



REPUBLIC OF KENYA



Musyoki Mogaka & Co. Advocates v Maeri & another (Civil Case E120 of 2023) [2024] KEHC 7935 (KLR) (Civ) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE E120 OF 2023**

JN MULWA, J

JUNE 27, 2024

BETWEEN

MUSYOKI MOGAKA & CO. ADVOCATES APPLICANT

AND

MICHAEL RIOGI MAERI 1ST DEFENDANT

ASPENUS ONDARA MAERI 2ND DEFENDANT

RULING

1. The Plaintiff in the motion dated 30/10/2023, brought under Order 45 Rule 1(b), Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act* seeks Orders of stay of execution dated 7/08/2023 and all consequences arising there from; as well as an order of Review to set aside vacate or discharge the orders of the court granted on 8/08/2023, upon grounds stated on its face and supporting affidavit sworn on even date by one Elikana Mogaka, Advocate for the Respondents in this matter as well as submissions dated 15/03/2024.
2. In opposition to the application the Respondent filed grounds of opposition dated 15/01/2024 and submissions dated 2/05/2024.
I have considered the parties pleadings and submissions.
3. The impugned orders granted on 7/08/2023, were issued by the Hon. E. M. Nyakundi in respect to the Advocates client Bill of costs dated 2/03/2023. The said Bill of costs emanated from the Advocates instructions by the Respondents to represent them in Criminal and Civil cases against one Douglas Onduso. Upon hearing Counsel's submissions on the Advocate-Client Bill of costs, the Taxing Master struck off the bill with no orders as to costs on 7/08/2023.



4. By the application before court, the applicant seeks to set aside the order of dismissal by way of a review under Order 45 Rule 1 of the Civil Procedure Rules on grounds of an error or mistake on the face of the orders.

The Respondents submit that the applicant has failed to meet the threshold under Order 45 CPR as no error or mistake has been identified in the said orders. It is evident that the Advocates/Applicant were dissatisfied with the Taxing Officers' decision on strike out the Bill of Costs.

5. It is trite that a court cannot interfere with the Taxing Officer's decision unless it is shown that either the decision was based on an error of principle on the fees awarded as either being excessively high or low as to justify interference, or that the taxing officer took into account irrelevant factors or omitted to consider relevant factors as rendered in First American Bank of Kenya v Shah and others [2002] EALR 64.

6. The above is not the position of the applicants. If they had been dissatisfied, they ought to have invoked the provisions of the Advocates Remuneration Order Paragraph II and file a reference to this court upon conditions set thereunder; one being that a reference (equivalent to an appeal) ought to be lodged within a specified period.

On a reference to a judge from taxation by the taxing officer, the Judge will not normally interfere with the exercise of discretion by the taxing officer unless the officer erred in principle in taxing the Bill of Costs Kipkorir Kiptoo & Kiara Advocates v Deposit Protection Fund Board.

7. Considering the Applicant's pleadings and submissions nothing has been placed before the court to show how the taxing officer erred in principle in his decision. It is not enough to state, evidence must be adduced to support the submissions.

In Moses Wekesa v Paul Nyamodi t/a V/A Nyamodi & Advocates [2021] eKLR, the court held that on: "Reference, the judge only deals with what was on record before the taxing officer"

It is instructive that the applicants did not seek leave of court to introduce new evidence by amendment of the pleadings before the taxation see par. 7 - 9 of the Supporting Affidavit.

It would be prejudicial to the Respondent if such an order is allowed at the appellate level as held in Otieno Rago & Co. Advocate v National Bank of Kenya Ltd [2020] eKLR.

8. Admission of documents in taxation proceedings is a preserve of the taxing master Under Rule 13A of the Advocates Remuneration Order.

I agree with the Respondents that the application is misconceived and has no proper basis in law as drawn.

The court is therefore left with no alternative than to find no merit in the said Application dated 30/10/2023. It is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2024.

JANET MULWA

JUDGE

