



**Rutto v Hotel Waterbuck Limited & another (Cause 86 of 2018)
[2022] KEELRC 1240 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1240 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 86 OF 2018
HS WASILWA, J
JULY 21, 2022**

BETWEEN

IAN KIPRONO RUTTO CLAIMANT

AND

HOTEL WATERBUCK LIMITED 1ST RESPONDENT

DEBRA CHELAGAT 2ND RESPONDENT

RULING

1. Before this Court for determination is the Respondents/Applicants application dated 12th May, 2022, brought pursuant to Sections 12 and 13 of the *Employment and Labour Relations Court Act*, 2014, Rules 17,29 and 31 of the *Employment and Labour Relations Court(Procedure) Rules*, 2016, Order 51 Rule 1, 2 & 3 of the *Civil Procedure Rules* and sections 1A, 1B & 3A of the *Civil Procedure Act* seeking for the following Orders; -
 1. Spent.
 2. Spent.
 3. That the warrants of attachment of movable properties issued herein on 6th May, 2022 be suspended and the proclamation of attachment dated 10th May, 2022 be lifted until further orders of this Honourable Court.
 4. That there be stay of execution of the Ruling on costs delivered herein on the 12th March, 2022.
 5. That the claimant and or the claimant's advocates do personally pay the auctioneers costs.
 6. That the Respondent do file their reference within 14 days of service of the Taxing officers handwritten ruling delivered on 12th March, 2022.
 7. That the costs of this Application be provided for.



2. The Application is based on the following grounds; -
 - a. That the Respondent herein fraudulently obtained warrants against the 1st Applicant's properties on allegation of failure to pay taxed costs when neither a certificate of costs nor an application for entering judgement were ever served upon the Applicants as required by the law.
 - b. It is averred that on the 12th March, 2022, the Taxing officer delivered a ruling on the claimant's party and party Bill of costs dated 10th September, 2021, awarding him Kshs.209,560.
 - c. Aggrieved by this decision the Respondents/Applicants herein filed notice of objection dated 15th March, 2022 and requested for the reasons for the said decision, which Objection and letter was copied to the claimant's Advocates.
 - d. Despite several request to Court for the reason to be supplied to the Applicants advocates herein, none was forthcoming as such making it difficult to file a reference against the taxing master's decision.
 - e. By the letter of 17th, March, 2022, the Claimant's advocate demanded for the said Costs together with the decretal sum, when neither the Applicants nor their advocates were served with certificate of costs to warrant the said payments.
 - f. On 10th May, 2022, the Applicants properties were proclaimed by auctioneers on instructions of the claimant and unless the stay of execution orders are granted, the Applicants are likely to suffer irreparable loss and its capacity to discharge its obligations to its customers will be strained.
3. The Application is also supported by the affidavit of Davies Kinyanjui Nderu, the director of the Respondent, deposed upon on the 12th May, 2022.
4. The Claimant/ Respondent herein opposed the application and filed a replying affidavit sworn on the 25th May, 2022. According to the claimant the Applicants have misinterpreted section 51(2) of the *Advocates Act* as the said section deals with costs arising out of Advocate /Client Bill of costs and not party to party costs.
5. He avers that after judgement was entered for the claimant herein, the party to party Bill of costs was taxed and a ruling delivered. A demand letter dated 17th March, 2022 was later send to the Applicant's advocates, which did not elicit any response.
6. It is averred that there is no rule that requires that a certificate of costs be served upon the Respondent before executions are commenced and in any event the Respondent's advocates were aware of the same.
7. It is the affiant's averments that Applicant did not object to any of the taxed items within 14 days as required under Rule 11(1) of the *Advocates Remunerations Order 1962*. He further avers that the request for reason for taxation to the taxing master cannot operate an automatic stay of execution proceedings.
8. The deponent maintain that the execution process was followed as provided for under the law and the time within which reference can be filed has already lapsed and the Application having not sought for enlargement of time ought to be dismissed.
9. He stated that there is no basis upon which the application for payment of Auctioneers fees was made and in any case it's the Applicants who are suppose to cater for the auctioneer's fees as they failed to pay the decretal sum and taxed costs.



10. The affiant aver that the ruling of the Taxing master contained the reason for taxation and the execution emanating out of the said decretal sum and taxed costs were all done in accordance with the law and this Application is made to merely delay this matter.
11. The Application was disposed of by way of written submissions.

Applicants' Submissions.

12. The Applicants submitted that the claimant failed to follow due procedure prior to applying for the warrants of attachment and therefore the proclamation dated 10th May, 2022 arose out of faulty warrants of attachment issued on 6th May, 2022. He argued that the error was admitted by the claimant in the replying affidavit and that no certificate of taxation was ever extracted when the same was mandatory as per the rule v National Hospital Insurance Fund}} [2017] eKLR where the Court held that;

“For execution proceedings to commence there must be an order or decree or certificate of taxation of taxed costs, where the decree is not a money decree, then in the event that costs are awarded, then they must be assessed and a certificate to that effect issued for enforcement... it is also the mandate of the Deputy Registrar to issue certificate of taxed costs before execution for their recovery. The certificate is a formal expression of the ruling of the court on certified costs and there is no prejudice if the same is issued before execution for recovery.”

13. Similarly, it was argued that the claimant did not file an application to enter judgement in terms of the certificate of taxation which he was required to extract prior to execution of the decree. He also cited the case of *Muiruri & Wachira Advocates v Nicola Farms Limited* [2021] eKLR where the ELC Court was of the opinion that certificate of taxation issued after taxation of advocate/Client Bill of costs cannot be subjected to execution until judgement had been entered and not otherwise.
14. Pertaining section 51(2) of the Advocate Act, the Applicant relied on the case of *Tom Ojienda v County Government of Meru* [2021] eKLR where the Court held that;-

“When is a decision on taxation enforceable? Section 51 (2) of the *Advocates Act* provides that, the certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs” (emphasis added)

The Court went ahead to state that. The provision tells me that a decision of the taxing master on taxation is not a final judgment cable of execution and the court, as defined by the Act, must be resorted to pronounce a judgment. I further read and understand the statute to say that a judgment would only be entered by the court where there is no contention as to retainer of the advocate. Where there is dispute as to retainer, the recourse is a suit in which retainer is to be proved.”

15. Accordingly, that the claimant ought to have made an application to have the taxed costs entered as judgement of the Court. Having failed to follow this procedure, the Applicant submits that the execution is unlawful and the same ought to be declared as such as was held in *Republic v Commissioner of Police & 2 others ex-parte Kenya Commercial Bank* [2014] eKLR.



16. The Applicant submitted further that, the claimant having founded the proclamation of warrants of attachment issued contrary to the law, the claimant should not be allowed to benefit from its wrongs and instead stay of execution should be ordered. The basis upon which the Applicant seek for stay Orders, is that the taxing master erred in principle in allowing costs of Kshs 209,000. When the decretal sum was of Kshs. 32,000, which taxed costs were manifestly high in the circumstances.
17. It is the Applicants' submission that the claimant had already been paid the decretal sum and their objection is on the taxed costs which did not follow dues procedure as such, they beseeched this Court to allow their stay Application as they pursue a reference on the taxed costs.
18. On the prayer to have the claimant and its advocate liable for auctioneers cost of *Ngomeni Swimmers Limited v Katana Chara Suleiman*[2015] eKLR where the Court held that;-

“In determining whether an advocate would be condemned to bear costs personally, the advocate's conduct was of paramount importance. Where an advocate's conduct was unjustifiable for instance, where he deliberately misled the Court or client, craftily interpreted or misinterpreted the law, his conduct was oppressive and blatantly aimed at achieving ulterior motives, an order for costs also known as wasted costs could be made against him personally. However, before making such an order the Court would be required to hear the advocate.”
19. Similarly, it was argued that the claimant and his advocate having failed to follow due procedure, should be condemned to pay costs.
20. On the prayed to have the reference filed in 14 days, it was submitted that the reference as per the rules ought to have been filed 14 days after the Ruling on taxation was rendered. This was not done and the delay was occasioned by the taxing master failure to give reasons for taxation. He cited the Supreme Court decision in *Hassan Nyanje Charo VIRTUALLY Khatib Mwashetani and 3 others* [2014] eKLR and urged this Court to consider its reason and allow the reference to be filed out of time.

Claimant's Submissions.

21. The claimant submitted that it followed due procedure in executing the decretal sum and costs granted to him vide the taxation of the Bill of costs. In this they relied on the case of Francis Kimani Kiige V National Hospital Insurance Fund [2017] eKLR where the Court held that;

“for execution proceedings to commence there must be an order or decree or certificate of taxation of taxed costs, where the decree is not a money decree, then in the event that costs are awarded then they must be assessed and a certificate to that effect issued for enforcement. The Applicant does acknowledge the significance of a decree or certificate of taxed costs that's why he adhered to the directive of this Court to extract the decree. He has also extracted a certificate of costs stated/taxation which is due for signature and sealing by the deputy registrar. On the other hand, it is also the mandate of deputy registrar to issue certificate of taxed costs before execution for their recovery. The certificate is a formal expression of the ruling of the court on certified costs and there is no prejudiced if the same is issued before executions for recovery”
22. For that reason, it was submitted that the party and party Bill of costs was filed, heard and a ruling delivered by the taxing master, which ruling has never been stayed therefore that the subsequent execution proceedings were done in accordance with the law.



23. On the auctioneers fees payment request made, it was submitted that the Applicants herein are the debtors in this case and, in accordance with section 7 of the *Auctioneers Act*, are liable to pay the Auctioneers fees. In this he relied on the case of *Cooperative Bank of Kenya Limited v Joefrick N Muinde t/a Kimu Auctioneers*[2019] eKLR where the Court stated that;
- “Rule 7 of the Auctioneers Rules, 1997 which I have set out in full is written in simple and plain language. It clearly stipulates that “a debtor shall pay the charges of the auctioneer” and continues to set out the only exceptions upon which the client would pay. As was held by Majanja J in *Co-operative Bank of Kenya Limited v Joefrick N. Muinde t/a Kimu Auctioneers (supra)* whether or not the exceptions set out in Rule 7 have been established is a question of fact and I dare add to be proved by the auctioneer.”
24. With regard to the prayer seeking to have a reference filed within 14 days, the claimant submitted that the same is not the same as seeking leave as such it cannot be granted by this Court. He further stated that the time within which such reference ought to have filed as per Rule 11(1) of the *Advocates Remuneration Order*, has already lapsed. In this he relied on the case of *Abmwdnasir Abdikadir and company Advocates V National Bank of Kenya Ltd* [2006] 1 EA A5.
25. On costs, it was submitted that the same follow the event and therefore the Applicant should be compelled to pay costs for this Application.
26. I have examined the averments and submissions filed before me. It is true that on 15/3/22 the taxing officer delivered a Ruling on the claimant Party & Party Bill of Costs dated 10th September, 2021.
27. The Ruling was delivered in the presence of Nduta for the Respondent and Applicant was absent.
28. From the court record a Certificate of Costs dated 22nd April, 2022 was issued.
29. The applicant avers that on 15/3/22 after learning of the decision by the court, he filed a notice of objection dated 15/3/22 and requested for the reason for the said decision which objection and letter was copied to claimants advocates.
30. I have looked at the court records including the digital platform and have not seen any objection as alleged by the applicant nor a letter requesting for reason for the decision made on the taxation.
31. If the applicant indeed made the objection and requested for reason of the decision, these should have been annexed to this application which he didn't.
32. The letter attached to the application has no receipt stamp of court showing that it was ever received by this court.
33. The Emails attached to the letter in question do not also show that they were accompanied by any attachments.
34. It is therefore my finding that the applicant has not followed the procedure envisaged in filing any objection to a taxation and finally filing a reference as envisaged.
35. There was nothing in the circumstances that barred the respondents from proceeding with execution.
36. The applicants content that execution was irregular but I do not find any irregularity in the process followed in execution of the taxed bills.
37. A certificate of costs was signed by the court on 22/4/22. An application for execution was then made before court which was allowed and signed by the DR on 6/5/22.



38. The execution having commenced, I see no reason to stay the same unless the applicants put in motion a process to correct the process and also show an indication of objection to the taxed bill.
39. Paragraph 11 of the *Advocates Remuneration Order* provides as follows;
- “Objection to decision on taxation and appeal to Court of Appeal.
- 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.
- 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”.
40. The law here envisages that an objection to a taxation should be filed within 14 days. This has not been done to date as it were and the only recourse the applicants have to seek to file the reference out of time which they have done and which I allow them to do within 14 days.
41. Since the court envisages there will be such an application the execution is stayed for 14 days on condition that the applicants pay auctioneers costs.
42. The costs of this application to be in the cause.

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

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mugure holding brief for Konosi for Claimant - present

Nduta Kamau holding brief for Dr. Kuria for Respondent – present

Court Assistant - Fred

