out of time and deemed as duly filed.
 - b) An order of stay of execution of the impugned ruling dated 27/8/2024 is hereby granted upon the Applicants depositing the assessed/taxed costs in a joint interest earning account in the names of the Advocates herein within thirty (30) days from the date hereof failing which the stay shall lapse.
 - c) The costs of the application shall abide in the reference.

Orders accordingly.

DATED SIGNED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.



D. KEMEI

JUDGE

In the presence of:

Ondego.....for Applicants

Ohayo.....for Respondent

Ogendo.....Court Assistant

