Everest Enterprises Limited v Mereka t/a Mereka and Company Advocates (Environment and Land Miscellaneous Application E008 of 2023) [2024] KEELC 13417 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13417 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E008 OF 2023

CK NZILI, J

NOVEMBER 20, 2024

BETWEEN

EVEREST ENTERPRISES LIMITED ..... APPLICANT

AND

DAVID MUKII MEREKA T/A MEREKA AND COMPANY ADVOCATES ..... RESPONDENT

RULING

1. What is before the court are two applications dated 21st and 30th August 2024. The prayers sought by the applicant are:
    i. The setting aside of the judgment made on 22.5.2024 and a decree issued on 11.6.2024.
    ii. Setting aside the tax master's decision made on 24.11.2023.
    iii. Enlargement of time to file a response and oppose the advocate/client bill of costs.
    iv. Order an inter-parties hearing of the taxation with an opportunity to cross-examine the respondent.
    v. Consolidation of this matter with ELC Misc No. E007 of 2023.
    vi. Lifting of the warrants of attachment issued on 27.8.2024.
    vii. Costs
2. The grounds are set out on the face of the two applications and in the supporting affidavits of John Karuga Wahinga sworn on 21st & 30th August 2024. The applicant avers that it was served with a statutory demand on 16.7.2024 and insolvency proceedings were also filed against it in the High Court; it then instructed the current lawyers to come on record by a notice of appointment dated 31.7.2024

3. The applicant averred that it was after the current lawyers on record came in that it was shocked to establish that a taxation ruling was delivered on 24.11.2023 regarding an advocate/client bill of costs that had never been served upon it or made aware of.

4. The applicant contends that it has never instructed any advocate to receive any court processes on its behalf, nor did it instruct M/S P.M Maina Advocates to come on record on its behalf in the taxation proceedings or this matter.

5. The applicant avers that there was no retainer issued to the respondent with respect to NLC/HLI/025/2017 at the National Land Commission, which conducted its hearing in the year 2022. Further, the applicant avers that the respondent is unlawfully holding its Kshs.20,000,000/= with respect to ELC No. 110 of 2009 and also Kshs.100,000,000/= from a land conveyancing.

6. The respondent opposed the two applications by replying affidavit sworn by David M. Mereka on 4th and 22.10.2024. It was averred that the applications are fatally defective since no leave was sought for the applicant's lawyers to come on record after a judgment was entered in compliance with Order 9 Rule 9 of the Civil Procedure Rules.

7. The respondent avers that the applications have no basis in law, whose sole intention is to deny the respondent from enjoying the fruits of his labor. Further, it was averred that no reference to the said taxation has been filed to challenge the taxing master's ruling, which decision remains final.

8. As to stay, the respondent avers that the applicant has failed to meet the conditions set under Order 42 Rule 6 (2) of the Civil Procedure Rules, given that the applications were filed late, no security has been offered, and that the intended reference stands no chance of success, for it is based on frivolous and non-arguable issues.

9. The respondent avers that it is not true that the taxation case proceeded exparte; otherwise, the applicant was ably represented by a law firm on record, which received and accepted service of the bill of costs and a taxation notice as per annexure marked DMM "1", "2" & "3".

10. The respondent avers that the said advocates who were on record for the applicant attended court severally on behalf of the respondent as court attendance record, correspondence, and affidavits of service reflect, marked DMM "4" a – h, and as such, the respondent cannot claim that it was not given an opportunity to participate in the taxation proceedings.

11. Accordingly, the respondent avers that in addition to attending the taxation proceedings, the said advocate or law firm on record was served with the application for entry of judgment as per the attached email marked DMM "5" and attended court with respect to the said application as per court attendance record marked DMM "6", received submissions and a ruling notice as per emails marked DMM "7" and "8" respectively.

12. Again, the respondent avers that the applicant has no basis for protesting legal representation since it was clear under item 3 of the letter dated 26.8.2020 in DMM "1" that its director, John Karuga Wahinya, gave instructions to his law firm to represent the applicant in NLC Case No. NLC/HLI/025/2017, and the applicant executed pleadings prepared by the respondent as per the attached witness statement marked DMM "9".

13. The respondent avers that it remains unclear how the applicant can dispute the retainer and, at the same time, request a completion statement, update of legal work done, and a quotation on legal fees, as can be seen under item 3 of the said letter.

14. Regarding the prayer to set aside the ruling on taxation, the respondent termed the same as bad in law and offensive to paragraph 11 of the Advocate's Remuneration Order; since no objection to the ruling has been filed, no request has been made to the taxing master to give reasons, to enable the applicant to invoke the jurisdiction of this court to consider any decision on the objected items, and that an application for setting aside ought to have been made through a chamber summons to the Judge.

15. As to consolidation, the respondent averred that the proposed two files relate to separate and distinct instructions, one having arisen from the NLC and the other from the ELC Meru, which are at different stages of prosecution.

16. The respondent denied holding a single cent belonging to the applicant as alleged or at all. On the contrary, he averred that it was, represented by Mr. John Karuga, purposely failed to swear an affidavit in this matter in order to avoid perjuring himself and left it to the advocates to swear non-truths under oath.

17. The respondent avers that his firm wrote the attached letter dated 28.8.2024 marked DMM "10," with respect to the allegations that his firm was holding in excess of Kshs.100,000,000/=, which has elicited no response.

18. Further, the respondent avers that he equally wrote to Mr. John Wahinya Karuga by a letter dated 9.9.2024 marked as DMM "11," which equally got no response from Mr. John Wahinya Karuga on behalf of the applicant or Nicola Farm Ltd.

19. The respondent avers that following the entry of judgment, the execution proceedings were instituted by way of insolvency proceedings, grounds of opposition were sent, and the proceedings were abandoned by way of a notice of withdrawal dated 26.8.2024 as per attachment marked DMM "12" and "13".Therefore, the respondent averred that now he wishes to proceed by way of attachment and sale and has instructed auctioneers who have already proclaimed on the applicant's movable assets as per the letter dated 28.8.2024 marked DMM "14," only for the applicant to hide its movable assets in order to frustrate the entire execution process.

20. The respondent avers that it was not true that the execution process was illegal or unlawful since taxation proceeded inter parties with the participation of the applicant; the retainer has never been disputed, and in any event, the applicant did file pleadings in the original suit, the subject matter of the taxation including among others things forwarding to the advocate title no. L.R 84163 and L.R 87955 are the subject matter of the suit attached as DMM "15".

21. The respondent termed the supporting affidavits as fatally defective and incompetent, which should be struck out with costs for offending Order 19 Rules 3 and 8 of the Civil Procedure Rules, in addition to Rule 8 of the Advocate's Rules.

22. Through the affidavit sworn on 22.10.2024, the respondent reiterated the contents of the earlier affidavit save to add that no basis has been laid to lift the warrants of execution since there exists a valid judgment after parties were given an opportunity to be heard and that the warrants can only be lifted under Order 22 Rules 49 and 50 of the Civil Procedure Rules, in this case, the conditions set out there in have not been met.

23. The respondent avers that the deponent of the applicant's application was aware that there were several other taxation proceedings against himself and his two related companies totaling over Kshs.40,000,000/=. Similarly, the respondent avers that the allegations in paragraphs 13 and 14 of the affidavit sworn on 20.8.2024 cannot amount to a reason for seeking the orders herein since there are

other proper forums where such matters can be ventilated if there was anything due to Mr. John Karuga Wahinya and his related companies, which he as a result of this, denies.

24. The respondent avers that the deponent has failed to disclose that M/s P.M Maina & Co. Advocates acted for him in this matter and has so acted for it in its other related companies in various taxation and, therefore has perjured himself, in addition to failing to call the said M/S P.M Maina and Co. Advocates to substantiate or support his allegations in the two applications.

25. Lastly, the respondent urged the court to find that there are no exceptional circumstances with respect to the alleged irreparable loss or damage; the applicant has come to court with unclean hands, for it was ably represented in the taxation, the applications are impeding the execution process, the applicant is guilty of laches, security has not been offered, and there is no prima facie case with a probability of success.

26. In a supplementary affidavit sworn on 22.10.2024, John Karuga Wahinya averred that the applicant was never served with any bill of costs, taxation notice, or any court processes at all.

27. Therefore, in the absence of evidence of personal service under Order 5 Rule 3 of the Civil Procedure Rules, otherwise, if at all there was any alleged service of court processes, the same was received under protest by the alleged M/S P.M Maina and Co. Advocates, who it never instructed to receive the court process for any of its matters filed in 2023.

28. The applicant avers that the letter dated 26.8.2020 did not amount to instructions. Further, the applicant avers that no law firm filed a memorandum of appearance or notice of appointment of advocates to act for it in this matter, and hence, the respondent had no power to appoint one for it, and to serve court process on such a law firm.

29. Moreover, the applicant avers that it had instructed its law firm to challenge the authenticity of DMM 4 (a) – (g) since the documents do not comply with the *Evidence Act* Cap 80 of the laws of Kenya.

30. Again, the applicant avers that there was no service of court processes on it regarding the taxation, ruling notice, and notice of entry of exparte judgment, going by the court records of 31.8.2023, 17.10.2023, 24.11.2023, and later after the delivery of judgment on 22.5.2024, otherwise, the respondent should have provided the affidavit of service to that effect.

31. As to instructions to represent it before the NLC, the applicant avers that its letter dated 26.8.2020 was informed by its reasonable suspicion that the respondent was quoting matters in its unsubstantiated client/account financial statement at which date, no legal services had been offered or rendered in NLC/HLC 025/2017.

32. The applicant avers that after the orders were made by Hon. Lady Justice Lucy Mbugua in the consolidated files in early 2022, after receiving correspondence and calls from NLC, it participated in the investigations hearing on 1.2.2022, 22.3.2022, 5th – 6th May 2022, 2nd – 3rd June 2022. Therefore, it was averred that there were no express or implied instructions issued to the respondent to represent it in the said matter; hence, the admissibility of DMM "9" used in the consolidated file is challenged.

33. On setting aside the taxation and the judgment, the applicant avers that there are valid grounds availed in the application, affidavits of service had not been availed, it was condemned unheard, an explanation for non-service is not available, it has not been indolent but vigilant, and costs will be an appropriate remedy.

34. On grounds of the stay, the applicant reiterated that the respondent was holding its funds. On consolidation and authenticity of some annexures in the respondent's affidavit, the applicant avers that

the two files are similar, it reserves the right to cross-examine the maker on the contents of paragraphs *13* & 14 of the replying affidavit, it was not served with the letter dated 9.9.2024, it never gave instructions in 2020 or introduced M/S PM Maina & Co. Advocates to the respondent or instructed him to act in this matter vide an alleged notice of appointment dated 9.3.2023, and that the respondent' was misleading the court about the protest letter.

35. Regarding the financial statement relating to conveyance, the applicant averred that it was confirmed that the respondent received Kshs.247,000,000/= without its authorization, and he only paid Kshs.174,000,000/= after protests. Further, the applicant averred that it had not authorized the respondent to pay Kshs.49,797,981/= and Kshs.6,839,700/= and that there was an outstanding amount of Kshs.73,000,000/=, currently Kshs.100,000,000/= due to interest as per the demand letter dated 30.7.2024 marked as JKW "4".

36. Regarding Kshs.20,000,000/= over ELC No. 110 of 2009, the applicant avers that the respondent received Kshs.13,650,010/= without authority, which has accrued to Kshs.20,000,000/= as per a demand dated 30.7.2024, annexed as JKW "5"; otherwise, the respondent had concealed material facts to mislead the court.

37. On the request to clarify withholding Kshs.18,928,005/=, the applicant avers that it needed better particulars for the same. The applicant denies that the respondent had approached it to settle the outstanding issues on the withheld funds amicably. On the contrary, the applicant avers that despite its efforts to request a meeting, the respondent has been evasive since 2018 as per annexures JKW "*6*" – "9". On the insolvency issue, the applicant denies that the same had been withdrawn in view of the Order dated 27.8.2024 annexed as JKW "10".

38. Directions in this matter were issued and parties were given strict timelines to file and serve written submissions. The applicant filed no written submissions.

39. The respondent relied on written submissions dated 5.11.2024. It was submitted that an advocate/client bill of costs was filed on 16.2.2023 and came for a hearing on 9.3.2023 when M/S P.M Maina & Co. Advocates showed up and prayed for 21 days to file a preliminary objection and written submissions. The respondent submitted that despite leave to file a response, the said law firm did not comply with the court directives; hence, the bill was taxed at Kshs.20,101,200/= vide a ruling delivered on 24.11.2023.

40. The respondent submitted that after he applied for entry of judgment, again, the said P.M Maina & Co. Advocates appeared for the applicant and, from the court record, sought and was given time to respond and to file submissions before 5.4.2024 but failed to do so. Therefore, the respondent submitted that the entry of judgment on 22.5.2024 was regular, followed by the execution proceedings, leading to a proclamation notice dated 28.8.2024.

41. As to the application dated 21.8.2024, the respondent submitted that the elements for a stay under Order 42 Rule 6 (2) of the Civil Procedure Rules had not been met since there was an inordinate delay, lack of demonstration of sufficient cause, or substantial loss and the offer of security for the due realization of the decree. Reliance was placed on Halal & another vs. Thorton & Turpin (1963) LTD (1990) eKLR, James Wangalwa & another vs. Agnes Nliaka Cheseto (2012) eKLR, G.M Muema Mt. View Maternity & Nursing Home vs Miriam Maalim Bishah & Jimale Rashid Hassan (2018) eKLR and Joseph Gachie t/a Joska Metal Works vs Simon Ndeti Muema (2012) eKLR.Equally, the respondent relied on Nyati Security Guard & Services Ltd vs. Municipal Council of Mombasa (2004) eKLR and Korea United Church of (K) & others vs. Seng Hasang (2014) eKLR on the principles to apply to the consolidation of suits. In this case, the respondent submitted that the issue was disposed of by the lower court in the proceedings of 22.6.2023.

42. Further, the respondent submitted that the procedure to set aside taxation and enlarge time to file taxation is governed by Paragraph 11 of the Advocates Remuneration Order, as held in *Republic vs Public Procurement Administrative Review Board and another Sports Arts and Social Development (exparte) Application E063 of 2023* (KEHC 22514 (KLR) JR (25th September 2023 (Ruling), Multiline Motors (K) Ltd vs Migori County Government (2021) eKLR. To this end, the respondent submitted that the applicant was in the wrong forum and should note that court orders are not made in vain.

43. Further, it was submitted that a law firm ably represented the applicant during the taxation; no notice of objection to the taxation was filed; reference was not made, and therefore, the prayer was misplaced.

44. The respondent also submitted that a court of law is governed by evidence and the law but not extraneous matters such as those included by the applicant in his application and the supplementary affidavit sworn on 22.10.2024, as a fishing expedition and was equally a wild goose chase with no relevance to the issues before this court aimed at invoking sympathy. Reliance was placed on Kinyuni vs Nyambura *& another (Civil Appeal 163 of 2017*) (2022) KECA 923 (KLR), where the court cited with approval Kenya Ports Authority vs Kunton (K) Ltd (2009) E.A 212.

45. Regarding the application dated 30.8.2024, the respondent relied on Republic vs. Kenyatta University exparte Losem Naomi Chepkemoi (2021) eKLR on the proposition that the applicant has not met the conditions for stay in a case of a regular judgment.

46. The respondent submitted based on Mereka & Co. advocates vs Zakhem Construction (K) Ltd (2014) eKLR that the retainer need not only to be in writing but can be implied from the party's conduct as held in Ohaga vs Akiba Bank Limited (2008) IEA 300 and Ochieng Onyango Kibet & Ohaga Advocates vs Athimba Bank Ltd (2007) eKLR.

47. In this case, the respondent submitted that John Karuga Wahinya, a director of the applicant, orally requested him to act for it, and the matter was allocated to Mr. Levis Muchui, an advocate who dwelt with the matter exclusively, including attending court in Meru and the site visits as per request for update by the applicant as per DMM "1".

48. As to the notice of objection to the admissibility of evidence, production, and intention to cross-examine, the respondent submitted that the said were attempts to include extraneous matters, the notices were not properly before the court; they came late, long after directions were given on the disposal of the application through written submissions.

49. The respondent submitted that to grant a stay is a discretionary and equitable power exercised for the proper motives. In this instance, the applicant has come to court with unclean hands by disowning his former lawyers and even where there were retainer /instructions to defend it as per annexure DMM "1,". Reliance was placed on Mongare (suing as Administrator and Personal Representative of the estate of Richard Mongare Ogamba) vs Kerubo Succession Cause No. E016 of 2023 (2024) KEHC 4980 (KLR) (14th May 2024 (Ruling) and Rule 10 of the Advocates Remuneration Order, that the taxing officer for the taxation of the advocate /client bill under the Order shall be the registrar, district or deputy registrars of the High Court.

50. The court has carefully gone through the applications and the responses, as well as the record of this matter. When the two applications came for an interparty hearing, comprehensive directions were issued on the filing of further affidavits and disposal of the matters by way of written submissions. Strict timelines to comply were also given.

51. None of the parties sought cross-examination of the makers of the specific documents or raised any objection to any of the annexures thereto. A party seeking to cross-examine a deponent of an affidavit

on any document or annexure to it has to lay a basis for the same under Order 19 of the Civil Procedure Rules. The application has to be made at the earliest opportunity. The court retains the discretion on whether or not to allow cross-examination. A court ought not to readily allow for cross-examination of witnesses in applications whose timelines are limited, more so where it may further curtail or may not be in the broader interest of justice as held in Republic vs. Ministry of Roads & another exparte Vipingo Ridge Ltd and another (2015) eKLR.

52. In this matter, the applicant failed to lay basis or any exceptional circumstances for the notice to produce and or cross-examination of the respondent on his averments on oath and regarding the annexures to his affidavits. See held in Lawson & Anor vs Odhams Press Ltd and Anor 19482 ALLER 717, GGR vs H-P S (2012) eKLR and Ahmednassir Abdikadir & Co Advocates vs NBK Ltd 2(2006)2 E.A.

53. Parties were given an opportunity to ventilate all the issues through affidavit evidence and to file and exchange written submissions. The court, unfortunately, notes that both parties have traveled outside the specific issues before this court and generally waded into matters touching on past advocate/client relationships, with no bearing at all on the instant two applications.

54. Such extraneous issues cannot be resolved without convoluting the dispute at hand. There is an established dispute resolution mechanism over an alleged complaint against a lawyer for alleged misconduct or negligence under Section 60 of the *Advocates Act*. This court adopts deference and the doctrine of avoidance and declines to dwell on those non-issues in this ruling. See Republic vs the Disciplinary Committee Exparte Wambugu (2008) eKLR.

55. The issues calling for my determination are whether the court has been moved appropriately regarding setting aside the taxation proceedings, if the applicant was duly served with and participated in both the taxation and the entry of judgment thereof, if the two decisions should be set aside, and if there should be a stay of execution of the decree issued, following entry of judgment by this court against the applicant.

56. In Bernard Gichobi Njiru vs. Kanini Njira Kathendu & another (2015) eKLR, the court held that a magistrate is allowed and or mandated by law to assess or tax costs payable in a given case. In Donholm, Rahiji Stores Firm vs E. A Portland Cement Ltd (2005) eKLR, the court said that in taxation of costs, whether those costs be between party and party or between advocate and client, the jurisdiction is reserved to the taxing officer under the Advocates' Remuneration Order, and that the High Court could not be drawn into the arena of taxation, except by way of a reference from a decision on taxation made under Rule 11 thereof.

57. Rule 11 of the Advocates Remuneration Order provides that a party who wishes to object to the decision of a taxing officer may, within 14 days after the decision, give notice in writing to the taxing officer of the items of taxation to which he objects.

58. Upon receipt of the reasons, a party is required to apply by chamber summons to the Judge, which application shall be served upon all the parties concerned setting out the grounds of his objection. In Ahmed Nassir vs NBK Ltd (2006) E. A, the court was of the view that if the reasons are already contained in the decision, there is no need to seek further reasons. Regarding setting aside the decision of taxation, in First American Bank of Kenya vs. Sahh & another (2002) 1 E. A 64, Ringera J, as he then was observed, that a Judge may not interfere with the taxing master's decision unless it was based on an error of principle or where the award was so manifestly excessive as to justify an inference that it was based on an error of principle.

59. As to entry of judgment, Section 51(1) (2) of the *Advocates Act* grants powers to a High Court to enter judgment for the sum certified to be due to an advocate upon taxation of a bill of costs, unless it is set aside or altered by the court, and where it is final as to the amount covered thereby, and where a retainer is not disputed, with interest. See County Government of Meru vs Mwirigi Kaburu & Co. Advocates ELC Misc Application E016 of 2024 (2024) KEELC 5037 (KLR) (26th June 2024) (Ruling).

60. In Kenya Airports Authority vs Otieno Ragot & Co. Advocates (Petition Application E011 of 2023 (2023) KESC 56 9KLR) Civil (16th June 2023) (Ruling), the applicant had sought a stay of the decree and enforcement proceedings pending before the High Court pending the hearing of the petition, at the Supreme Court of Kenya, which had been called upon to determine the applicable principles on taxation of advocates' client bill of costs vis a vis the constitutional right to access justice, since the amount demanded by the respondent was colossal, hence the need for public interest considerations on costs payable from public coffers.

61. In considering whether to stay the execution, the Supreme Court said that an applicant must satisfy the court that his appeal was arguable and not frivolous and that unless the orders of stay were granted, the appeal would be rendered nugatory. Thirdly, the court considered the public interest element as required for a stay order to be made, as held in Gatirau Peter Munya vs Dickson Mwenda & others (2017) eKLR.

62. In Kemboy Law Advocate vs Narok County government, (Civil Misc Application E351 of (2023) (2024) KEHC 3683 (KLR) (Civ) (8th March 2024) (Ruling), the court had been called upon to stay the proceedings, enlarge time to file a reference as per the draft reference attached and stay the execution of a certificate of costs. The court cited Nicholas Kiptoo Arap Korir Salat vs. IEBC and others (2014) eKLR on the principles to apply on extension of time. Further, the court cited with approval Njoroge vs Kimani (civil application Nai E049 of 2022 (2022) KECA 1188 (KLR) (28th October 2022) (Ruling), on what excusable delay is. The court made a finding that the client and respondent's advocates were present when the ruling by the taxing master was delivered and that the ruling was readily accessible on the C.T.S platform immediately after its delivery.

63. Further, the court made a finding that satisfactory reasons for not filing a reference had not been offered. The court held that, in reality, the application was just another addition to a lengthy list of maneuvers aimed at pressuring the court to accommodate their preferences rather than adhering to the defined statutory timelines, more so when there was evidence of proper service with the court processes leading to the taxation. The court cited Ashmore vs. Corp of Lloyd (1992) 1 ALL ER 486 and Bangue Financiere De La Cile S.A vs West Gate Insurance Co. Ltd (1990) 2 ALL ER 947, where Lord Templeman, a relentless crusader against abuse of court processes said:

> " Proceedings in which all or some of the litigants indulge in over-elaboration cause difficulties to judges at all levels in the achievement of a just result. Such proceedings obstruct the hearing of other litigation. A litigant faced with expense and delay on the part of his opponent, which threatens to rival the excesses of Jarudyce vs. Jarudyce (1853), must perforce compromise or withdraw with a real grievance".

64. On stay of execution of taxation ruling, the court in Labh Singh Harman Singh Ltd vs AG & others (2016), eKLR observed that the client was obliged to state clearly what loss, if any, it stood to suffer since a reference with high chances of success does not necessarily amount to substantial loss, as parties are only expected to file a reference where the reference has a high chance of success.

65. Applying the preceding case law and principles, in this application, the applicant has not attached the draft proposed notice of objection to the advocate /client's bill of costs. Equally, the applicant failed to attach the draft proposed reference to be filed if this court were to allow the application. The applicant has not alleged that the taxing master fell in error of principle or that the taxed amount is colossal or would bring its operation to a standstill. As held in James Wangalwa & another vs Agnes Naliaka Cheseto (supra), execution is a legal process, and once put into motion, it does not amount to substantial loss. Similarly, the applicant has not offered any security as a condition precedent for granting stay orders as held in Gianfranco Manethi & another vs AMACO.

66. The discretion to set aside an order, decree, or extend time is to be exercised judiciously, not on whim, sympathy, or caprice. See Paul Wanjohi Mathenge vs Duncan Gichane Mathenge (2013) eKLR.

67. The period of the delay, reasons for the delay, degree of prejudice, public interest, need to adhere to statutory timelines and public interest are some of the other factors to consider. See Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Nairobi Civil Application No. 255 of 1997. In the County Executive of Kisumu vs the County Government of Kisumu and others (2017) eKLR, the court observed that the whole period of delay should be declared and satisfactorily explained to the court.

68. In this application, the applicant has disowned the alleged instructions to M/S PM Maina and co Advocates alleged by the respondent to have acted or participated for the applicant in the lower court during the taxation and before this court, when the application to enter judgment after the taxation was made. The applicant has denied giving instructions to any law firm to defend it during the taxation and before this court. The applicant has not sought an explanation from the law firm or asked this court to summon those lawyers or law firms that purported to represent it to show cause as to why it misrepresented itself to this court and at the trial court as appearing for the applicant.

69. There is no evidence that the applicant has lodged a formal complaint with the Disciplinary Tribunal or the Law Society of Kenya against the law firm, advocates, and the respondent for collusion, complicity, and gross misconduct regarding taxation and the judgment herein. The easiest thing would have been for the applicant or the respondent to procure an affidavit from the said law firm or lawyers confirming that it or they had instructions or mistakenly received court processes on behalf of the applicant or mistakenly appeared before the court without instructions.

70. Appearance by counsels representing the applicant on the virtual platform has not been denied at all. A case belongs to a party and not his advocate. It is the litigant who must pursue the prosecution of their case. The right to a fair hearing is sacrosanct. It includes the right to be represented by an advocate of one's choice. In Duale Marry Ann Gurre vs Amina Mohamed Muhambi & another (2014), Mutungi J held that an advocate is an agent of the party who instructs him, and such an instructing principal continues to have the obligation and duty to ensure that the agent is executing the instructions given.

71. As held in Ochieng Onyango Kibet & Ohaga Advocates vs Akiba Bank Ltd (supra), the participation and authority of an advocate is a matter that can be implied or discerned from the conduct of the client.

72. A retainer means the instructions, employment or engagement of an advocate by his client. It denotes a relationship between parties. A retainer agreement is merely the physical written document or manifestation of such a relationship as held in *Omutele & Tollo Advocates vs Mount Holdings Ltd C.A No. 75 of 2015*.

73. From the annexures in the replying affidavits by the respondent, I am not convinced that there was proper service of court processes personally upon the applicant both at the trial court and before this court, which would have logically led it to instruct M/S PM Maina Advocates to come on record for

it. The court has been unable to trace any filed and stamped notice of appointment of an advocate to act in the taxation proceedings or before this court for the applicant.

74. Both the applicant and the respondent failed to call for an affidavit from PM Maina advocates or issuance of summons to appear to shed light on or lack of receipt of the court processes, said to have been served and received by the law firm on its behalf and followed by his appearance in court to authenticate knowledge of the court processes and the attendant hearings. See Nyachoti & Co. Advocates vs Giriama Ranching Co. Ltd (2021) eKLR.

75. In *Mbugua vs. Mbugua and five others (Civil Case 11 of 2019)* (2022) KEHC 11912 (KLR) (Commercial & Tax) (18th August 2022) Ruling, the court held that an advocate on record had perceived authority to compromise a suit or consent to judgment and that in the absence of evidence of withdrawal of instructions, misrepresentation, mistakes, fraud, collusion, the consent judgment could not be set aside, more so when the applicant had not indicated if he took any action against the lawyers for allegedly acting without his instructions. In this file, there is nothing to show any perceived authority by the applicant to any lawyer or law firm to act for it in the absence of a duly filed notice of appointment.

76. As to whether there was a retainer or not between the respondent and the applicant over the National Land Commission matter leading to taxation for legal services and the entry of judgment by this court, a party seeking setting aside in such circumstances must provide a tangible defense that there existed no scintilla of evidence of a retainer. The proceedings in the National Land Commission matter and ELC suit have not been attached to show that the respondent offered legal services on behalf of the applicant in those files.

77. Even though no evidence is tendered that the applicant has made a formal complaint against the respondent for professional misconduct at the Law Society of Kenya or at the Disciplinary Tribunal for purporting to have represented the applicant before the National Land Commission, my finding is that the applicant has raised several issues against the respondent for the period 2018 to the present, some of which touch on the issue that was before the Deputy Registrar for taxation.

78. In all these matters and looking at the totality of the material before me, I find there are triable issues among them, whether there was a retainer or not to be raised in the intended notice of objection to the advocate/client bill of costs. The applicant has pleaded that the respondent had no instructions to act for it; he did not act as such; the taxation was based on a non-existent retainer, and so was the entry of judgment on a certificate of taxation.

79. On the other hand, the respondent urges the court to find that he had ostensible authority and did act for the applicant as per the pleadings and correspondence annexed to show that there was a retainer, including a demand by the applicant's director for an update of the case progress.

80. The respondent relied on Mereka & Co. Advocates vs. Zakhem Construction Kenya Ltd (supra) that retainer may be inferred or implied from the conduct of parties as held in Ohasa vs. Akiba Bank Ltd (2008) 1 E.A 300 and Ochieng Onyango Kibet & Ohaga Advocates vs Akiba Bank Ltd (supra), where a client acquiesces in and adopts proceedings, is estopped from denying the right of an advocate to act or denying the existence of a retainer and where a client by his conduct performed part of the contract and lastly; where a client has consented to a consolidated order.

81. Taxation between an advocate and his alleged client starts with the taxing master establishing if its jurisdiction is invoked correctly. It is ordinarily a preliminary issue. There is evidence that the purported advocates appearing for the applicant had raised a preliminary objection on a retainer. They eventually abandoned it and sought leave to file written submissions to the taxation, which they never did.

82. In Wilfred Konosi t/a Konosi & Co. Advocates vs. Flamco Ltd (2017) eKLR, the Court of Appeal, while dismissing an appeal that had arisen from the finding of the High Court that there was no advocate-client relationship held thus:

> "Not a single letter by the appellant was exhibited to demonstrate that the relationship of advocate client obtained. The onus reposed on the applicant was not discharged. In the absence of proof that there existed advocate client relationship, the taxing officer was justified in striking out the bill of costs, and the learned Judge of the High Court was right to uphold the decision of the taxing officer".

83. In G5 Law LLP Advocates vs. Wilbur Khasilwa Ottichilo (2021) eKLR, the court had been invited to stay taxation proceedings since there was no advocate-client relationship with regard to Kakamega H.C Election Petition No. 11 of 2017 to warrant the taxation sought. The appellant had urged the court to infer a retainer from the conduct of the parties based on the pleadings he drew, which the respondent signed and filed in court. After that, he was asked to attend court to testify. The court held that even though the respondent had not expressly instructed the applicant, he acquiesced to their acting for him the moment he accepted to sign the papers that they drew on his behalf and to let them be filed in court. The court also held that an election petition was not a dispute between the government and the candidate but between the losers and the winner; hence, the respondent was defending himself privately and personally using personal resources, both human and financial.

84. In this matter no evidence has been tendered to show that the applicant acquiesced to or authorized the alleged lawyers to act or appear for it. In these circumstances, therefore, the court is asked to grant reliefs of setting aside the taxation ruling and the judgment, stay and set aside the execution, enlarge time to respond to the bill, order for the respondent to be cross-examined during the hearing of the taxation and lastly to consolidate this matter with ELC Misc No. E007 of 2023.

85. Evidence on when the applicant personally became aware of the taxation proceedings and entry of judgment is lacking by way of an affidavit of service. The delay in moving the court almost ten months down the line against the ruling and the judgment dated 24.11.2023 and 22.5.2024 respectively have been sufficiently explained.

86. What is before me is an omnibus application brought on the same grounds. There is no draft answer to the bill, notice of objection, or reference. In Ongandi vs Odhiambo ELC No. Appeal E013 of 2020 (2024) KEELC 3986 (KLR) (2nd May 2024) Ruling. Okong'o J was faced with an almost similar scenario to set aside the taxation and consequential orders with an alternative Order for the taxation to start denovo. He held that the application was vexatious, frivolous, and an abuse of the court process since what was before him was not a reference.

87. In Mereka & Co. Advocates vs Everest Enterprises ELC Misc Application E08 of 2023 (2024) KEELC 4339 (KLR) (22nd May 2024) (Ruling), the court observed that a Miss Maina advocate appeared on 5.3.2024 for the applicant herein and sought 21 days to respond to the application. The court granted the request and ordered parties to file written submissions by 5.9.2024. The applicant filed none. This court found the application merited since there was no pending reference, appeal, setting aside, or a stay of execution application as a bar to entry of judgment. The applicant has now moved this court to set aside the judgment based on no service and for being condemned unheard.

88. In Yooshin Engineering Corporation vs Aia Architects Ltd (Civil Appeal E074 of 2022 (2023) KECA 872 (KLR) (8th July 2023 (Judgment), the court observed guided by Bouchard International Services Ltd vs M'Mwereria (1987) KLR 193, that where there is a proper service of a hearing notice, then

the court will have before it a regular judgment and the discretion is intended to be exercised to avoid injustice or hardship, resulting from an accident inadvertence or excusable mistake, but is not designed to assist a person who whether by evasion or otherwise is out to obstruct or delay the course of justice.

89. Even in a regular judgment, the court still has broad discretion, the main concern being to do justice to the parties. In this matter, the applicant has disowned all the lawyers who appeared for it both at the taxation and before this court. See James Kanyitta Nderitu & another vs. Marios Philotas Ghikas & another (2016) eKLR and Job Kilach vs National Media Group (2015) eKLR.

90. In my view, the conduct of the applicant does not fit that of a party out to obstruct the course of justice deliberately or delay it. See Richard Ncharpi Leiyangu vs IEBC & others (2013) eKLR. The main concern of the court is to do justice to the parties as per the law. See Patel vs E.A Cargo Handling Services Ltd (1974) E.A 75. The court record shows that the applicant was not directly served with the court processes. All the alleged service of court notices was through the advocate's firm which has denied having instructions to act in this matter.

91. Equally, the law firm that purported to appear for the applicant failed to execute the services and or file a notice of appointment. A court will usually not set aside a regular judgment, unless there are triable issues or where there is lack of service of summons. See Philip K. Chemwolo & another vs Augustine Kubede (1982-1988) KAR 1036, Tree Shade Motors Ltd vs D.T Dobie & Co. Ltd Civil Appeal No. 38 of 1998.

92. As to consolidation, I find there is no basis at this stage to do so. See Republic vs Paul Kihara Kariuki Exparte Law Society of Kenya (2020) eKLR and Joseph Okoyo vs Edwin Dickson Wasunna (2014) eKLR.

93. The upshot is that the tax master's decision made on 24.11.2023, and the judgment of this court delivered on 22.5.2024, together with the decree dated on 11.6.2024 are hereby set aside. Leave is hereby granted to the applicant to file a response to the advocate/client bill of costs within 21 days from the date hereof.

94. Costs to the applicant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20TH NOVEMBER, 2024

In presence of

C.A Kananu

Ogunde for Kirimi for the applicant

Njoroge for Mereka for the respondent

HON. C K NZILI

JUDGE