



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. 56 OF 2017

MUMIAS SUGAR COMPANY LIMITED.....APPLICANT

AND

PROFESSOR TOM OJIENDA & ASSOCIATES.....RESPONDENT

(Being a Reference from ruling and order in Mumias CMCCC

Misc Application No. 34 of 2017, by Hon. T.A Odera, of 14th July 2017)

RULING

1. What is for determination is a reference by the applicant herein brought by way of a Chamber Summons, dated 27th July, 2017. It seeks in principal, the variation or setting aside of items that were taxed in the impugned bill, an order for re-taxation of the bill, among other prayers. The grounds upon which the application is premised, and which are aligned to the facts deposed in the supporting affidavit are that the taxing court lacked jurisdiction to tax the bill, there were arithmetical errors on the face of the impugned ruling which made the total amount taxed incomprehensible, there was no privilege for awarding fees to Senior Counsel for bills under Schedule VII of the Advocates Remuneration Order, the applicant did not get a chance to participate in the taxation, the delay in the applicant coming to court to deal with the matter was excusable, among others.

2. The respondent, in response, argues that the applicant was properly served with notice, but filed its papers two months after service, thereby proving that they were casual in their approach to the matter. On jurisdiction, it is argued that a magistrate had jurisdiction to tax or assess bills for business at the magistrate's court, by virtue of Rule 49 of the Advocates Remuneration Order. It is averred that the court gave reasons for taxing the bill as was.

3. The issues that I believe are for determination in this application are with respect to which court had jurisdiction to tax the bill, and whether the applicant was denied the right to be heard in the taxation of costs.

4. The bill in dispute arose from a matter that had been handled at the Mumias Senior Principal Magistrates Court, being Mumias PMCCC No. 13 of 2012. The costs to be assessed or taxed were, therefore, in respect a business that was handled by the applicant in that court. For bills emanating from the magistrate's court, the magistrate would have jurisdiction to tax or assess them, by dint of Rule 49 of the Advocates Remuneration Order, which states as follows:

“PART III – TAXATION OF COSTS IN CONTENTIOUS AND OTHER MATTERS

49. Application of Part III

(1) This Part shall apply to contentious matters and the taxation of costs as between advocate and client and between party and party in contentious and other proceedings.

(2) In this Part, the expression “the Court” means the High Court or any judge thereof or a resident Magistrate Court or any magistrate sitting as a member of a resident Magistrate Court.”

5. The matter in Mumias PMCCC No. 13 of 2012 was contentious, and, therefore, Rule 49 of the Advocates Remuneration Order applied. Under Rule 49, Hon. Odera had jurisdiction to tax the bill. I am fortified in coming to that conclusion by the decision in *Nyamogo & Nyamogo Advocates vs. Pan Africa Insurance Company Limited & another* [2016] eKLR (Aburili J), where it was held:

“... paragraph 49 of the Advocates Remuneration Order clearly defines a court to mean both the High Court or any judge thereof or a Resident magistrate’s court or a magistrate sitting in a magistrate’s court. A court in part III of the Advocates Remuneration Order is mandated to determine costs in contentious matters as between advocate and client and between party and party. It is therefore clear that a magistrate’s court has jurisdiction to assess costs.”

6. Similar remarks were made in *Bernard Gichobi Njira v Kanini Njira Kathendu & another* [2015] eKLR (Limo J), where it was held:

“Paragraph 49 of the Advocates Remuneration Order clearly defines a “court” to mean both the High Court or any judge thereof or a Resident Magistrate’s Court or a magistrate sitting in a magistrate’s court. A court in Part III of the Advocates Remuneration Order is given the mandate to determine costs in contentious matters as between advocate and client and between party and party. It is therefore clear and indisputable that a magistrate’s court has jurisdiction to assess costs and as a matter of law, paragraph 51 of the Advocates Remuneration Order clearly gives the applicable scale to be used in the subordinate courts as Schedule VII.”

7. Was the applicant denied a hearing on the taxation of costs. It the constitutional right of every person to be accorded a fair hearing. See Article 50 of the Constitution of Kenya, 2010. The applicant concedes that it was served with a taxation notice dated 22nd March 2017, on 31st March 2017, unfortunately indicating that the taxation was scheduled for 11th March 2017, which was a date long before the date of the taxation itself and the date of its service. When it followed up the matter thereafter, it established that the bill had been taxed, and was due for ruling on 12th May 2017, and due to that they were unable to place any documents on record, as the file was not available at the registry. I have seen a copy of the said notice of taxation dated 22nd March 2017, served on 31st March 2017. It shows that the date of taxation was 11th March 2017, which was misleading. The matter was placed before the court on 11th April 2017 and proceeded. Given that the applicant had been served with a taxation notice which had a misleading date, one can conclude that the applicant was denied its right to a hearing. I note that the respondent has stated that the taxation was due for 11th April 2017, but he is silent on the allegation that the taxation notice served did not refer to 11th April 2017, but to 11th March 2017.

8. I am alive to the fact that the practice of inviting parties for assessment of costs is not mandatory, with respect to bills at the magistrate’s court. That would suggest that the taxing officer was quite within her discretion to allow the taxation to go on in the absence of the applicant. However, it is desirable to give the parties the chance to be heard, as the court cautioned, in *Bernard Gichobi Njira vs. Kanini Njira Kathendu & another* [2015] eKLR (Limo J), where it was stated:

“The subordinate court has a discretion either to assess costs ex parte and notify the parties or invite the parties and tax the same inter partes that is if the parties are not in agreement on a specific item which usually relate to instructions fees. In my view there is nothing wrong for magistrates to proceed in either way and are perfectly in order to proceed either way to tax or assess costs payable in a case before them. The practice of inviting parties for assessment of costs for me though not mandatory is desirable to give the other parties a chance to be heard in order to avoid unnecessary complaints or references for one reason or the other.”

9. I am persuaded that this a proper case to have the matter referred back to the taxing officer for fresh taxation of the bill. The applicant was served with a notice with a misleading date, hence it lost a chance to be heard on the taxation. The right to be heard is a basic natural justice concept and ought not to be taken away. The order, therefore, that commends itself to me to make, is in terms of prayer 3 of the summons of 27th July 2017. The bill taxed in Mumias CMCCC Misc. Application No. 34 of 2017, vide the ruling delivered therein on 14th July 2017 is hereby set aside. I direct that the Advocate client bill of costs in that cause be taxed afresh, with proper notice to the applicant herein. Let the applicant have the costs of this reference.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER 2021

W MUSYOKA

JUDGE