



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC. APPLICATION NO. E085 OF 2019

MWADUMBO & COMPANY ADVOCATES.....ADVOCATE/RESPONDENT

VERSUS

RUDUFU LIMITED..... CLIENT/APPLICANT

RULING

(1) Before this Court is the Notice of Motion dated **3rd December 2019** by which **RADUFU LIMITED**, the Client/Applicant seeks the following orders:-

1. SPENT

2. SPENT

3. **THAT the ex parte Judgment entered herein on 1st November 2019 be reviewed, set aside, and/or varied and the Defendant be granted leave to participate in the Taxation proceedings.**

4. **THAT the ex parte Certificate of Costs entered on 1st November 2019 and subsequent orders granted against the Defendant/Applicant be set aside and the Defendant/Applicant be granted leave.**

5. **THAT costs of this application be borne by the Plaintiff/Respondent.**

(2) The application is premised upon **Order 42 rule 6(1) (2), Order 22 rule 51, Rule 1** of the **Civil procedure Rules, Sections 3 and 3A** of the **Civil Procedure Act, Article 50 Constitution of Kenya 2010** and all other enabling provisions of law and was supported by the Affidavit of even date sworn by **JOSEPH MAINGI** the Finance Manager of the Applicant's Company.

(3) The Advocate / Respondent **MWADUMBO AND COMPANY ADVOCATES** opposed the application through the Replying Affidavit dated **18th December 2019** sworn by **ANGELA N. MUNGA – MWADUMBO** an Advocate of the High Court of Kenya and a Partner in the Respondent Law firm. The application was canvassed by way of written submissions. The Client / Applicant filed its written submissions on **2nd March 2020**, whilst the Advocate / Respondent filed its submissions dated **13th March 2020**.

BACKGROUND

(4) The Client / Applicant instructed the Respondent firm of Advocates to represent it in two (2) separate suits ie **CMCC No. 7743 of 2016** and **CMCC No 8609 of 2017**. It is averred for the Applicant that at some point during the hearing of the said cases the Advocate abruptly and for no apparent reason filed an application to cease from acting for the Client. As a result the Client found itself exposed in the two suits and opted to engage its adversary with a view to amicably setting the same. The Client claims that it paid to the Advocate the sum of **Kshs. 150,000/-** and **Kshs. 131,000/-** to represent it in the two cases.

(5) On **28th November 2019** the Applicant was served with a Proclamation and Warrant of Attachment for **Kshs. 995,331.56**. The Applicant avers that the Advocate filed a Bill of Costs which Bill was never served upon them. The Applicant further allege that they were never served with the Taxation Notice and as a result the said Taxation proceeded Ex Parte. The Applicants contend that this failure to serve them amounted to a denial of their right to defend and / or oppose the Bill of Costs to their great prejudice. That they now stand exposed to execution process arising from an unprocedural Taxation. Hence the present application seeking to set aside the entire Taxation.

(6) The Advocate / Respondent confirms that it was instructed to act for the Client in the two suits **CMCC No. 7743 of 2016** and **CMCC**

No. 8609 of 2017. As a result the Advocate maintains that legal fees is due and owing to the firm of **Mwadumbo & Company Advocates** arising from that representation. That the law firm acted within the law in presenting their Bill of Costs for Taxation. The Respondent insists that the Bill of Costs was duly served upon the Applicants and that the Applicant was also properly served with the Notice of Taxation.

(7) The Respondent avers that the Applicants only recourse if they were aggrieved by the Taxation was to file a Reference. That the Notice of Motion dated **3rd December 2019** cannot be used to challenge the Taxation conducted by the **Hon. Deputy Registrar**. Finally the Respondent urges the Court to dismiss the application in its entirety with costs.

ANALYSIS AND DETERMINATION

(8) I have carefully considered the Notice of Motion before me, the Affidavits on record as well as the written submissions filed by both parties. The gist of the application is that the Taxation was conducted without the participation of the Applicant as they were not served with either the Bill of Costs or the Taxation Notice. The Respondent retorts that the Taxation was conducted procedurally as the **Hon. Deputy Registrar** properly exercised her discretion to proceed Ex parte, after satisfying herself that there had been proper service upon the Client / Applicant.

(9) The Respondent has annexed to their Replying Affidavit dated **18th December 2019** evidence that the Applicant were properly served. Annexure **ANMM '7'** includes a copy of an Affidavit of Service dated **13th November 2018** sworn by one **MICHAEL NJONJO** a Licensed Court Process Server. The Affidavit indicates that the Process-Server visited the offices of the Defendant on three (3) different occasions and finally served the Bill of Costs dated **18th October 2018** together with the Notice of Taxation dated **30th October 2018**. Both documents were served on the final visit to the Applicant's office on **5th November 2018** at **1400hrs**.

(10) Therefore prima facie there is evidence that the Applicants were properly served as required by law. This Affidavit of Service has not been controverted in any way. Moreover it is highly unlikely that the **Hon. Deputy Registrar** would have proceeded with the Taxation Ex parte unless she had first satisfied herself on this crucial issue of service.

(11) Therefore on this question of service I find that despite the Applicants assertions to the contrary there is clear evidence that they were duly served with both the Bill of Costs as well as the Notice of Taxation.

(12) In both the Supporting Affidavit dated **3rd December 2019** as well as in their written submissions the Applicants have dwelt at some length on the short comings of the Taxation as conducted by the **Hon. Deputy Registrar**. It is averred that the amount claimed in the Bill of Costs was excessive as the Applicants insist that the Respondent firm abandoned them prematurely leaving the Applicants with no option but to seek an amicable solution to the two cases. That the matter was eventually settled out of Court without the involvement of the Advocate.

(13) The Respondent counters that these are issues which the Applicant could only ventilate by way of a Reference as provided by **paragraph 11** of the **Advocates Act** which provides as follows:-

“Where a party is aggrieved by the decision of a Taxing Officer, he is required to object in writing by requesting the Taxing Officer to give reasons for the items of Taxation that he is objecting to and thereafter file Reference to this Court.”

(14) The documents filed by the Applicants indicate that they are challenging the entire Bill of Costs as well as the decision reached by the Taxing Officer. There is no evidence that the Applicant ever wrote to the Taxing Officer indicating which particular items of Taxation they are objecting to and seeking that reasons be given for the Taxation. As such the Applicant has failed to comply with the provisions of **paragraph 11**. The Applicant cannot seek to turn this Notice of Motion into a Reference against the Taxation.

(15) In **MACHIRA & COMPANY ADVOCATE –VS- ARTHUR K. MAGUGU (2012)eKLR** the Court of Appeal held as follows:-

“Appeals require the typing of proceedings compiling of records of appeal and hearing of the same in open Court. Reviews, however would require provisions a kin to those of Section 80 of the Civil Procedure Act, of discovery of new and important matters, errors on the face of the record and so on. In our view, the Rules Committee intended to avoid all that and provide a simple and expeditious mode of dealing with the decisions on Advocates Bill of Costs through References under Rule 11 to a Judge in Chambers.”

The Court went on to hold as follows:-

“The Appellate jurisdiction of any Court is a creature of the Statute and has to be exercised in accordance with the provision of the Statute creating it. With regard to the Advocates Bill of Costs, we agree with the decision of Ringera J (as he then was) in MACHIRA VS MAGUGU (1) that the Advocates Remuneration Order is a complete code which does not provide for appeals from the Taxing Master's decisions. Rule 11 thereof provides for ventilation of grievances from such decisions through References to a Judge in Chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used” [own emphasis]

(16) The failure / omission of the Applicant to file a Reference cannot be excused as a **'mere technicality'** in terms of **Article 159** of the **Constitution of Kenya 2010**. In **SPEAKER OF THE NATIONAL ASSEMBLY –VS- KARUME [2008]I KLR**, the Court of Appeal stated as follows:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

(17) Thus I find that **Order 11** of the **Advocates Act** cannot be short-circuted in any manner whatsoever. The Applicant has failed to follow the legally sanctioned procedure to challenge a Taxation and thus his application is incompetent and cannot be allowed.

(18) Based on the foregoing I find no merit in this application. The Notice of Motion dated **3rd December 2019** is dismissed in its entirety. Costs are awarded to the Advocate / Respondent.

DATED IN NAIROBI THIS 21ST DAY OF MAY, 2021.

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MAUREEN A. ODERO

JUDGE