



REPUBLIC OF KENYA



Odhambo Owiti & Company Advocates v UAP Insurance Company Limited (Miscellaneous Civil Application 62 of 2022) [2024] KEHC 7153 (KLR) (28 May 2024) (Ruling)

Neutral citation: [2024] KEHC 7153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CIVIL APPLICATION 62 OF 2022**

REA OUGO, J

MAY 28, 2024

BETWEEN

ODHIAMBO OWITI & COMPANY ADVOCATES APPLICANT

AND

UAP INSURANCE COMPANY LIMITED RESPONDENT

RULING

1. This ruling relates to the Notice of Motion filed on 18/8/2023 brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 10 Rule 11, Order 51 Rules 1 and 15 of the *Civil Procedure Rules, 2010* and Article 50 (1) of the *Constitution of Kenya*. The applicant seeks the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. That this Honourable Court be pleased to set aside the ex parte taxation proceedings and an ex parte Ruling/Order delivered on 21st June 2023 and consequent proceedings and re-admit the matter for taxation on merits with the respective parties being afforded a chance to advance their cases.
 5. That the costs of this application be provided for.
2. The application is on the grounds that the respondent/client is apprehensive that the applicant/advocate may anytime form any move to execute the ex parte ruling/order delivered on 21st June 2023 by proclaiming and attaching the client's properties. The applicant/advocate was instructed by the respondent/client to defend its insured in Bungoma CMCC no 644 of 2016 where judgment for the sum of ksh. 81,700 was entered. The applicant/advocate raised a deposit request note dated 9th



February 2017 and a final fee note dated 22nd July 2021 which were settled in full. The advocate is by operation of law estopped from claiming additional fees and taxing the matter when his legal fees was settled in full in Bungoma CMCC no 644 of 2016. The advocate failed to disclose the money paid to him in his Bill of Costs. If execution ensues, the respondent shall be condemned to settle fees that had already been paid and shall thus suffer immense prejudice which cannot be compensated by way of damages. Similar grounds were raised in the supporting affidavit sworn by Cheryl Odipo.

3. The applicant/advocate filed a supporting affidavit dated 2/11/2023. It was averred that the respondent instructed the applicant to defend it in Bungoma CMCC no 644 of 2016. Under the said instructions, the applicant entered an appearance on behalf of the respondent and defended it in the matter to its logical conclusion. According to the determination of Bungoma CMCC no 644 of 2016, the applicant raised the final fee note and forwarded the same to the respondent in the sum of ksh 206,101.00/-.
4. The respondent did not settle the final fee note in full and neither did the respondent inform the applicant that they had made payments with regards to the file despite the applicant sending reminders on settlement of the final fee note. The applicant on 20/7/2022 proceeded and filed its bill of costs dated 25/5/2022 for taxation. Despite the respondent being served with the said bill of costs together with the taxation notice, it never responded, and neither did it inform the applicant that it had made any payment. The respondent was served with the taxation notice dated 3/5/2023 but failed to attend court on 10/5/2023 when the matter came up for hearing. The court proceeded and taxed the applicant's bill of costs in the sum of ksh 214,680/- as per the certificate of costs. The applicant contends that the issues now raised before the court ought to have been raised before the taxing master. It was the applicant's case that there was simply no basis brought forth by the respondent to warrant this court to set aside the taxation proceedings and the ruling delivered on 21/6/2023.
5. In any event, the applicant's final fee note forwarded sought the sum of ksh 206,101/- before the taxation. The respondent as per the annexed payment invoice paid ksh 125,801/-. The respondent still owes the applicant the sum of ksh 67,879/-.

Submissions

6. Counsel for the applicant, Mr. Nganga submitted that the application is dated 30.6.2023 and they seek the stay of execution of the ex-parte ruling pending the hearing of this application and prayer 4, that is, that the ex parte ruling of June of 21.6.2023 be set aside and the matter be admitted for hearing interpartes. Counsel argued that the applicant has a formidable defence to the taxation proceedings, in particular, the client contends that part of the sum has been paid and the advocate in submitting the bill of costs failed to declare the amount paid to the advocate which is a sum of ksh 149,000. The applicant's defence is that the amount is settled. Further, the client contends that after the conclusion of the matter in Bungoma CMCC no 644 of 2016 the advocate raised fee in 2 stages, a deposit request of 9.2.2017 and a final fee note dated 22.7.2021. The fees charged were paid to the advocate upon deducting the initial deposit (see Ex.2B). It was argued that the court has the discretion to set aside a judgment if there is a defence which has triable issues and the client should be given a chance to ventilate his issue. The advocate can be compensated by way of throw-away costs.
7. Miss Oduor, on behalf of the respondent, submits that the applicant has failed to show that they are entitled to the court's discretion. They were served with the bill of costs. The bill was taxed at ksh 214,680/-. The applicant agreed to settle ksh 125,800 plus an additional ksh 20,000/- in settlement of the taxed costs but has only settled part of the costs. Therefore, there is no need to send the matter back to the Deputy Registrar and the applicant should settle the amount owing, ksh 67,879/-.



Analysis And Determination

8. I have considered the application before me and the rival submissions by the parties. However, before delving into the merits of the application, I must first satisfy if the application is properly before the court. The application before me is not an appeal in the strict sense. Rule 11 of the [Advocates Remuneration Order](#). Rule 11 of the [Advocates Remuneration Order](#) lays down the procedure for appealing against the decision of a taxing master. It provides as follows:

“ 11. Objection to decision on taxation and appeal to Court of Appeal

- (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 for 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 time fixed by subparagraph (1) or (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 may be so made notwithstanding that the time sought to be enlarged may have already expired.”

9. Order 10 of the [Civil Procedure Rules](#) deals with non-appearance and default judgment. Order 10 Rule 11 of the [Civil Procedure Rules](#) provides that where judgment has been entered under this Order 10 the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just. Such an application is made before the court that entered the said judgment.

10. Therefore, the jurisdiction of this court can only be invoked by an appeal by way of Chamber Summons as provided in Rule 11 of the [Advocates Remuneration Order](#). With the above finding, I will not consider the merits of the application.

11. Consequently, I find that the application is improperly before the court and the same is struck out, each party to bear its own costs.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 28TH DAY OF MAY 2024.

R.E. OUGO

JUDGE

In the presence of:



Applicant- Absent

Mr. Mwanza For the Respondent

Wilkister/ Diana - / C/A

