



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISC. APPLICATION NO. 31 OF 2016

JOHN OMUTIMBA T/A MATRIX AUCTIONEERS...AUCTIONEERS/RESPONDENT

AND

MONICA GATHONI MUGWE.....PLAINTIFF

VERSUS

CYRUS MBUGUA NDUA

BROADWAYS BEKARY LIMITED.....DEFENDANTS/APPLICANTS

RULING

1. By a Motion on Notice dated 10th May, 2016, the Defendants/Applicants seek an order that the ex parte proceedings of 12th April, 2016 be set aside. and that the Court orders that the matter be fixed to taxation inter partes. It was further sought that the Auctioneers charges be paid by the Plaintiff, **Monicah Gathoni Mugwe** who initiated the execution process without complying with Order 22 Rule 18 of the **Civil Procedure Rules**.
2. The Motion is expressed to be brought pursuant to Order 12 Rules 2 and 7, Order 51 Rule 1 of the **Civil Procedure Rules**, Section 3A of the **Civil Procedure Act** and all other enabling provisions of the law.
3. Although the supporting affidavit does not clearly bring out the grievance, it is clear from the application that the subject of this ruling is the decision made on 12th April, 2016. According to the Applicant, the advocates on record were not served but instead service was effected upon the parties hence it took long for the advocate to become aware of the taxation. By the time the advocates were instructed the matter had already proceeded for taxation in the absence of the Defendant's Advocates and a ruling given for 18th May, 2016.
4. In response to the Application, the Respondent filed a Notice of Preliminary Objection in which he took issue with the competency of the application on the ground that the challenge to the decision of the taxing master ought to have been brought by way of a reference pursuant to Rule 11(2) and (4) of the **Advocates Remuneration Order**.
5. In response to the said contention, the Applicant's position is that no taxation took place on 12th April, 2016 and that what they seek is simply a decision as to who ought to pay the Auctioneers charges before the same are taxed. The reason why the Applicants are challenging being burdened with the costs of the auctioneers is because the taxation process that led to the costs being claimed by the Auctioneers were, according to them, undertaken after one year without notice to show cause being taken out as required under Order 22 Rule 18 of the **Civil Procedure Rules**.
6. It is trite that where taxation of costs has been undertaken the only known procedure for challenging the same is by way of reference. Where a person discovers the fact of taxation after the time stipulated as it is alleged herein paragraph 11(4) of the **Advocates Remuneration Order** empowers the court to extend time. It has been said time and again that where there is a specific procedure provided for addressing a grievance that procedure should be strictly complied with. **Ringera, J** (as he then was) in **Re: Leisure Lodges Limited Nairobi (Milimani) HCWC No. 28 of 1996** was of the view that a party who is aggrieved by any decision of the taxing officer whether interlocutory or final and whether it be on the quantum awarded on the bill as a whole or any items thereof has a recourse to the High Court by way of a reference under paragraph 11 of the Advocates Remuneration Order. The same Judge in **Muthoga Gaturu & Co. vs. Fidelity Commercial Bank Ltd. Nairobi (Milimani) HCCC No. 570 of 2000**, held that although it is true that **rule 11** of the **Advocates Remuneration Order** allows reference to the High Court in respect of taxed items of a bill of costs, where taxation has not proceeded on the basis of any items in the bill but the entire bill has been struck out the aggrieved parties only remedy is a reference to the High Court in respect of such a decision in its entirety. In **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA**

65 it was held that the correct procedure to challenge the decision on taxation is not by applying to have it set aside but by reference under **rule 11** of the *Advocates Remuneration Order*. In **Behan & Okero Advocates vs. National Bank of Kenya Kisumu HCMA No. 114 of 2004 Tanui, J** held:

“Rule 11 of the Advocates (Remuneration) Order clearly stipulates that any party who is aggrieved by the decision of the taxing officer whether the grievance is against some items of the bill of costs or against the entire bill, has to come to the High Court by chamber summons under rule 11(2) and an applicant who follows such a procedure would have a chance to appeal to the Court of Appeal should he be not satisfied with the decision of the Judge upon reference of the objection from the orders of the taxing officer. Therefore an application seeking to set aside orders made on taxation under Order 9 Rule 8 CPR is incompetent and the Court does not have jurisdiction to entertain it.”

7. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the taxing master has directed himself on a matter of principle. If the same is found to have been the case the usual course is to remit the matter back to the taxing master with the necessary directions. The decision whether or not to proceed with taxation is an exercise of discretion and if the Taxing Officer proceeds *ex parte* in circumstances in which he/she should not have so proceeded, in my view, that would amount to an error of principle and the Judge may remit the matter back with directions that the bill be re-tax in the presence of the parties. It is therefore my view, and I so hold, that the only recourse available to the party aggrieved in such circumstances would be by way of a reference.

8. However, the taxation of auctioneers costs is undertaken pursuant to the *Auctioneers Act* as opposed to the *Advocates Act*. The preamble to the said Act provide that it is:

An Act of Parliament to amend and consolidate the law relating to advocates.

9. The *Advocates Remuneration Order*, an Order made under the Section 21 of the *Advocates Act* provides that:

This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts).

10. Accordingly, the Order only applies to remuneration of and advocate by his client and the taxation thereof and the taxation of costs between party and party. Auctioneers are generally not parties to suits unless the Court join them as such and they are clearly not advocates unless an advocate decided to dabble in auctioneering business but even then when he acts as an auctioneer, his fees will not be regulated by the *Advocates Remuneration Order*. Accordingly, the *Advocates Remuneration Order* does not strictly apply.

11. In this case Rule 55(4) of the *Auctioneers Rules* provides that:

An appeal from a decision of a registrar or a magistrate or the Board under subrules (2) and (3) shall be to a judge in chambers.

12. The said subrules deal with fees payable to auctioneers. It therefore follows that what ought to be filed is an appeal where a decision has been made. In this case, however, I am unable to see the decision made by the Taxing Officer on taxation. In those circumstances, the contention by the Applicants that they arrested the matter before the ruling on taxation was made seems to have some merit. In those circumstances, the Court in exercise of its inherent powers may well make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

13. The next issue is whether the proceedings of 12th April, 2016 ought to be set aside. It is contended that instead of serving the advocates on record, service was instead effected on the party in person who had to take the documents to the insurer and by the time the same reached the advocates the proceedings of 12th April, 2016 had taken place. The decision to set aside an order is undoubtedly an exercise of discretion. The principles guiding the setting aside *ex parte* orders are trite that the court has wide powers to set aside such *ex parte* orders save that where the discretion is exercised the Court will do so on terms that are just. In **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** it was held as follows:

“That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate.”

14. In **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22**, Oder, JSC stated:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”

15. In **Waljee’s (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188**, it was held that:

“There is no injustice if the other side can be compensated by costs...There is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine.”

16. Have considered the issues raised herein it is my view and I find that this is a proper case for setting aside the proceedings of 12th April, 2016. Let the same be undertaken de novo.

17. As regards the issue of notice to show cause, the same only applies where the order sought to be executed is more than one year old. Once an auctioneer taxes his costs, what he is executing is not the original order but the order arising from his costs. Accordingly, for the purposes the execution of the auctioneer’s costs, the one year period starts running from the date he gets the order for payment of his costs and not from the date the original order between the parties was made.

18. Accordingly, let the taxation be undertaken afresh before the taxing officer.

19. There will be no order as to the costs of this application. It is so ordered.

RULING READ, SIGNED AND DELIVERED IN COURT THIS 29TH DAY OF NOVEMBER, 2021

G.V. ODUNGA

JUDGE

In the absence of the parties.

CA Susan