



**Njuguna & Partners Advocates v Wanjiru & 2 others (Sued as the administrators of the Estate of Jemimah Njeri Njoroge (Deceased)) (Miscellaneous Application E007 of 2021) [2023] KEELC 797 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 797 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
MISCELLANEOUS APPLICATION E007 OF 2021  
CG MBOGO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**NJUGUNA & PARTNERS ADVOCATES ..... ADVOCATE**

**AND**

**KENNETH MWAURA NJOROGE ..... 1<sup>ST</sup> CLIENT**

**CAROLINE WANJIRU ..... 2<sup>ND</sup> CLIENT**

**DOUGLAS GIKARU NJOROGE ..... 3<sup>RD</sup> CLIENT**

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF JEMIMAH NJERI NJOROGE (DECEASED)**

**RULING**

1. Before this court for determination are two notice of motion application dated October 4, 2022 and October 11, 2022 respectively.
2. The notice of application dated October 4, 2022 is filed by the respondent and is expressed to be brought under Section 11 of the [Advocates Remuneration Order 1962](#), Order 40 of the [Civil Procedure Rules](#) seeking the following orders: -
  1. spent
  2. That this court be pleased to issue a stay of execution order on the certificate of taxation issued by the Deputy Registrar in this matter on September 27, 2022.
  3. That this court be pleased to issue an order staying any further proceedings consequential to the certificate of taxation issued by the Deputy Registrar in this matter on September 27, 2022.



4. That this honourable court be pleased to set aside *ex parte* ruling that culminated to the issuance of the certificate of taxation dated September 27, 2022 in this matter.
  5. That this honourable court be pleased to have this matter placed before the honourable judge for the hearing and determination of the applicant's notice of preliminary objection dated November 26, 2021 which remains unheard.
  6. That costs of this application be awarded to the applicant.
3. The notice of motion application dated October 11, 2022 is filed by the advocate/ applicant and is expressed to be brought under Order 51 Rule 1 of the [Civil Procedure Rules](#) and Sections 51 (2) of the [Advocates Act](#) and Rule 7 of the [Advocates Remuneration Order 2014](#) seeking the following orders: -
1. Judgment be and is hereby entered in favour of the applicant against the respondents jointly and severally in the sum of Kshs 1,243,916 being the taxed costs herein.
  2. Interest be granted on prayer (1) hereinabove at the rate of 14% per annum from October 17, 2021 until payment in full.
  3. Costs of this application be awarded to the applicant and the same be assessed and included in the decree.
  4. The application dated October 4, 2022 is premised on the grounds *inter alia* that the Deputy Registrar ignored the applicant's notice of preliminary objection dated November 26, 2021 and went ahead and issued a certificate of taxation on September 27, 2022. That on April 13, 2022 the applicant wrote to the Deputy Registrar requesting for a hearing date of the preliminary objection which has never been responded to up to date and that he was not served with a ruling notice for the ruling that was delivered on September 7, 2022 which is against the rules of natural justice as the applicant is condemned unheard.
  5. The application is supported by the affidavit of Kenneth Mwaura Njoroge, the respondent herein, which was sworn on even date at Kikuyu. The respondent deposed that on October 29, 2021, he filed and served a notice of preliminary objection dated November 26, 2021 which the Deputy Registrar ignored to hear and determine the same. He further deposed that on September 28, 2022, he was served with a certificate of taxation dated September 27, 2022 via email and at no time was he served with a ruling notice for the session that the ruling herein was delivered which is against the rules of natural justice.
  6. The respondent deposed that the Deputy Registrar ought to have first heard and determined the notice of preliminary objection before issuing a certificate of costs and that the issuing of the certificate of taxation on September 27, 2022 will cause him irreparable damage once it is executed by the applicant.
  7. The application was opposed by the replying affidavit of Abel Githiri Kimani on behalf of the applicant which was sworn on October 11, 2022. The applicant deposed that the application has failed to comply with the provisions of Rule 11 of the Advocates Remuneration Order by failing to file a notice of objection to the taxing officer's decision, failing to annex a copy of the ruling to the application and failing to seek enlargement of time as provided under Rule 11 (3) of the Advocates Remuneration Order. The applicant further deposed that from the respondent's annexure, the notice of preliminary objection was never assessed and filing fees paid as such it is not on record and for this reason, the respondent should not blame the registry for his indolence in prosecuting the preliminary objection.



8. The applicant further deposed that all through, the applicant has shared all the correspondence and notices with the respondent's email address, in particular kenjorogeken@gmail.com which is the same address the respondent has used for filing and service of court documents. Further, that denying service of the ruling notice through the same email address is a blatant lie to the court and the respondent has filed the instant application with the sole intention of frustrating the recovery of the applicant's taxed legal fees.
9. The application dated October 11, 2022 filed by the applicant is premised on the grounds *inter alia* that the applicant filed its Advocate-Client Bill of Costs dated August 26, 2021 and served the same upon the respondent on September 17, 2021 and which the Deputy Registrar delivered a ruling on the same on September 7, 2022 and issued a certificate of taxation on September 27, 2022.
10. The application is supported by the affidavit of Abel Githiri Kimani on behalf of the applicant herein which was sworn on October 11, 2022. The applicant deposed that the Bill of Costs was taxed by Hon Ngayo on September 7, 2022 at Kshs 1,243,916/- in favour of the applicant's law firm and were issued with a certificate of taxation on September 27, 2022. Further, that vide emails dated September 29, 2022 and October 3, 2022 the applicant informed the respondent of the taxation and sought for an amicable settlement which emails have not elicited any response. The applicant deposed that the certificate of taxation constitutes a *bonafide* debt as there is no dispute as to the retainer of the applicant and in the instant case, the applicant is entitled to interest on the taxed amount from October 17, 2021 until payment in full.
11. The respondent filed grounds of opposition dated November 4, 2022 in opposition to the application on the following grounds: -
  1. That the certificate of taxation of advocate/Client Bill of costs dated September 27, 2022 is a subject of my notice of motion dated October 4, 2022 herein and hence *subjudice*.
  2. That the advocate's notice of motion dated October 11, 2022 is vexatious, bad in law and an abuse of court process as it is filed with the applicant's full knowledge that the whole proceedings resulting to the issuance of the certificate of taxation dated September 22, 2022 is a subject of litigation in this matter.
  3. That the advocate's/applicant's notice of motion dated October 11, 2022 is meant to frustrate and exhaust me in my pursuit of my notice of motion dated October 4, 2022 herein.
  4. That the advocate's/applicant's notice of motion dated October 11, 2022 offends Section 6 of the *Civil Procedure Act* since the certificate of taxation of Advocate/Client bill of cost dated September 27, 2022 is a subject of my notice of motion dated October 4, 2022 herein.
  5. That the advocate's/applicant's notice of motion dated October 11, 2022 is meant to defeat my notice of preliminary objection dated 26, 2021 herein which is yet to be heard and determined by this honourable court and the advocate's/ applicant's notice of motion dated October 11, 2022 should be dismissed with costs.
4. The respondent further filed a replying affidavit sworn on November 14, 2022 in opposition to the application. The respondent deposed that the applicant being an officer of the court, he has deliberately failed to assist this court when he went ahead and obtained a ruling and the certificate of taxation



knowing that he had filed a notice of preliminary objection which was yet to be heard and determined. He further deposed that his application dated October 4, 2022 ought to be heard and determined regardless of its failure to seek enlargement of time as Article 159 (2) (d) of the Constitution prohibits technicalities and that he has no control over the assigning of files to be heard by any judicial officer. Further, that upon perusal of the court file, he found that the registry had downloaded his notice of preliminary objection on November 29, 2021 and that failure to assess the said preliminary objection cannot be visited upon him. The respondent further deposed that Article 22 of the Constitution guarantees him the right to file a suit in this honourable court even without paying court fees and this court should proceed and determine his preliminary objection.

5. The respondent further deposed that he wrote a letter to the Deputy Registrar on April 15, 2022 requesting for a mention date and the Deputy Registrar deliberately ignored his letter and handed over the file to Hon Ngayo who issued the punitive certificate of costs dated September 27, 2022. Further, that failure by the Deputy Registrar to facilitate hearing and determination of his preliminary objection forfeits his powers of hearing and determining the bill of costs dated August 26, 2021 which is a violation of his right under Article 47 (1) (2), 48 and 50 (1) of the Constitution and the entire proceedings of the bill of costs application ought to be declared a nullity.
6. The respondent further deposed that being fully aware that a preliminary objection is always dispensed with first, the applicant has no business lecturing on technicalities which he himself has circumvented.
7. When this matter came up for mention on November 16, 2022, this court directed both applications to be canvassed by way of written submissions. The applicant filed written submissions dated December 20, 2022 and raised four issues for determination as follows: -
  - i. Failure to comply with rule 11 of the Advocates Remuneration Order.
  - ii. The respondents' notice of preliminary objection.
  - iii. Whether the ruling notice was duly served.
  - iv. Whether the advocate is entitled to the prayers sought in the application dated August 17, 2021.
8. On the first issue, the applicant submitted that on July 27, 2022, the court fixed the ruling of the advocate-client bill of costs on September 7, 2022 and as per the directions of the court, the respondents were duly served and the respondent knew of the ruling date but failed to attend court. Further, that the ruling with the reasons of the court's decision was delivered on September 7, 2022 but the respondents failed to file a notice of objection to the taxing officer's decision as per Rule 11 of the *Advocates Remuneration Order*. That on October 4, 2022, the applicant filed the application seeking to stay the execution of the taxed costs without seeking enlargement of time as was held in the cases of Twiga Motor Limited versus Hon Dalmas Otieno Onyango [2015] eKLR and Ufundi Co-operative Savings and Credit Society v Njeri Onyango & Company Advocates [2015] eKLR.
9. On the second issue, the applicant submitted that the respondents have not pursued the preliminary objection diligently and the court should not condone their indolence and the respondents' failure to prosecute their preliminary objection is not an error on the part of the taxing officer that would warrant setting aside the taxed costs.
10. On the third issue, the applicant submitted that they filed and served the ruling notice dated July 27, 2022 upon the respondents through their usual email address and which the respondents have not disputed service and which fact the respondents acknowledged in paragraph 6 of their supporting affidavit. The applicant relied on the case of *Justus Mungumbu Omiti v Enock Nyambati Osebe & 2 Others* [2010] eKLR.



11. The applicant further submitted that the respondents' have not stated any error in law made by the taxing officer and it is a trite principle of taxation that the court will not interfere with the decision of the taxing officer unless there exists an error in principle or the law. The applicant relied on the case of *KANU National Elections Board & 2 Others v Salah Yakub Farah* [2018] eKLR.
12. On the fourth issue, the applicant submitted that the bill of costs was taxed in accordance with the Advocates Remuneration Order and the principles of taxation and no valid reason has been given by the respondents to warrant setting aside of the taxed costs. The applicant relied on the case of *Musyoka & Wambua Advocates versus Rustam Hira Advocate* [2006] eKLR.
13. The respondents filed two written submissions both dated January 16, 2023. The respondents submitted that the applicant being an officer of this honourable court, he failed to assist the court when he went ahead and obtained a ruling and the certificate of taxation knowing that he had filed a notice of preliminary objection. The respondent relied on the cases of *Hassan Ali Jobo & Another versus Suleiman Said Shabal & 2 Others* [2014] eKLR and *Kimani Wanyoike versus Electoral Commission & Another* [1995] eKLR.
14. The respondents further submitted that the applicant failed to inform the court that its client passed away on February 20, 2015 and breached Order 24 Rule 4 of the *Civil Procedure Rules* by not applying to the court to enjoin him as a legal representative of its late client. Further, by dint of Order 24 Rule 4 (3) of the *Civil Procedure Rules*, there was no transferable suit as the applicant's 3<sup>rd</sup> defendant was deceased and no application for substitution had been made within one year. The respondent further submitted that the applicant was acting on auto pilot mode as it ceased having instructions in the matter. The respondents relied on the case of *Japhet Nzila Muangi v Hamisi Juma Malee* [2022] eKLR.
15. The respondent further submitted that the applicant went ahead and filed a replying affidavit in response to a notice of motion application dated August 17, 2017 in Narok, a year after the demise of its client, the 3<sup>rd</sup> defendant which is unethical and unprofessional and an act of perjury. That a perjurer has no business coming to court to enforce a certification of costs of an ill obtained bill of costs. The respondent relied on the cases of *Simon Mugo Rutere v Republic* [2021] eKLR and *Viktar Maina Ngunjiri & 4 Others v Attorney General & 6 Others* [2018] eKLR.
16. The respondent further submitted that the applicant intends to breach Section 55 of the *Law of Succession Act* as he will move with supersonic speed to execute the orders of the court against the estate of his deceased mother hence inter meddling in the estate of the deceased.
17. I have carefully analysed and considered both applications, grounds of opposition, the replies thereof and the written submissions filed by both parties and the issues for determination are as follows: -
  - i. Whether the notice of preliminary objection dated November 26, 2021 was ignored and the effect thereon.
  - ii. Whether this court can set aside the ruling delivered on September 7, 2022 and issue stay of execution of order on the certificate of taxation issued on September 27, 2022.
  - iii. Whether the application dated October 11, 2022 has merit.
18. In a bid to sufficiently address and determine all the issues above, it is necessary that I reproduce the events leading to the filing of both applications. The applicant filed an Advocate and Client Bill of Costs dated August 26, 2021. When the matter was mentioned before the Deputy Registrar on



September 27, 2021, the respondent prayed for time to instruct and advocate and was granted the said prayer with taxation slated for November 1, 2021.

19. On November 1, 2021, Mr Njoroge the 2<sup>nd</sup> respondent informed the Deputy Registrar that he had filed an application dated October 27, 2021 and had served all the parties. The Deputy Registrar directed that the application be served upon the applicant for inter-partes hearing on November 15, 2021. Upon consideration, the court directed the application to be canvassed by way of written submissions and the court slated the matter for a ruling on February 28, 2022. The court delivered its ruling on March 14, 2022.
20. It is the respondent's submission that he requested for a mention date for the hearing of the notice of preliminary objection dated November 26, 2021 but the same was ignored. A perusal of the record shows that there is a notice of preliminary objection filed in court on November 29, 2021. However, the same does not bear the assessment of fees to be paid and any receipt as evidence of proof that the same was paid. The respondent further deposed that he wrote letters to the registry requesting for a mention date for the preliminary objection. The respondent annexed a copy of the email that was sent to the registry. Based on the documents attached to the application, it can be observed that indeed the respondent sent an email on November 26, 2021 at 3.06pm and attached a copy of the submissions to the chamber summons dated October 27, 2022 and a notice of preliminary objection. The respondent indeed requested for an invoice to enable him pay. The respondent wrote another email dated April 19, 2022 requesting for an invoice to enable him pay but it appears no action was taken.
21. It appears, that there was an oversight on the part of the registry for the reason that as per the records, the said submissions were assessed on November 26, 2021 but the notice of preliminary objection was not assessed. It is unclear whether the assessment of the written submissions filed by the respondent was ever sent back to the respondent via email for payment. If at all the same was paid, it would have been brought to the attention of the Deputy Registrar's for further action.
22. It is on this basis that the Deputy Registrar not being aware of an existing notice of preliminary objection, went ahead and proceeded to tax the bill of costs at a sum of Kshs 1,243,916/- vide his ruling dated September 7, 2022.
23. However, the approach of the respondent with regard to the orders sought in the notice of motion application dated October 4, 2022 is wrong. Where a party is dissatisfied with the decision of the taxing officer, the correct route to take would be to approach this court by way of Rule 11 of the Advocates Remuneration Order which makes provision for the procedure an aggrieved party must adopt. It provides:
  - “(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.”

24. The procedure contemplated above is:
- a. The aggrieved party issues a notice within 14 days on the items objected
  - b. The Taxing Officer shall forthwith give reasons for his decision
  - c. Upon receipt of the reason, the objector shall within 14 days file an application to the High Court setting out grounds for objection
  - d. If dissatisfied with the High Court, the objector shall with leave of court appeal to the Court of Appeal.
25. The procedure as stated above carries a mandatory requirement. Undoubtedly, the respondent did not comply. It is trite that rules of procedure are handmaidens and not mistresses of justice, and they are meant to aid in the administration of justice and not to cause injustice as it was held in Nairobi Civil App No 810 of 2001:- *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* [2001] eKLR.
26. Article 159(2) (d) of the *Constitution* and the oxygen principles as drafted were meant to cure technicalities in the process of administering justice and this court while doing so may exercise its inherent jurisdiction. In the case of *Kenya Power & Lighting Company Ltd vs Benzene Holdings Ltd t/a Wyco Paints* (2016) eKLR, the Court of Appeal described the inherent jurisdiction of the court as a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.
27. It is my belief that the respondent knew that the registry would communicate and advise on payment and his request for a mention date which unfortunately did not take place. This is a serious oversight that has come to the attention of the court. Having discovered this oversight, this court cannot just close its eyes and fold its hands in resignation. The court has an option at its disposal for the sake of safeguarding the due process of the law.
28. Accordingly, this court, exercising its inherent jurisdiction and declares any proceedings from January 24, 2022 which was the date when the court issued a ruling date a mistrial, as a result of the serious oversight – failure to notify the respondent of the fees payable and issuance of a mention notice.
29. In this case, I adopt the perspective that a court of law has a duty to take appropriate action, as in the instant case, to remedy an irregularity that may result to an injustice. The consequences of the procedural flaw in this matter would be as serious as that of unfairly condemning a respondent unheard. The court must act in order to preserve the integrity of the judicial process and the rules of natural justice.
30. As such, I hereby set aside the ruling dated September 7, 2022 together with the certificate of taxation dated September 27, 2022 pending the hearing and determination of the notice of preliminary objection. Having found that there was an oversight on the part of the registry, it would be unfair to determine the notice of motion application dated October 11, 2022 at this stage. I further direct that the Deputy Registrar to ensure that the notice of preliminary objection dated November 26,



2021 is assessed and an invoice sent to the respondent within 3 days from the date of this ruling. The respondent to make payment of the assessed amount within seven days thereof. The matter to be mentioned before the Deputy Registrar on March 2, 2023 as to the hearing and determination of the preliminary objection. I make no orders as to costs. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**MBOGO C G.**

**JUDGE**

**16/2/2023**

**In the presence of:**

**CA:Chuma**

