



Sammy Mathai Maina t/a Mathai Maina & Co Advocates v Wesonga (Miscellaneous Reference Application 32 of 2023) [2024] KEELC 3657 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3657 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
MISCELLANEOUS REFERENCE APPLICATION 32 OF 2023
JM ONYANGO, J
APRIL 29, 2024
ARISING OUT OF ELDORET HIGH COURT CIVIL APPLICATION NO. 109 OF 2022
ELD MISC APPLICATION E017B OF 2022**

AND

**IN THE MATTER OF ADVOCATES ACT UNDER SCHEDULE 7 OF
THE ADVOCATES (REMUNERATION) AMENDMENT ORDER 2014**

BETWEEN

**SAMMY MATHAI MAINA T/A MATHAI MAINA & CO
ADVOCATES ADVOCATE**

AND

BEN WESONGA CLIENT

RULING

1. Before the court is the chamber summons application brought under Rule 11(2) of the [Advocates Remuneration Order](#) dated 28th July 2023 seeking the following orders: -
 1. That the Applicant be granted leave to file an Objection and Taxation Reference to this Honourable Court out of time against the ruling of the Honourable court delivered on 12th May 2023.
 2. That the Bill of Costs be taxed afresh with directions on the correct approach the taxing officer should take in items 1(a) and 1(b)
 3. That this Honourable Court issues a stay of execution of the ruling for payment of Kshs.526,500/= pending determination of this Honourable Court.
 4. That the objection of Taxing officer annexed hereto be deemed as duly filed and served.



5. That the costs be included in the taxation
2. The application is premised on the grounds on its face and supported by the affidavit of Charles Duke Nyamweya sworn on 28th July 2023. He deposes that the Advocate/Respondent filed an Advocate/Client Bill of Costs dated 21/5/2019 where the same was taxed at Kshs 526,500/= when the ruling was delivered on 12th May, 2023. He deposes that the taxing master erred in principle in determining instructions fee where the value of the subject matter was speculative as there was no valuation report. He deposes that he erred in allowing items 1(a) and (b) of the bill without taking into account the applicant's submissions and provisions of schedule B of the scale of fees. A notice objecting to the taxing master has been duly filed. He further states that the ruling was delivered in their absence and by the time they came to learn of it, time had lapsed.
3. A second application was filed chamber summons dated 7/8/2023 which sought the following orders: -
 1. That this Honourable court do order that the applicant's chamber summons dated 28th July 2023 hereby be certified urgent and heard as a matter of urgency during the current vacation.
 2. That cost of this application be on the course.
4. The court gave directions granting leave for the ex-parte chamber summons application dated 11th August, 2023 to be heard during the court vacation.
5. The court further issued directions on the application dated 11th August, 2023 deferring the Notice to show cause scheduled for 23rd August, 2023 pending the directions on the application 28th July, 2023 which we hereby delve into.
6. The application is opposed by the Replying affidavit filed on 15th September, 2023 sworn by one Sammy Mathai Maina. The Respondent states that the application has no merit and the same ought to be dismissed. In a nutshell he states that the Taxing Master reasonably exercised his discretion in assessing instructions fees where the value is not ascertained and the same cannot be faulted. He states that the value of the subject matter can be obtained from the pleadings and the same is not subject to *interrogation* by either party. He contends that the application offends Section 11 paragraph 11 of the *Advocates Act*.
7. The application was canvassed by way of written submissions.

Submissions

8. The Applicant's submissions to the application were filed on 13th December, 2023 while Respondents' submissions were filed on 3rd November, 2023.

Applicant's Submissions

9. The applicant's submissions gave a background of the case. In summary, the Advocate-Client Bill of Cost dated 21st May, 2019 presented by the Respondent was taxed at Kshs7,699,900/-. With regard to item 1(a) instruction fees the Respondent submitted a fee of Kshs.4,395,000/- on the assumption that the subject matter was valued at Kshs.300,000,000/-. It was the Applicant's submission that the value of the subject matter could not be ascertained and thus the instructions fees of Kshs.300,000 taxed by the taxing master was excessive as it was based on an assumption.
10. The applicant narrowed down three issues for determination namely:



- i. Whether leave should be granted to the applicant to file an objection and taxation reference out of time.
 - ii. Whether there should be a stay of execution.
 - iii. Whether the application has merit
11. The Applicant prays that leave be granted to file reference out of time arguing that the court has discretion to allow an application for extension of time as his delay was only for a period of two months. To illustrate their point, they relied on the case of [George Kagina Kariuki & 2others v George M. Gichimu & 2 Others](#) (2014) eKLR.
 12. On the issue of stay, he relied on the case of Civil Appeal 3 of 2022 [Nicholas Stephen Okaka and Charity Njoki Muigai v Alfred Waga Wesonga](#) to demonstrate that they have met the conditions for stay of execution set out under Order 42 Rule 6 [Civil Procedure Rules](#). The Applicant submits that they stand to suffer a substantial loss in the event the Respondent is allowed to proceed with the execution. It is her contention that the Taxing Master taxed the subject matter based on an unascertained value of the subject matter and thus arrived at Kshs.300,000/- yet he should have been guided by Schedule 6(1) of the [Advocates Remuneration Order](#) and taxed it at Kshs.75,000/-.
 13. She of the view that the application has merit and that it should be granted as prayed.

Respondents' Submissions

14. The Respondents commenced their submissions by giving a background to the case where they represented the Applicant herein in E & L Petition No. 13 of 2015 [Moses Kiptoo Rono v The Chief Land Registrar & 5 others](#). The court allowed the petition through its judgment and the Applicant instructed the Respondent to file a Notice of Appeal. After filing the notice, the Applicant changed advocates to Onyinkwa & Co. Advocates without paying a shilling towards instructions fees. The Respondent filed a Client-Advocate Bill of Costs claiming a total of Kshs.7,669,900/=. The ruling which was delivered on 12th May, 2023 taxed the bill at Kshs.286,000/= which triggered the filing of this Reference by the Applicant. It is their submission that grievances emanating from a ruling can only be ventilated through paragraph 11 of the [Advocates Remuneration Order](#) which provides for the procedure an aggrieved party must follow. To buttress their point, they relied on the cases of [Michira & Co. Advocates v Magugu](#) (2002) and [Gacau Kariuki Co. Advocates v Allan Mbugua Ng'ang'a](#) (2012) eKLR.
15. It is their submission that the application is incompetent because the Applicant did not seek reasons from the Taxing Master before filing the Reference. Further that the Applicant never stated in his application the reasons as to why he moved this court nor did he demonstrate in his application that he requested for reasons from the Deputy Registrar. That a taxation Reference cannot be heard in a vacuum without reasons from the Taxing Master. To demonstrate that the application was incompetent counsel relied on the cases of [Kaminyori & Co. Advocates v Development Bank of Kenya Limited](#) (2015) eKLR, [Charles Nyanga Njeru v Independent Electoral & Boundaries Commission](#) (2015) eKLR, [Evans Thinga Gaturu Advocate v Kenya Commercial Bank](#) and [Muriu Mungai & Co. Advocates v New Kenya Co-operative Creameries Limited Nairobi](#) (2012) eKLR.
16. It is their submission that the Applicant filed an application dated 7th August 2023 seeking the court to certify the application dated 28th July 2023 as urgent and heard during vacation.
17. The court heard the application ex-parte and gave directions on 16th August 2023 where leave was granted. The respondent assumes that the leave granted was the one sought in the 28th July 2023



application as they were never served with the application dated 11th August, 2023. After leave was granted the Applicant did not obtain reasons from the Taxing Master and did not issue the notice within 14 days on the item he is objecting to the taxing master.

18. It is the Respondents' submission that the application is defective since the Applicant never sought reasons from the Taxing officer nor did he state the reasons that were given by the Taxing Master while rendering his ruling on taxation 12th May, 2023. He also did not he attach the Certificate of Costs hence making the application defective. To buttress their point, they relied on the case of *Elijah Ireri T/a Ireri & Co. Advocates v County Government of Embu* (2021) eKLR.
19. It is their submission that the Taxing officer exercised proper discretion guided by the prayers sought by the petition. To buttress their point, they relied on the cases of *Kamunyore & Co. Advocates v Development Bank of Kenya Limited* (2015) and *Jareth Limited v Kigano Associates Advocates* (2002). They submitted that the Taxing Master was not excessive as the interest of the Applicant was to be allocated the suit property. It is their contention that the Reference lacks merit and should be dismissed.

Issues For Determination

20. I have read the application, the response thereto and rival submissions filed by the parties and find that the issues for determination are:
 - i. Whether extension of time should be granted and
 - ii. Whether execution should be stayed.

Analysis And Determination

21. Rule 11 of the *Advocates Remuneration order* 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.
- (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.”

22. This rule grants the court power and discretion to enlarge time for filing an objection in certain circumstances however, it does not give pre-set conditions the court considers when enlarging time in such circumstances but the court shall be guided by the general conditions when faced with an



application for extension of time. In the case of *First American Bank of Kenya Ltd vs. Gulab P. Shah & 2 others Nairobi (Milimani)* HCCC No. 2255 of 2000 {2002} 1 EA 65 the court sets out conditions when considering an application for extension of time as: -

“(i). the explanation if any for the delay; (ii). The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favor of the applicant.”

23. The ruling in the instant case was delivered on 12th May 2023 and the application was filed on 28th July 2023. Time started running from 12th May 2023 when the bill was taxed upto 28th July 2023 when this application was made. There is a delay of 77 calendar days. The delay was explained by the Applicant’s counsel as attributable to the fact that the ruling was delivered in their absence and by the time they learnt of it, time had already lapsed. Upon perusal of the court record the ruling dated 12th May 2023 shows that it was indeed delivered by B. K. Kiptoo Principal Magistrate in the absence of the Respondent and in the presence of the Applicant’s counsel.
24. I find that the explanation given by the Applicant is reasonable given the fact that they were not aware of the delivery of the ruling. This explains the delay in making the application which the court finds it not inordinate given the circumstances. I also find that the Respondent will not be prejudiced as he is the decree holder and in any case, in the event the Applicant is not successful the Respondent can go ahead and execute. I find that the Applicant has demonstrated sufficient cause.
25. The Respondent also argued that the Applicant never attached to the application reasons as to why he moved this court making the application incompetent. He also argued that the Applicant did not demonstrate in his application that he requested for reasons from the Deputy Registrar. He added that a taxation Reference cannot be heard in a vacuum without reasons from the Taxing master.
26. On this argument this court is guided by the case of *Ahmed Nassir –Vs- National Bank of Kenya Ltd* [2006] E.A where the court held thus: -

“Although Rule 11(1) of the *Advocates Remuneration Order* stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the *Advocates Remuneration Order* demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”

27. Upon perusal of the ruling which forms part of the annexures of the Respondent the court notes that the Taxing Master gave reasons as to how he arrived at the figure of Kshs.526,500/- and taxed the bill as such. He also pointed out that the value of the subject matter could be ascertained and used his discretion as ably empowered by the law. The Notice of Objection which forms part of the application also gives reasons of their objection in respect to the bill of costs. It is my considered view that the application cannot be deemed incompetent on this ground alone. The reasons advanced are clear.



28. The discretion to grant an order of stay of execution is provided under Order 42 rule 6 of the Civil Procedure Rules. The court is guided buy the case of RWW Vs. EKW (2019) eKLR where the court held as follows:

“...the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

29. What is before this court is an application seeking leave to file a taxation Reference against the bill of costs taxed in favour of the Respondent herein. The court is guided by the conditions as set out above in determining whether to allow a stay. The Applicant has a right to file a Reference as spelt out under the Advocates Remuneration Order. The Applicant’s rights should be balanced with the rights of the decree holder who is the Respondent herein. The question that begs is if the stay of execution of the Certificate of costs is refused, will the subject matter in the Reference be rendered nugatory if the reference is successful? Does the intended Reference have merit? The court finds that there is a substantial question to be adjudicated upon by the appellate court. The Applicant also stands to suffer substantial loss if the stay is not granted as the Respondent will proceed with execution.

30. In view of the reasons stated above, the court finds that the application is merited. The Applicant is granted leave to file their taxation reference out of time against the ruling of the Honourable Court delivered on 12th May 2023. Prayers 3, 4 and 5 of the application are hereby granted.

31. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 29TH DAY OF APRIL 2024

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J.M ONYANGO
JUDGE

In the presence of;
Miss Chepkwony for Mr. Nyamweya for the Applicant
No appearance for the Respondent
Court Assistant: Mr. Brian K.

