



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC.APP.NO. 35 OF 2019

JOHN NAMASAKA FAMBA.....APPLICANT

VERSUS

AUTO SELECTION (K) LTD.....1STRESPONDENT

LYSBETH GATIRIA MBAE.....2ND RESPONDENT

JASPER GITONGA KIUBUTHI.....3RD RESPONDENT

RULING

1. The Chamber Summons is dated the 17th May, 2019 and is brought under the provisions of Part II (2) and 79 of the Advocates Remuneration Order, and all the enabling provisions of the law; the applicant seeks the following orders;

- (i) That the ruling of the Taxing Master delivered on 3rd May, 2019 be set aside in its entirety,
- (ii) That this Honorable Court be pleased to adjust the figures and the costs due be re-assessed,
- (iii) That in the alternative the party and party bill of costs dated 23rd November, 2018 be referred to another Taxing Master for re-taxation,
- (iv) The cost of the reference be awarded to the applicant.

2. In disposing of the application the applicant's counsel had made oral submissions on the 12/02/2019 but the applicant was directed to file a Further Affidavit and to annex a copy of the Bill of Costs; but the respondent was not silent and filed a Preliminary Objection to the application; in disposing of the application the applicant reiterated what was deposed in the affidavits and the respondent relied on the contents of the Preliminary Objection; hereunder is a summary of their rival submissions;

APPLICANT'S CASE

3. The application is premised on the grounds on the face of the application and on the Supporting Affidavit made on the 17/05/2019 by **JOHN NAMASAKA FAMBA** who deponed that the party and party Bill of Costs which was allowed and taxed in the total sum of KShs.65,000/- was erroneously awarded; it was also contrary to the provisions of Schedule VI (a) of the Advocates (Remuneration) Order which prescribes a maximum fee of Kshs.154,721/-;

4. That the taxing master exercised his/her discretion unreasonably, unfairly, and injudiciously and applied wrong principles by failing to apply Schedule VI to the rest of the items and thereby arrived at an erroneous conclusion on all the items taxed; that the taxed amount was too low and unreasonable;

5. The applicant depones that he had applied to be furnished with reasons for the decision but the taxing master failed to furnish him with the reasons supporting the decision within the stipulated time;

RESPONDENT'S CASE

6. In response to the instant application the respondent raised a Notice of Preliminary Objection dated the 11/08/2020 on the grounds that the Supporting Affidavit dated 17/05/2019 and the Further Affidavit dated 28/05/2020 in support of the Notice of Motion are made by **JAMES NAMASAKA FAMBA** a layman who lacks '*locus standi*' to attest to issues where the disputed matter relates to the taxation of the Bill of Costs dated 23/11/2018 which was raised by the firm of Mang'erere & Company Advocates; that the bill of costs was raised under the

provisions of the Advocates Remuneration Order, 2014 to which the applicant cum deponent is not privy to.

ISSUES FOR DETERMINATION

7. After reading the affidavits and the preliminary objection filed herein this court finds only one issue for determination is whether to uphold the Preliminary Objection;

ANALYSIS

8. The application is premised under the Advocates Remuneration Order which is a creature of the Advocates Act ('Act') and the Act is very clear that it guides advocates in ascertaining the costs they are entitled to when making their claims as to costs;

9. The instant Preliminary Objection is anchored on the fact that the applicant herein is a layman and that the information contained in the affidavits is made by a person who lacks capacity to swear a supporting affidavit claiming and challenging advocates costs yet he is not an advocate;

10. Indeed, the record reflects that the affidavits make no reference to the deponent being an advocate who is seized of the matter and or having conduct of the matter;

11. It is trite law that affidavits are confined to such facts as the deponent is able of his own knowledge to prove; the applicant depones at paragraph 3 of his Supporting Affidavit as follows;

'3. That having been dissatisfied with the Ruling of the taxing master delivered on the 3rd May, 2019 when the matter came up for taxation, I wrote to the Deputy Registrar seeking to be supplied with reasons for the decision to enable me to file a reference before this Honorable Court; (Annexed and marked 'JNF2 is a copy of the letter dated 8th May, 2019)'

12. It is noted that the annexure referred to is signed by an advocate and the signature and the name demonstrates that the deponent is not the author of the letter as he purports in paragraph 3 of the affidavit;

13. At paragraph 6 the applicant goes on further to depone that;

'6. That the taxing master committed an error in principle in failing or neglecting to put into consideration the maximum party and party costs as stipulated by the law hence arriving at a wrong conclusion.'

14. This court reiterates that the applicant is not an advocate and that he is not in a position to prove that the taxing master erred in principle and in law as he has not indicated the source of information as to how the figures that were to be taxed were arrived at and lacks knowledge as he was not privy to how the same was subjected to taxation;

15. The applicable law is found at Order 19 Rule 3 of the Civil Procedure Rules 2010 which provides that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove;

16. This court also makes reference to the case of **John Muli & Anor vs Thomas Nzioka Wambua & Anor (suing as Administrators of the Estate of Michael Makau Nzioka (Deceased)[2021] eKLR** where it was held;

'Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: provided that interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof'

17. Ideally, the authorized and appropriate person who ought to have made the supporting and further affidavits and all the depositions therein would have been an advocate who has prior knowledge on the costs incurred and the amounts taxed;

18. This court is satisfied that the Supporting Affidavit and the Further Affidavit do not comply with Order 19 Rule 3 of the Civil Procedure Rules 2010 as the applicant in being a layman cannot of his own knowledge prove the facts as set out, therein; the affidavits are also found to be devoid of the sources and grounds of his information to support any of his averments; the irregularities and non-conformity with the law renders the affidavits as being fatally defective and inadmissible and for those reasons the affidavits are hereby struck out; the application is thereby rendered incompetent as it is devoid of supporting affidavits;

19. The upshot is that the Preliminary Objection is found to have merit and it is hereby upheld;

FINDINGS AND DETERMINATION

20. In the light of the foregoing this court makes the following findings and determinations;

(i) The Preliminary Objection is hereby upheld;

(ii) The application is hereby struck out with no order as to costs.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 20TH DAY OF MAY, 2021.

HON. A. MSHILA

JUDGE