



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

MISC APPLICATION NO. 18 OF 2019

WAMBUA MUSEMBI & CO ADVOCATES.....APPLICANT

-VERSUS-

MICHAEL MUDOGO.....RESPONDENT

RULING

1. This ruling is in respect of the applicant's application dated 26th March, 2021 filed under certificate of urgency on 29th March, 2021 pursuant to Rule 11(2) and (4) of the Advocates Remuneration Order, Section 1A,1B and 3A of the Civil Procedure Act and Article 148 of the Constitution, seeking the following orders;

- 1) That the Honourable Court be pleased to extend time within which this reference ought to have been filed and upon the said extension, the reference be deemed to be properly before the Court.**
- 2) The Ruling of the Honourable M. Kyalo, Deputy registrar delivered ex-parte on 5th January, 2021 be deemed to contain the reasons informing the resultant taxation.**
- 3) This Honourable Court be pleased to set aside the taxing officers ruling delivered on the 5th January, 2021 as relates to all the taxed items in the Applicants Bill of costs dated 14th October, 2019.**
- 4) That this Honourable Court be pleased to adjust the figures and reassess the fees due to the Applicant or in the alternative the matter be remitted to such other taxing master as the Court May Direct for re-assessment.**
- 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 26th March, 2021 by **Fidelis Wambua Musembi**, the advocate ceased of this matter, and based on the following grounds: -

- (a) That, the trial Court matter being Nakuru ELRC Cause number 438 of 2013-Michael mudogo –v- Kerio Valley Development Authority was heard and judgment delivered on 9th November, 2015 in favour of the Claimant as against the Respondent.
- (b) That when the matter was subjected for taxation (Advocate-client bill of costs), the taxing master erred in disallowing items that are normally allowable.
- (c) That the Applicant was not aware of the Ruling of the said taxation and only learnt of the same through the Respondent's counsel letter dated 11th March, 2021.
- (d) That they now are challenging the Bill of costs dated 14th October, 2019 and seek to set aside the Order and the Ruling dated 5th January, 2021 and the matter be reassessed afresh by this Court or the file be taxed by another taxing master.

3. In opposing the application, the Advocate for the Respondent, **Dennis Musyoka**, swore a replying affidavit dated 7th June, 2021 and filed in Court on 9th June, 2021 on the following grounds;

- a) That the Respondent was represented by the Applicant in the trial suit subject of the taxation proceedings culminating to this Application.

b) That there was no agreement by the Client and the Advocate on the fees payable upon completion of the matter.

c) That as a result of the judgement the Applicant, former advocates for the Respondent have been withholding Kshs 441,000/-. Also that parties disagreed on fees payable leading to the Applicant filing a client Bill of cost dated 3rd April, 2019 which was dismissed on 4th September, 2019 on the basis that the same was not properly drawn.

d) That on the 14th October, 2019 the Applicant filed another Bill of costs and failed to prosecute the same forcing the Respondent to follow up the said taxing and a ruling was delivered on the 5th January, 2021 in their absence.

e) That the Respondent have not been vigilant in this matter and only filed this application as a ploy to delay and eventually deny him fruits of his judgment which monies they are still withholding from 2015 to date.

f) That there are no reasons given to warrant the issuance of the Orders for setting aside and or reviewing the Order issued on 5th January, 2021.

g) The Respondent therefore want the Application dismissed.

4. The parties herein disposed of the application by way of written submissions with the applicant filing on 4th May, 2021 and the Respondent on 9th June, 2021.

Applicant submissions

5. The applicant's Advocate submitted that they were not aware of the date the ruling of the Advocate-client Bill of costs was delivered to enable them file a reference immediately and submitted that they only learnt of the said ruling by the Respondent's Advocates letter dated 11th March, 2021.

6. It was submitted that the instruction fees was taxed at 75,000 when the award given was one of Kshs.926,000/- which could have at least been taxed at Kshs.100,000/-. Further that the total items allowed by the taxing matter amounted to Kshs.304,165/- and not Kshs.154,165 as indicated in the ruling of 5th January, 2021.

Respondent's submissions.

7. The Respondent submitted from the onset that the taxing master made a sound decision in capping the instructions fees at Kshs. 75,000/-. He argued that to allow the Applicant to charge instruction fees of Kshs 450,000/- half of the entire decretal sum would be unreasonable and cited the case of **Lucy Waithera & 2 others –v- Edwin Njagi t/a Njagi and co advocates [2017] eklr.**

8. He further cited the case of **Premchand Raichand Ltd & Another –v- Quarry service East Africa ltd and another [1972] EA 162** which provided guidelines on the issue a taxing master ought to consider to include;-

(a) Costs should not be allowed to rise to a level as to confine access to justice to the wealthy.

(b) That a successful litigant ought to be failed reimbursed for costs he had to incur

(c) That the general level of remuneration of advocates must be such as to attract recruits to the profession.

(d) So far as possible there should be consistency in the award made.

9. On the contention that the Applicant was never informed of the Ruling date, it was submitted that the Applicant after filing the Bill of cost failed to follow up the same therefore he was not vigilant when the Bill of costs was drawn by them.

10. It was submitted that the taxing master's decision was sound and that no ground has been given by the Applicant to warrant this Court to disturb that decision. He thus prayed for the application to be dismissed and the Applicant be ordered to deduct its cost from the Kshs 441,000 its holding and remit the balance of Kshs 286,835 to the Respondent.

11. I have examined the averments of the parties herein. From the record, I note that the Ruling was delivered on 5/1/2021 in the absence of the parties. There is no indication that the parties had been notified of the new date for delivery of the ruling which had earlier on been set for 10th November, 2020.

12. It is therefore apparent that the applicants were prejudiced in that a ruling was delivered in their absence and the need to file a reference in time was obstructed by this.

13. Their application to file a reference of time is therefore allowed.

14. The reference already before court is now deemed to be properly before court.

15. I will give parties time to file submissions on the reference for the court to make a determination on the same.

16. Costs in the application.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Waiganjo holding brief for Wambua for Applicant – present

Respondent – absent

Court Assistant - Fred