



Langat t/a Kolato Auctioneers v Sitienei & another (Miscellaneous Application E016 of 2021) [2022] KEELRC 1239 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1239 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E016 OF 2021**

**HS WASILWA, J
JULY 21, 2022**

BETWEEN

ISAAC KIPYEGON LANGAT T/A KOLATO AUCTIONEERS APPLICANT

AND

EZEKIEL K KIPROP 1ST RESPONDENT

HOSEA SITIENEI 2ND RESPONDENT

RULING

1. Before me for determination is the Respondents/Applicants Chamber Summons dated 15th, June, 2022 filed under certificate on the 16th June, 2022 and Brought pursuant to Rule 55(5) of the Auctioneers Rules 1997, Articles 50 and 159 of the Constitution of Kenya 2010 and all other enabling provisions seeking the following Orders; -
 - 1) That this Honourable Court be pleased to stay execution of the taxing officer's decision of 30th November, 2021 and consequential Orders pending hearing and determination of the Application.
 - 2) That this Honourable Court be pleased to stay the execution of the Taxing officer's decision of 30th November, 2021 and consequential orders pending hearing and determination of the Intended Appeal.
 - 3) That Boniface Muendo Munyao be summoned to Court for cross examination on the basis of the Affidavit of service dated 13th October, 2021.
 - 4) That this Honourable Court be pleased to enlarge time within which the Applicants are to file and serve their appeal challenging the decision of the taxing officer of 21st December, 2021.
 - 5) That the costs of this Application be provided for.



2. The application is supported by the grounds on the face of the application and the affidavit sworn on 15th June, 2022 by Hosea Sitienei, the 1st Respondent/Applicant herein, which was based on the following grounds: -
 - (a) That the Respondent herein filed a bill of costs dated 29th July, 2021 which was assessed on the 30th November, 2021.
 - (b) The Applicants were not served with the Bill of costs, taxation Notice, certificate of costs or the ruling of the Taxing master delivered on the 30th November, 2021. Therefore, the information on the taxed costs were not within the knowledge of the Applicants herein.
 - (c) The taxing master erred in taxing Bill of costs in Petition 3 of 2019, which the Court had ruled that execution was a nullity as there was stay of execution Orders in place.
 - (d) It is averred that the items in the Bill of costs, comprising the particulars of work which the auctioneers were seeking payments for had been nullified by Order of the Supreme Court dated 1st November, 2019 and the letter of this Court of 12th November, 2019.
 - (e) He stated that the taxing master erred in failing to rule that the Respondent was entitled to only half of the fees payable if at all as the entire execution proceedings had been stayed by an express Order of this Court.
 - (f) It is stated that the taxing officer erred in principle in basing the commission fees on the decretal sum of Kshs.38,905,116.60 rather than the value of the work done. Further that the attachment was irregular having attached property whose value was more than the decretal sum of Kshs 45,000,000.
 - (g) He stated that the taxing master failed to apply the correct principle in taxing item 3, which was taxed at Kshs 1,189, 152 instead of Kshs.625,000. He added that the Court award of Kshs.1,220,387 is manifestly excessive, criminal, suspicious and unjustifiably high.
 - (h) It is the affiant's averments that the delay is justified in light of the fact that they were not aware of the taxation proceedings therein.
 - (i) They are dissatisfied with the said ruling and intends to appeal, which appeal has high chances of success.
 - (j) They urged this Court to allow the Application herein in the interest of justice and added that the same was filed within reasonable time from the time they were made aware of the said proceedings.
3. In opposing the application, the Respondent, Isaac Kipyegon Langat, filed a replying affidavit deposed upon on the 20th June, 2022. The Respondent herein maintains that the Bill of costs, date for taxation was served upon the Applicants herein by a Court process server through WhatsApp as evidence by the Affidavits of services filed herein and marked as IKL (a), IKL(b) and IKL(c).
4. It is on being satisfied with service of the Bill of costs and taxation notice, that the taxing master proceeded to tax the Bill of costs herein and delivered her ruling.
5. It is alleged that the Respondent were directed by the Applicant's advocates by the letter of 11th November, 2019 to proceed without haste and proclaim the Applicant's goods and forward the cheque to them for onward transmission to their clients who are the Applicants herein on the basis that the Court of Appeal Orders of 18th October, 2018 has since been fully implemented.



6. The auctioneer avers that having received instruction from the said advocates to carry out execution proceedings, they cannot now turn around and renege their instructions and alleged illegality.
7. He avers that after proclamation was carried out in ELRC Petition number 3 of 2019, the Respondent/Applicants herein were fully paid their dues and his charges remain unpaid to date, over 2 years from the date of instructions.
8. On following up on the said Costs, he was advised by the Applicant advocates to file his Bill of costs which he did vide ELRC MISC number 5 of 2020 which was dismissed on the basis that there were stay of execution Orders in place. He therefore filed this Miscellaneous application after the said Stay of execution Orders were lifted.
9. He prayed for the Application to be dismissed and his execution proceedings be allowed to proceed to recover his fees.
10. The Applicant in response to the Replying Affidavit, filed supplementary Affidavit reiterating the contents of its supporting affidavit and in addition stated that, the Orders of Court declaring the execution proceedings a nullity and void are still in force and have never been varied or set aside as such the taxation proceeding should suffer the same fate and be dismissed as well.
11. Direction were given by this Court for the Application to be disposed of by way of written submissions.

Applicants' Submissions.

12. The Applicants submitted from the onset that the warrants of attachment giving rise to the fees claimed in this Application were declared null and void and therefore no fees can be payable. It was argued that in absence of review, Appeal or any other order setting aside the decision of the honorable Court in *Isaac Kipyegon Langat T/A Kalato Auctioneers V University of Eldoret* [2021] eKLR of 15th June, 2021, any other action to the contrary would not only be illegal but in contempt of the Court Orders.
13. It was argued that since the orders of the Court were not varied or appealed from, the current Bill of costs ought to suffer similar fate and be dismissed with costs. To support its case the Applicant relied on the case of *Central Bank of Kenya and another V Ratalal Automobiles Limited & others* Civil Application number Nai.247 of 2006, where the Court of appeal emphasized on the need of the parties to obey Court Orders until they are stayed or varied.
14. In conclusion the Applicant argued that there are stay Orders which are still in place and the Bill of costs which the Respondent seeks to recover its alleged fees is done in deviance of the Orders of the Court and the same ought to be nullified and their Application allowed as prayed.

Respondent's Submissions.

15. The Respondent submitted that the prayers sought in the application cannot be granted for the reason that the Applicant has failed to establish the threshold required before such Orders are issued. It was argued that the warrants of attachment were issued on instruction of the advocates for the Applicant and they therefore cannot now turn around and allege the said warrants were procured illegally.
16. It is the Respondent's submission that the application herein is seeking for Court discretion to enlarge time within which an appeal can be lodge, however the Applicant instead of arguing for the said enlargement of time attacked the ruling of the Taxing master on the Bill of costs and failed to articulate on why this Court should grant them time to appeal out of time. He therefore prayed for the Application to be dismissed for lacking merit.



17. On the prayer to have the process served cross-examined, it was argued that the Applicant had an opportunity to seek for such a prayer when direction to file submission were given. Having failed to seek those Orders, there are now late and in any case they have not opposed the service on their WhatsApp as evidence in the annexure attached therein.
18. I have examined the averments and submissions of the parties herein.
19. The Applicant seeks orders of this Court to stay execution of the taxing masters bill of costs dated 30th November, 2021 on the ground that they were never served with the said Bill of Costs, Taxation Notices, Certificate of Costs or Ruling of taxing master.
20. The Applicants who aver that the taxing master erred in proceeding with the taxation when there were stay of execution orders.
21. The Applicants also fault the manner in which the Bill was taxed which particulars had been nullified by the Supreme Court.
22. On issue of whether the Bill of Costs was served or not I note that the affidavit of service dated 13/10/21 indicate the manner of service of the Bill of Costs for which I am satisfied was proper service.
23. The Certificate of Costs was also served on 22/12/21. The Applicants aver that the Bill was taxed when there were stay orders in place.
24. I however note that this Bill was taxed and a Ruling delivered on 30th November, 2021 after the Supreme Court in Pet. No. 33 of 2019 had dismissed the application for stay of execution.
25. The averment by the Applicant that the Bill was taxed when there was a stay order is therefore false.
26. As concerns the manner in which the Bill was taxed, the Law is clear on what an Applicant should do if dissatisfied with the taxing master's decision.
27. Section 11 of the *Advocates Act* states as follows;

"11. 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”.

28. There is no indication that the Applicants objected to the taxing master on the decision she made.
29. No proper objection proceedings are before Court.
30. I find therefore that the application before me is irregularly before me and I proceed to strike it out with costs.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF JULY, 2022.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kipkoech for Applicant Respondent – present

Kamanga for Respondents – present

Court Assistant - Fred

