



Anthony Burugu & Co Advocates v Konchelah & another (Miscellaneous Application E192 of 2021) [2023] KEELC 227 (KLR) (24 January 2023) (Ruling)

Neutral citation: [2023] KEELC 227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E192 OF 2021
MD MWANGI, J
JANUARY 24, 2023**

BETWEEN

ANTHONY BURUGU & CO ADVOCATES APPLICANT

AND

GRACE NEMAYIAN KONCHELAH 1ST RESPONDENT

LEINA KONCHELLAH 2ND RESPONDENT

*(In respect of the Notice of Motion application dated 6th July 2022
and the Chamber summons application dated 25th July 2022)*

RULING

Background

1. The Advocate/Applicant in this matter filed an Advocate-client bill of costs dated November 3, 2021. The said bill was eventually taxed at the sum of Kshs 489,179.03 by way of a ruling dated May 4, 2022. A certificate of taxation was issued on 20th June 2022 confirming the sum of Kshs 489,179.03 as the taxed costs.
2. The Advocate's application is supported by his own affidavit sworn on July 6, 2022 and the Supplementary one sworn on 23rd September 2022.
3. The Advocate under the provisions of section 51 (2) of the *Advocates Act*, Cap 16, Laws of Kenya filed the Notice of Motion application dated 6th July 2022 seeking entry of judgment in his favour against the Respondents for the sum of Kshs 489,179.03. The advocate too prays for the costs of the application.
4. According to the Affidavit of service filed by the Advocate, the Notice of Motion application was served upon the Respondents' Advocates, Nathan Mbullo & Associates on 20th July 2022 at 8.35 a.m. One week later, on 27th July 2022, the Respondents through their advocates filed the chamber summons



- application dated 25th July 2022 under the provisions of rule 11 (4) of the Advocates Remuneration order, under certificate of urgency.
5. The Respondents in their application seek for an order of enlargement of the time fixed by rule 11 (1) of the Advocates Remuneration Order to allow them object to the decision of the taxing officer dated 20th June 2022.
 6. The Respondents Chamber summons application is based on the grounds on the face of it and the supporting affidavit sworn by Grace N. Konchellah on 25th July 2022.
 7. The Respondents grounds are that they are aggrieved by the decision of the taxing officer who taxed the bill of costs and delivered the ruling thereof in their absence. They allege that they became aware of the decision of the taxing officer on 23.6.2022 when their counsel was served with the certificate of taxation. Further that there is need for the taxing officer to give reasons behind the whole of the bill of costs to enable them challenge her ruling.
 8. The deponent, Grace N. Konchellah acknowledges that the Advocate/Applicant was their Counsel previously. She alleges that they did not know the outcome of the bill of costs dated 3/11/2021 since the ruling was given in their absence and that of their current Advocate. The deponent avers that they only became aware when their advocate was served with the certificate of taxation on 23.6.2023.
 9. The deponent asserts that they are dissatisfied with the decision of the taxing Officer particularly for the reason that they had not instructed their previous advocate (the Applicant in this matter) to appeal on their behalf in the matter which he had handled on their behalf. However, the time allowed by the law to object has since lapsed and they therefore seek leave of this court to enlarge the time.
 10. The Respondents therefore implore the court to exercise its discretion to extend time in their favour to enable them object to the decision and challenge the ruling of the taxing officer since they have not delayed in making the application to extend time.
 11. In addition to filing their own application to extend time, the Respondents further opposed the Advocates Notice of Motion application dated 6th July 2022 by way of a replying affidavit sworn on 23rd August 2022 by Grace N. Konchellah.
 12. The Respondents oppose the entry of judgment against them on the basis that they had not given the Advocate/Applicant, who was their Counsel in ELC 659/2009 instructions to appeal against the judgment dismissing the suit on their behalf. They allege that they only became aware of the appeal in the month of March 2022 when they were served with the bill of costs.
 13. It is the Respondents contention that their Counsel never got to know the outcome of the taxation of the bill of costs as the ruling date was moved several times till 4.5.2022 when the same was delivered in the absence of their Counsel. By the time their Counsel was able to access the court file on 24th June 2022, 14 days had already lapsed and they could therefore not object to the ruling of the taxing Officer without leave of the court and moreso without reasons of the taxing master.
 14. The Respondents urge the court to hear their application first before considering the Advocate's application for entry of judgment in accordance with the certificate of taxation issued in this matter.
 15. On his part, The Advocate/Applicant opposed the Respondents application for extension of time by way of a replying affidavit sworn on 20th September 2022.
 16. The Advocate/Applicant terms the application by the Respondents as frivolous, unmerited and a gross abuse of the process of court. He insists that upon filing the Advocate client Bill of Costs dated 3rd



November 2021, he served the same together with the Notice of taxation on 16th January 2022 and duly filed an affidavit of service confirming service. The Respondents despite service did not attend court. A ruling date was given for 9th March 2022. The ruling was adjourned thrice.

17. The Respondents appointed their current advocates who filed a notice of appointment which they served upon the Advocate/Applicant vide a letter dated 22nd March 2022. The Advocate deposes that the Respondent's advocates confirmed that they were aware of the pending ruling and would indeed be in attendance. They indeed appeared in court on 24th March 2022 when the ruling was adjourned to 30th March 2022. They again attended court on 30th March 2022 when the ruling was adjourned to 21st April 2022. They however did not attend court thereafter including the date when the ruling was delivered.
18. The Advocate/Applicant contends that the Respondents' advocates have not explained why they failed to attend court neither have they explained why they took no steps to know the outcome of the taxation. The Advocate affirms that this is a clear indication that the Respondents were not interested in the proceedings before the Deputy Registrar (taxing Officer). The application is therefore but an afterthought calculated to delay the settlement of the advocates fees as taxed by the taxing officer.
19. The Advocate avers that he has enjoined to act in his clients' best interests which he did by filing the appeal on their behalf after the main suit was dismissed. The appeal was successful and the Respondents have judgment in their favour. It is the Advocate's contention that having received instructions to file suit, he did not need fresh instructions to file an appeal after the Respondents' suit was dismissed.
20. The Advocate terms the Respondents' turnaround as unfortunate and sad yet he rendered them legal services and obtained judgment in their favour. He alleges that he billed them for a sum of Kshs 630,785/- way back on 3rd September 2013 but they did not pay him even a single cent.
21. The Advocate insists that the Respondents duly appointed their advocate in this matter before a ruling was given by the taxing officer and therefore had an opportunity, which they however squandered to raise the issues they now allegedly wish to raise by way of a reference to this court. This is a further demonstration that the Respondents' application is therefore frivolous and without merit.
22. The Advocates asserts that the court's discretion must be exercised judiciously. In the circumstances of this case, no material has been placed to warrant the exercise of the court's discretion in favour of the Respondents. He prays for the dismissal of the Respondents application.

Court's Directions.

23. The court directed that both applications be canvassed together and by way of written submissions. Both parties have complied. The court had the opportunity to read the submissions filed.

Issues for Determination.

24. Having considered the 2 applications pending before the court, and the submissions filed by the parties, in the courts opinion, there are only two issues for determination namely:
 - a. Whether clients have made a case for enlargement of time fixed by rule 11 (1) of the Advocates Remuneration order.
 - b. Depending on the outcome on (a) above, whether judgment should be entered in favour of the Advocate against the clients for the sum of Kshs 489,179.03



Determination.

A. Whether clients have made a case for enlargement of time fixed by rule 11 (1) of the Advocates Remuneration order.

25. Rule 11 (4) of the Advocates Remuneration Order gives this court the discretion to enlarge time fixed under sub paragraphs 1 and 2 thereof for purposes of filing an objection. It is the rule under which the Respondents' application is premised on in the instant case.
26. I am of the view that the principles set down by the Supreme Court of Kenya in the case of *Salat –vs- Independent Electoral & Boundaries Commission and 7 others (2014)* for purposes of an application to extend time for filing an appeal should guide this court in exercising its discretion in an application of this nature. The court was emphatic that: -
- “...discretion to extend time is indeed unfettered but it is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there were extenuating circumstances that could enable the court to exercise discretion in favour of the applicant.”
27. In doing so, the court pronounced the following principles as applicable: -
- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party.
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - iii. Whether the court ought to exercise discretion to extend time, is a consideration to be made on a case by case basis.
 - iv. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the court.
 - v. Whether there would be any prejudice suffered by the Respondent if the extension was granted.
 - vi. Whether the application has been brought without undue delay.
 - vii. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
28. Additionally, it is well settled that judicial discretion must be exercised ‘judicially, not on whim, sympathy or caprice’.
29. As noted earlier, the Clients/Respondents only filed their application after they were served with the Advocate’s application seeking entry of judgment. This raises the question why the Clients/ Respondents did not find it appropriate to file their application immediately after they were served with the certificate of taxation. In their own words, the Clients/Respondents have clearly stated that they became aware of the decision of the taxing officer on 23.6.2022, when their Counsel was served with the certificate of taxation.
30. The clients/Respondents have not made an attempt to explain the delay from the time they allegedly became aware of the ruling of the court and the time they actually filed the application in court.



31. I have perused the record of the court and confirmed that the advocate for the clients/Respondents attended court on 30.3.2022 before the taxing officer. This was before the ruling was delivered. The taxing officer on the said date noted that the ruling from the Deputy Registrar of the Court of Appeal (in respect of the party to party costs thereof) had not been availed and directed the Advocate/Applicant to avail the same.
32. The Clients/Respondents did not raise any objections when they appeared before the taxing officer either on her alleged lack of jurisdiction on the basis of the Respondents not having instructed the Advocate or on any other issue whatsoever.
33. The ruling of the taxing officer was eventually delivered on 4th May 2022. The Clients/Respondents aver that they were not informed about the delivery of the ruling. They allege that they only became aware of it on 23.6.2022.
34. The court's online record however shows that at 9.00 a.m, on 4th May 2022, immediately after the delivery of the ruling, an update was entered confirming delivery of the ruling. The entry reads, 'ruling delivered case closed'. I therefore find the clients/Respondents' claim that they were not informed about the delivery of the ruling preposterous. It was on the judiciary e-portal for all to see.
35. Considering all the above circumstances and the conduct of the Respondents, the court is not persuaded to exercise its discretion in their favour. They have not discharged the burden of laying the basis of the exercise of the discretion of the court in their favour.
36. Accordingly, the Clients/Respondents' chamber summons application dated 25th July 2022 is disallowed with costs to the Advocate.

B. Whether Judgment should be entered in favour of the Advocate in accordance with the certificate of costs issued in this matter.

37. It is not in dispute that the Advocate's bill of cost was taxed at Kshs 489,179.03/- on 4th May 2022. A certificate of costs was subsequently issued on 20th June 2022.
38. The said taxation was not challenged by the clients under the provisions of order 11 of the Advocates Remuneration Order. In view of the court's finding in respect of the 1st issue herein, that window of opportunity is not available to the Clients/Respondents anyway.
39. Section 51(2) of the *Advocates Act* provides that the certificate of taxation of the taxing officer unless set aside or altered by the court is final in regard to the amount of costs covered therein.
40. There are numerous authorities on matters Advocate - Clients' bills of costs.
41. In the case of Kenya Commercial Bank Ltd vs Kinagop Reliance Co. Ltd & Another (2011) eKLR the court affirmed the position that a certificate of taxation is deemed final. It is the last and final step designating the amount of costs recoverable by the Advocate.
42. It was the same position in the case of Lubulellah & Associates Advocates Vs N K Brothers Ltd (2014) eKLR. In the said case, the court held that the law is clear that once a taxing master has taxed the costs, and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter Judgement.
43. Accordingly, the court finds that since the certificate of taxation issued in this matter has not been challenged as provided for under the Advocates Remuneration Order, the court has no option but to



enter judgment in favour of the Advocate against the Clients/Respondents jointly and severally for the sum of Kshs 489,179.03/-. The advocate shall also have the costs of the application dated July 6, 2022.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr Mbullo for the clients/Respondents.

N/A for the Advocate/Applicant.

