



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MISC. CAUSE NO. 175 OF 2019**

**IN THE MATTER OF: THE ADVOCATES ACT**

**AND**

**IN THE MATTER OF: TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT**

**BETWEEN**

**GEORGE MIYARE T/A MIYARE & COMPANY ADVOCATES.....ADVOCATE/APPLICANT**

**VERSUS**

**ELSEK & ELSEK CONSTRUCTION LIMITED.....1<sup>ST</sup> CLIENT/RESPONDENT**

**BEMUDA HOLDINGS LIMITED.....2<sup>ND</sup> CLIENT/RESPONDENT**

**ARISING FROM**

**HIGH COURT MISC. APP. NO. 356 OF 2015**

**BETWEEN**

**ELSEK & ELSEK CONSTRUCTION LIMITED.....APPLICANT**

**VERSUS**

**PRESBYTERIAN UNIVERSITY OF EAST AFRICA REGISTERED TRUSTEES....RESPONDENT**

**JUDGMENT**

1. Before me is a Motion on Notice dated 30/10/2020 by the Advocate (“Applicant”). It is brought under *section 51 (1) and (2) of the Advocates Act, Cap 16 Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules*. It seeks judgment for Kshs. 8,103,239/60 in terms of the Certificate of taxation dated 27/10/2020 together with interest at 14% from 10/5/2019 until payment in full.

2. The application is supported by the affidavit of **Sheila Oriwo** sworn on 30/10/2020. The applicant contends that sometimes in 2016, he was instructed by the respondent to continue with the proceedings in **Nairobi Misc. No. 365 of 2015: Elsek & Elsek Construction Company Limited vs. Presbyterian University of East Africa Registered Trustees**. The instructions were duly executed but the respondent failed to pay legal fees leading the applicant to lodge the Advocate-Client Bill of Costs dated 1/3/2019.

3. By a ruling made on 13/2/2020, the bill was taxed at Kshs. 8,103,239/60. The applicant objected thereto but later withdrew the objection on 27/10/2020. The decision of the taxing master has not been altered/varied or set aside. The applicant therefore prays that the orders sought be granted.

4. The 2<sup>nd</sup> respondent opposes the application vide a replying affidavit sworn by **Kamau Ngegi** on 18/11/2020. It is contended that the 2<sup>nd</sup> respondent had objected to the said ruling on taxation on 26/2/2020 and had at the same time requested for the reasons for the said ruling. That to-date neither the reasons nor a copy of the ruling have been supplied nor the 2<sup>nd</sup> respondent to enable it lodge a reference against the

said taxation.

5. On its part, the 1<sup>st</sup> respondent opposes the application vide its Grounds of Opposition dated 21/12/2020. It contends that the application is pre-mature and bad in law as the 2<sup>nd</sup> respondent had lodged a Notice of Objection to the ruling of 13/2/2020. That the application is unmerited because the Certificate of taxation dated 27/10/2020 is not certified as a true copy of the original, and it is not final as it was not issued by the taxing master who taxed the Bill of Costs in question.

6. The applicant filed a further affidavit by **Esther Mwikali** sworn on 11/2/2021. She explains that the typed ruling was ready way back in February, 2020 as the applicant obtained a copy thereof and lodged its reference on 11/3/2020. That in the premises, the ruling has always been available for collection by the parties. That the ruling was comprehensive and had reasons of the Taxing Master and a reference could have been lodged using the same as the applicant had done.

7. That no evidence had been adduced to show the effort made to obtain the said ruling. Further, no steps had been taken to pursue the purported objection to date. That due to Covid 19 containment measures, the Certificate of taxation was issued by the deputy registrar on duty.

8. In its submissions dated 11/2/2021, the applicant submits that though it annexed a scanned original Certificate of taxation dated 27/10/2020 in compliance with the e-filing regulations, the original Certificate of taxation is part of the court record.

9. That the issuance of the Certificate of taxation by a different deputy registrar, than the one who taxed the bill, is not fatal as it did not change the contents thereof. That the only bar to an application for judgment in relation to a Certificate of taxation is the existence of a dispute as to retainer or where the certificate has been set aside or altered. None of these are alleged to exist in these proceedings.

10. That the bill of costs dated 1/3/2019 was served on the respondents on 10/4/2019 and 15/3/2019, respectively. In the premises, the sum of Kshs. 8,103,239.60 should attract interest of 14% per annum from 10/5/2019 until payment in full.

11. The 1<sup>st</sup> respondent's submissions are dated 4/3/2021. It submits that the applicant has not satisfied the general provisions of **section 51(2) of the Advocates Act Cap 16**. That the only person who is authorized to issue a Certificate of taxation is the Taxing Officer. That in this case, the taxing officer was **Hon. S.A Opande** while the Certificate is signed by **S. Githongori**. That in the premises, the certificate is not final. The 1<sup>st</sup> respondent relied on the case of **Njogu & Company Advocates v Kenya National Capital Corporation (2006) eKLR**.

12. The 2<sup>nd</sup> respondent's submissions are dated 19/3/2021. It submits that it followed the laid down procedure on an objection to taxation under **Rule 11 of the Advocates Remuneration Order**. That it made effort to obtain a copy of the ruling via the request made to the Deputy Registrar to provide a copy of the ruling and the reasons for the same which went unanswered. That further enquiry from the registry revealed that the ruling was not typed at the time. That it is keen on challenging the Certificate of taxation and intends to file a reference Court.

13. The applicant filed supplementary submissions dated 8/3/2021 and relied on the case of **Ahmednasir Abdikadir & Company Advocates vs. National Bank of Kenya Limited (2006) Eklr** for the proposition that it was not fatal that the Certificate of taxation was not signed by the taxing officer who taxed the bill.

14. The preliminary issue for determination is whether the application before me is fatal for reason that the Certificate of taxation was issued by a different officer than the officer who taxed the bill.

15. It is not in dispute that the Certificate of taxation was not signed/issued by the taxing officer who taxed the bill of costs. The applicant submitted that **Hon. S.A. Opande** who taxed the bill was not available for signing hence the certificate was issued by **Hon. S. Githogori** who was the deputy registrar on duty.

16. I have perused both the ruling of 13/2/2020 and the Certificate of taxation dated 27/10/2020. I note that the taxed costs of Kshs. 8,103,239/60 was correctly reflected in the Certificate of taxation. The 1<sup>st</sup> respondent insists that in terms of **section 51(1) of the Advocates Act**, the Certificate should have been signed by **Hon S. O Opande**.

17. I have carefully considered the authority relied on by the 1<sup>st</sup> respondent of **Njogu & Company Advocates v. Kenya National Capital Corporation [2006] Eklr**. In that case, it was held that a Certificate under that section should be issued only by the taxing officer who taxed the bill. I have also considered the authority relied on by the applicant of **Ahmednasir Abdikadir & Company Advocates v. National Bank of Kenya [2006] Eklr** which allowed a certificate signed by a different officer.

18. Both decisions are only persuasive and none is binding on this Court. My take is that, the strict interpretation taken in the **Njogu & Company case** is unnecessary. This is because of the following reasons: -

a) Firstly, in post 2010 constitutional dispensation, there is shift from obsession with technicalities and emphasis on justice to the parties before court. It is all about dispensing justice and avoiding prejudice. There is no prejudice that can possibly be occasioned if a different deputy registrar than the one who taxes the bill issues a Certificate under **section 51(1) of the Advocates Act**. And, none was suffered here.

b) Secondly, insistence that the particular officer who taxes a bill of costs be the one to issue (sign) the Certificate will be defeating the dictates of **Article 159 (2)(b)** which require that justice be dispensed with without undue delay. Why would a litigant wait for an officer who is probably not present and is away either on leave or, like in this instance where Covid-19 protocols required officers to

work in shifts, to return to work to sign the document? That would defeat the overriding objective of litigation.

c) Thirdly, the issuing of the Certificate of taxation is not a judicial function but rather an administrative act which does not go to the root of the Certificate. All that is required is the correct certification of the amount taxed.

19. In this regard, my view is and I so hold that a Certificate of taxation under **section 51(1) of the Advocates Act** issued by any appointed deputy registrar but which correctly reflects the ruling on taxation is as good as the certificate issued by the very officer who undertook the taxation.

20. In any event, it was submitted and not denied that due to the necessary administrative decisions made by the judiciary when the courts were closed following the Covid-19 pandemic in the country, **Hon S. O. Opande** was unavailable to sign the Certificate and the same was issued on his behalf by **Hon S. Githongori**, who was the on-duty deputy registrar. That was an act of enhancing access to justice under **Article 48 of the Constitution of Kenya**.

21. Further, **section 43 of the Interpretation and General Provisions Act Cap 2** provides: -

***“Where a written law confers a power or imposes a duty on the holder of an office as such, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office...”***

22. At the time of signing, **Hon. S. Githongori** rightfully held the office of a Deputy Registrar and was on duty at the time she exercised the duty of signing Certificate of taxation. Accordingly, that objection is without merit and I reject the same.

23. The second issue is whether judgment should be entered in favour of the applicant. Where costs have been taxed, the applicable provision is **section 51(2) of the Advocates Act** which stipulate: -

***“The certificate of a taxing officer by whom it has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs”***.

24. From the above provision, it is clear, and it is a rule of practice for advocates to file applications by way of Notice of Motion (or Originating Motion) moving the court to enter judgment after taxation of their bills of costs and subsequent issuance of a Certificate of taxation.

25. This procedure ensures expedition since once issued, the Certificate is final as to the amount of the costs covered. All that remains is for the Court to pronounce itself on the same. The only bar to a judgment in such a case is where there is a dispute as to retainer or the Certificate is altered or set aside.

26. In the present case, there is no dispute as to retainer. The Certificate has not been altered or set aside. The only ground raised by the 2<sup>nd</sup> respondent is that, it filed a Notice of Objection on 26/2/2020 to the ruling of 13/2/2020. That it had also applied for the typed copy of the ruling and reasons therefor and had not received the same.

27. The record shows that as early as 11/3/202, the applicant had obtained the typed copy of the ruling. That is why the applicant was able to lodge its reference dated 11/3/2020. The present application was lodged 8 months later. There is nothing to show that the 2<sup>nd</sup> respondent made any effort during that period to obtain the copy of the ruling or the reasons therefor.

28. Lodging an objection to a taxation cannot be equated to a stay order. A single letter to the court is not enough. A party must show that it is diligent in its quest for justice. In the present case, the 2<sup>nd</sup> respondent only lodged an objection and went to sleep. It would be unjust to prevent the applicant from reaping the fruits of its labour just because the 2<sup>nd</sup> respondent expressed an intention to challenge the subject ruling a year ago. Expression of intent is not enough.

29. There having been no effort on the part of the 2<sup>nd</sup> respondent in its quest to challenge the subject ruling, it would be unjust to deny the applicant the chance of being heard on its application. The applicant has the right to have its application determined on merit.

30. Retainer is not disputed. The Certificate dated 27/10/2020 has not been altered or set aside. The pendency of an objection that has remained on record for over 8 months without being sought to be prosecuted cannot be a bar to a determination being made on the applicant's application. Equity cannot aid the indolent and at the same time, delay defeats equity.

31. Accordingly, I find the applicant's application dated 30/10/2020 to be meritorious and I allow the same as prayed. The applicant will also have the costs of the application.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY, 2021.**

**A. MABEYA, FCI Arb,**

**JUDGE**