



REPUBLIC OF KENYA



KENYA LAW
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**Mutai v Mutai (Miscellaneous Application E008 of 2021)
[2023] KEELRC 406 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 406 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
MISCELLANEOUS APPLICATION E008 OF 2021
DN NDERITU, J
FEBRUARY 16, 2023**

BETWEEN

JOSHUA KIPKEMBOI MUTAI APPLICANT

AND

KILELSON MUTAI RESPONDENT

RULING

I. Introduction

1. The applicant herein (the advocate), an advocate of the High Court of Kenya, acted for and gave professional legal services and represented the respondent (the client) in Kericho ELRC No 94 of 2018 wherein the matter was concluded and a judgment delivered on June 24, 2021 (Wasilwa J).
2. Thereafter, there arose a dispute about legal fees payable to the advocate by the client and or failure by the client to pay the agreed fees for professional services rendered as a result of which the advocate filed an advocate/client bill of costs (the bill) dated August 20, 2021, claiming a sum of Kshs 564,615/- against the client.
3. On November 24, 2021, upon satisfying himself that the said bill of costs had been served upon the client, the Deputy Registrar (DR) taxed the bill at Kshs 531,578/- and a certificate of costs was accordingly given on November 26, 2021.
4. The record and materials presented from both parties indicate that execution followed wherein properties belonging to the client were attached and sold by public auction and some amount realized in part satisfaction of the amount due. There is still a substantial balance that is yet to be settled.
5. On July 20, 2022 the client filed a notice of motion (the application) dated July 18, 2022 seeking that “taxation of the bill of costs filed by the respondent and further certificate of costs dated November 26, 2021 be set aside.” The application is based on a single ground on the face of the application - “that



the applicant questions on the manner in which the same was obtained in court without participation and or concern on the court proceedings.”

6. The said application is supported by the affidavit of the client sworn on July 18, 2022. He swore a supplementary affidavit on August 25, 2022 with two annexures thereto.
7. In opposition to the application the advocate filed a replying affidavit sworn on September 22, 2022 with several annexures thereto.
8. Both parties filed written submissions in support of their respective positions.
9. This ruling is thus in regard to the above-mentioned application.

II. Client’s Case

10. In his supporting affidavit the client admits that the advocate acted for him in the main cause and that he paid the following sums in legal fees on diverse dates – Kshs 98,000/-, Kshs 50,000/-, and Kshs 20,000/-. Of course, this is in addition to the sum of Kshs 86,000/- that the advocate admits was paid to him from the proceeds of the public auction.
11. The client states that he was not served with the bill and hence he was denied an opportunity to be heard on the same. He denies that he owes the legal fees as taxed and claims to have paid all the fees as agreed with the advocate.
12. In the supplementary affidavit the client states that after the bill of costs was filed in court by the advocate, he decided to inquire into the status of the advocate with the Law Society of Kenya (LSK) and discovered that the advocate did not hold an annual practicing certificate for the years 2020 and 2021.
13. According to the client the advocate, by virtual of him not holding a valid annual practicing certificate for the year 2021, had no legal capacity to draw, file, and present the bill and hence the entire proceedings should be set aside and the bill be struck out with costs.
14. In his submissions the client reiterates the foregoing from his affidavits and submits that section 9 of the *Advocates Act* disqualifies the advocate from acting as an advocate, and more so for the year 2021, for not taking out a practicing certificate.
15. However, the client submits that in *Kasamani Charles Lutta & 4 others v Amani National Congress & 3 others* (2017) eKLR the court held that lack of a practicing certificate does not invalidate pleadings and documents executed or signed and filed by an advocate who does not hold a current practicing certificate but rather such an advocate commits an act of professional misconduct.
16. The client insists that he was not served with the bill of and that the affidavit of service filed is false.
17. It is on the basis of the foregoing that the client prays that the application be allowed as prayed.

III. Advocate’s Case

18. The advocate’s position is expressed in the replying affidavit and the written submissions filed.
19. The advocate states that he acted for the client in Kericho ELRC No 94 of 2018 but unfortunately the client lost in a judgment delivered on July 8, 2021. He submits that the client failed and or refused to pay his legal fees prompting him to file the advocate/client bill of costs that is subject of these proceedings.
20. He states that he served the client with the bill of costs before the same was taxed, as per the affidavit of service, and that he engaged the client before and after the taxation and that the client even offered



- some proposals on settlement but the client negated on his promises. He has annexed copies of phone messages allegedly exchanged between him and the client in negotiations towards settlement of the fees before and even after taxation whereby the client made promises that he failed to honour.
21. He states that properties belonging to the client were attached and sold by public auction and he received a sum of Kshs 86,000/= from the auctioneers as proceeds of the said sale.
 22. The advocate admits that he did not take out practicing certificate for the years 2020 and 2021 but he states that he remained an advocate of the High Court of Kenya duly admitted and on the roll of advocates. He states that his failure to take out a practicing certificate did not invalidate any pleadings or documents prepared, signed, and filed by him during that period when he held no practicing certificate but that failure on his part may amount to professional misconduct.
 23. He states that the client is through this application making deliberate efforts to evade payment of legal fees that is due and payable to the advocate.
 24. The advocate submits that the figure of Kshs 531,578/- awarded after taxation considered the amounts already paid before taxation. He states that the amount realized from the public auction is Kshs 86,000/- and that even if this amount is considered there is still a balance of Kshs 445,578/- yet to be paid.
 25. He submits that all along the client was aware of the filed bill of costs and even the taxation date but the client decided not to attend court on the day of taxation. In any event, he submits that the client has not isolated any particular items that he is objecting to in the bill and as such his objections are empty and cosmetic without any sufficient cause as to prompt this court to set aside the taxation and the certificate of costs as done by the taxing master.
 26. Advocate has cited *National Bank of Kenya Limited v Anaj Warehousing Limited* (2015) eKLR, a decision from the Supreme Court, to buttress the argument that documents and pleadings do not become invalid or null and void of the fact that they were prepared and or executed by an advocate who did not hold a valid annual practicing certificate at the material time. He also cites section 34B of the *Advocates Act* in affirming that position.
 27. The advocate therefore argues that the bill of costs was properly filed and taxed and in absence of challenge to any item by the client this court should not interfere with the proceedings herein. He terms the application by the client as malicious, made in bad faith, misconceived, and with no merits and prays that the same be dismissed with costs.

IV. Determination

28. Upon careful consideration and analysis of the evidence and submissions from both sides, it is clear that there are a number of issues for determination by this court as follows –
 - a. Was the client served with the bill of costs before taxation?
 - b. Was the bill of costs as drawn and filed by the advocate properly presented before the court/ taxing master?
 - c. Are there sufficient reasons for this court granting the application as prayed?
 - d. Costs.
29. On issue (a) the straight answer is in the affirmative. The bill was filed in court on September 22, 2021. On September 24, 2021 the taxing master (DR) directed that the bill be served upon the client. There



- is an affidavit of service sworn by the advocate on September 27, 2021 stating that he served the client with the bill of costs on September 24, 2021 via his email address as provided for by the client.
30. The client has not denied that the email served through is his email address. The advocate has annexed to the replying affidavit communication between the parties via whatsapp, a social media platform, from about October 26, 2021, before the bill was taxed, wherein the parties discussed the bill of costs that was pending taxation, and the client made proposals on payments and settlement. The parties were to record a consent if the payments were made.
 31. The client did not make the payments as proposed and hence the bill was taxed as aforesaid.
 32. The foregoing clearly indicates that the client was well aware of the bill of costs pending taxation in court and if he failed to attend court for taxation it was of his free will and choice as opposed to lack of service.
 33. Issue (b) is on whether the bill of costs and in essence these proceedings are properly before court since they were commenced by the advocate when he admittedly possessed no annual practicing certificate for years 2020 and 2021. The material year is 2021 when the bill was drawn and filed in court by the advocate.
 34. The fit of documents, pleadings, instruments, and or legal tools drawn by a duly qualified advocate who does not hold a practicing certificate is now fairly settled following the pronouncements of the Supreme Court in *National Bank of Kenya Limited v Anaj Warehousing Limited* (2015)(supra) wherein the court offered as follows – “the facts of this case, and its clear merits, lead to a finding and the proper direction in the law, that, no instrument or document of conveyance becomes invalid under section 34(1)(a) of the [Advocates Act](#), only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.”
 35. The above position is fortified by the provisions in section 34B of the [Advocates Act](#) which now provides that all legal documents including pleadings, affidavits, depositions, applications, deeds, and other related documents filed in any registry under any law requiring the filing by an advocate are not invalid of the fact that the advocate did not hold a valid practicing certificate.
 36. The understanding of this court is that such documents, tools, pleadings, or instruments are and remain valid and properly on record but the concerned advocate may be subject to charges of professional misconduct.
 37. There is no evidence on record that the advocate had been struck off the roll of advocates or that he had been suspended from practicing law at the material times. In the circumstances, this court finds that the pleadings filed by the advocate in these proceedings, including the bill of costs, are properly on record.
 38. In any event, if the advocate had been struck off the roll or suspended, would it mean that he would not be entitled to pursue payment of his pending legal fees by all lawful means? The answer is no. I say no more on this issue.
 39. On issue [c], the client had the option of challenging the taxation of the bill by way of a reference to this court. he has not done so.
 40. The client has not pointed or singled out any item(s) in the said bill that he feels were not properly handled by the taxing master. This court has found that service of the bill upon the client was proper and the pleadings and documents in these proceedings are properly on record and this court finds no reason at all for disturbing these proceedings this far.



41. For all the foregoing reasons this court arrives at the inevitable conclusion that the notice of motion dated July 18, 2022 by the client must fail.
42. In the interest of justice, the client is spared further costs and hence each party shall meet own costs for this application.
43. This court orders that all payments made by the client and the amount received by the advocate from the auctioneer be accounted for in tabulating the balance now due and payable. Further, this court orders that the balance shall not attract interest till payment in full.

V. Orders

44. Flowing from the foregoing the following orders issue –
 - a. That the notice of motion dated July 18, 2022 by the client be and is hereby dismissed for want of merits.
 - b. That in determining the balance now due and owing, all amounts paid by the client and or received by the advocate shall be accounted for.
 - c. That the balance due and payable by the client shall not earn any interest till payment in full.
 - d. That each of the parties shall meet own costs of the application.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 16TH DAY OF FEBRUARY, 2023.

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DAVID NDERITU

JUDGE

