



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CIVIL APPLICATION NO. 36 OF 2017

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF THE TAXATION COST BETWEEN ADVOCATE AND CLIENT

AND

IN THE MATTER OF KISII HCCC NO 17 OF 2016

BETWEEN

VINCENT CHOKAA T/A

V. CHOKAA & CO. ADVOCATES ADVOCATE/ RESPONDENT

VERSUS

LOCAL AUTHORITIES PROVIDENT

FUND BOARD (LAPFUND)CLIENT / APPLICANT

RULING

1. Before this court, is an application dated 26th August 2019. It is brought under **Section 51 (2) of the Advocates Act, Rule 11 of the Advocates Remuneration Order and Article 50 of the Constitution**. The application arises from a bill of costs dated 27th June 2017 which was taxed on 25th January 2019 for a sum of Kshs. 59,804,907/=. A certificate of taxation was issued and judgment entered on 18th February 2019 for the Advocates against the Client for the taxed sum together with interest and costs of the application.

2. The Client contends that it was not represented in the course of the proceedings leading to the judgment and seeks the following orders in its application;

a. That the judgment entered on 18/2/2019 arising from the Certificate of Taxation dated 25/1/2019 and all consequential orders be stayed and /or be set aside ex debitojustitiae;

b. That alternatively the Certificate of Taxation dated 25/1/2019 and all consequential orders be stayed and/or be set aside ex debitojustitiae;

c. That the bill of costs dated 27/6/2017 be referred afresh for Taxation;

d. That this honorable court do review its order dated 26/11/2018; and

e. That costs of this application be provided for.

3. The application is supported by the grounds set out in the body of the application and an affidavit sworn by the Client's legal manager, Kellen Njue, on 26th August 2019. In that affidavit, it is deposed that the failure of representation prejudiced the Client and the resultant ex-parte judgment ought to be set aside. The legal manager avers that they were neither notified of the proceedings by their advocate at the time nor served with the bill of costs and only got to learn about the matter when they were served with an Amended Notice of Motion, a decree

and an order relating to the Taxation on 8th March 2019.

4. The legal manager avers further that the certificate of costs resulting in the judgment was premised on a flawed taxation process. She avers that the bill of costs was taxed pursuant to an appeal filed as a chamber summons under Order 49 Rule 2 of the Civil Procedure Rules and not a reference as provided by the Advocates Remuneration Order. The Client also contends that the Deputy Registrar exercised her discretion in taxing the bill wrongly which was compounded by the extremely high figure arrived at in item no. 1 of the bill of costs. The Client argues that since it was not afforded a right to fair hearing the judgment, certificate of taxation and all consequential orders should be set aside.

5. In response, the Advocate, Vincent Chokaa, in his affidavit sworn on 9th September 2019, deposed that the Client's application is based on the wrong provisions of law which do not relate to the setting aside of an ex parte judgment. The Advocate argues that the Client ought to have appealed against the decision since he is critiquing the process by which the judgment was obtained and also contends that the manner in which the Deputy Registrar taxed the bill cannot be a basis to set aside the ex parte judgment. He further deposes that the application is unmerited for the reason that the Client did not explain why its former advocates did not turn up at the hearing despite being served or state what defence it would have raised had it appeared at the hearing.

SUBMISSIONS

6. The application was argued by way of oral submissions by the parties' counsels.

7. Mr. Madara for the applicant submitted that they are challenging the certificate of taxation and all consequential orders starting from the affirmation of the certificate of taxation into a judgment of the court for purposes of execution up to the point garnishee proceedings were taken out. Counsel argued that if the certificate of taxation is not challenged a challenge of the subsequent judgment is untenable.

8. It is counsel's submissions that the court has discretion to set aside orders to avoid an injustice. In this case, counsel argued, the advocate instructed by the Client had failed to appear in all proceedings leading up to the judgment therefore the Client should not suffer the advocate's inaction. That as soon as the Client was served with the garnishee order it moved the court to seek the setting aside of the judgment and should be given an opportunity to participate in the matter.

9. He also contended that the Deputy Registrar had applied the wrong principles in taxing the bill of costs. He argued that the Deputy Registrar erroneously based the taxation of the instruction fees on the pleadings and failed to consider that the matter giving rise to the taxation had not been concluded. Counsel contended that Deputy Registrar ought to have considered the complexity of the suit, whether the suit had proceeded to trial, whether the judge had given directions on the matter, if it could be disposed of in a summary manner, whether the case was already fixed for hearing but did not do so.

10. He also submitted that there had been an agreement for payment of fees between the Advocate and the Client which had not needed to be written and signed. Based on that agreement, a sum of Kshs.18 million had been paid to the Advocate as fees. He insisted that the application had been brought under the proper provisions of law and argued that sufficient reasons had been given to warrant the setting aside of the certificate of taxation and the judgment.

11. Mr. Keyonzo, learned counsel for the respondent, submitted that the Client had been directed by the court to file an application to set aside the ex-parte judgment but the provisions of law cited by the Client in support of its application had nothing to do with the setting aside of an ex parte judgment. He observed that the court in its ruling dated 15th August 2019 had stated that it was satisfied that the Client had been served with the application and had failed to attend court but the Client had not given a reason for its absence in its application. Relying on the case of *Shah v Mbogo*, counsel submitted that a party has not only the duty to explain why he was not in court but must show the defence he has to state his case.

12. Counsel dismissed the claim that the Advocate had been paid Kshs.18 million and pointed out that if there was an agreement for fees between the Advocate and the Client, the Client should have attached something to show they had paid Kshs.18 million as fees. He submitted that if the Client was dissatisfied with the Court decision, it should have appealed and the grievances against the Deputy Registrar's decision should have been raised in a reference. He urged the court to dismiss the application for being incompetent.

ANALYSIS AND DETERMINATION

13. Having considered the parties' depositions, the submissions, the cited authorities and the law, I find that the main issue for determination is whether the judgment entered on 18th February 2019, the Certificate of Taxation dated 25th January 2019 and all consequential orders should be set aside.

14. It is not in dispute that the Client had appointed the Advocate to represent it in Kisii HCCC No. 17 of 2016. On 28th June 2017 the Advocate filed an Advocate/Client's bill of costs for payment of his legal fees. It is also evident that the Client received the bill of costs, as the firm of Kithi & Company Advocates filed a Notice of Appointment soon after the bill of costs had been filed.

15. Thereafter, the bill of costs was taxed for Kshs. 1,589,725/= by Hon. V. Karanja SDR on 15th February 2018. The Advocate filed a reference against the Deputy Registrar's decision and the same was allowed by the court on 13th August 2018. The court directed that the bill of costs be taxed by another officer other than Hon. V. Karanja SDR.

16. Hon. P. Wamucii DR, considered the bill of costs afresh and held that although the Client had not opposed it, no Advocate/Client relationship had been proved by the Advocate. The Deputy Registrar's decision to strike out the bill of costs prompted the Advocate to file another application dated 15th November 2018. The court observed that the issue of whether there had been a retainer or not had not been

raised and set aside the Deputy Registrar's decision in a ruling dated 26th November 2018. The court also directed the taxing officer to tax the bill of costs afresh. Following the court's orders, Hon. P. Wamucii DR assessed the bill of costs at a sum of Kshs. 54,804,907/=. A certificate of taxation was issued against the Client on 25th January 2019 and judgment entered for the taxed amount on 18th February 2019.

17. To satisfy the decretal amount, the Advocate initiated garnishee proceedings against Kenya Commercial Bank Ltd. A Nisi Order was issued attaching the monies held by the garnishee in the Client's Account. It is at this point that the Client filed an application dated 15th May 2019 seeking *inter alia* to set aside the Certificate of Taxation dated 25th January 2019 and have the bill of costs taxed afresh. In a ruling dated 15th August 2019, Majanja J. made the following observations on that application;

"6. ... it is clear that the Client does not refer to or indeed challenge the judgment of this court entered against it on 18th February 2019. It appears both parties and indeed the court proceeded with the matter without regard to the judgment. A judgment constitutes a merger of all the issues in the proceedings and unless it is set aside, the court cannot permit a collateral attack on that judgment which is lawful and regular. I therefore find and hold that the application dated 15th May 2019 is incompetent and is therefore struck out.

Since both parties proceeded on a misapprehension of the proceedings, I make no order as to costs. I however direct the Client to file an application to set aside the judgment within twenty one (21) days from the date hereof ...

18. The instant application to set aside judgment was made pursuant to the foregoing order of the court. The judgment which the Client seeks to set aside was made pursuant to **Section 51 (2)** of the **Advocates Act** which provides that once a certificate of taxation has been issued by the taxing officer and the same has not been altered or set aside, the Court may make an order that judgment be entered for the sum certified to be due with costs.

19. The Court of Appeal in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another Civil Appeal No. 6 of 2015 [2016] EKLr** outlined the principles to be considered in setting aside a regular default judgment thus;

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173. [Emphasis added]

20. The court's main concern when faced with an application to set aside a default judgment is to ensure that justice is done to the parties. In the words of Kneller JA in **Pithoni Waweru Maina v Thuka Mugiria Civil Appeal No. 27 of 1982 [1983] eKLR**,

The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the cause of justice.

21. The client complains that its appointed counsel did not participate in the proceedings leading up to the ex parte judgment entered in favour of the Advocate. The record does show that in as much as the respondent appointed an advocate to represent it in the matter, the bill of costs was not challenged. It has also been demonstrated that once the garnishee order was issued, the client moved promptly to have its former advocates replaced and also made an application to set aside the certificate of taxation and all consequential orders. It is a valid excuse for a party seeking to set aside a default judgment, that he was let down by his former advocate. As a general rule, the wrongdoings of counsel should not be visited upon a litigant. (See **Patriotic Guards Ltd v James Kipchirchir Sambu Civil Appeal No. 20 of 2016 [2018] eKLR**) In light of the foregoing, I find it necessary to set aside the ex-parte judgment entered on 18th February 2019.

22. The Client also argues that the certificate of taxation issued on 25th January 2019 and all consequential orders issued thereto should also be set aside. It is the Client's contention that the Chamber Summons dated 15th November 2018 was based on the wrong provisions of the law. The Client argues that the ruling made on 26th November 2018 allowing that application to set aside the Deputy Registrar's decision dated 9th November 2018 and the resultant assessment of the bill of costs and the issuance of the certificate of costs were erroneous.

23. Certainly, the only remedy for a party aggrieved by the taxing officer's decision is filing a reference as provided under **paragraph 11** of the **Advocate Remuneration Order**. The impugned application sought to remit the bill of costs for taxation after the taxing officer had dismissed it on the grounds that there was no proof of an advocate/ client relationship. Majanja J. in the ruling dated 26th November 2018 found that this issue had not been raised for the taxing officer's determination. Since the Client has not denied the existence of an advocate/client relationship, I find no prejudice that would be suffered from the Advocates' error in quoting the wrong provision of the law. In the case of **Gitau v Muriuki [1986] KLR 211** it was held that a court should exercise its discretion to allow an application if it satisfied that no harm would result to the respondent or if it did the same was capable of being compensated in costs.

24. Further **paragraph 11 (3)** of the **Advocates Remuneration Order** provides that were a party is aggrieved by the High Court's decision upon a reference based on a bill of costs such a party is required to appeal to the Court of Appeal. I therefore find this issue untenable and dismiss it.

25. The client also stated that it had entered into a retainer agreement with the Advocate which capped the Advocate's fees at Kshs. 18 million. **Section 45 (6)** of the **Advocates Act** provides that where such an agreement has been made fixing an advocate's remuneration, the costs of that advocate shall not be subject to taxation. It would be necessary for the client to establish the terms and conditions of the agreement, whether written or oral, to enable the court determine whether the agreement met the conditions of a valid agreement as provided under **section 46** of the **Advocate Act**. The alleged agreement between the Advocate and the client was not presented before the court. I am not convinced that such an agreement for payment of legal fees existed and I therefore find that the Advocate was entitled to file his bill of costs.

26. As for whether an Advocate/Client bill of costs can be taxed before a matter is concluded, the Court of Appeal in the case of **Machira & Co. Advocates v Arthur K. Magugu & another Civil Appeal No. 199 of 2002 [2012] eKLR** held in the affirmative that;

“An advocate whose instructions have been terminated is entitled to immediate payment of his fees for the services rendered. If upon demand the client refuses to pay, he is entitled to file his bill and have it taxed immediately. He does not have to wait until the matter is concluded. He also does not have to depend on the advocate on record to recover his fees for him. The client might compromise with his current advocate on his fees and no bill is filed.”

27. In the end, I find that the Client showed it is entitled to have the judgment entered against it set aside; it follows that the Client should be given audience before the Taxing Officer. It can take up the issue of the assessment of the instruction fee when the bill of costs is taxed afresh before the Deputy Registrar.

28. The application dated 26th August 2019 is allowed in the following terms;

a. The judgment entered on 18th February 2019, the Certificate of Taxation dated 25th January 2019 and all consequential orders are hereby set aside;

b. For the avoidance of doubt, the Decree Order Nisi issued on 4th March 2019 is hereby set aside;

c. The Bill of Costs dated 27th June 2017 is referred for taxation afresh;

d. The Client shall within 30 days of the date hereof, deposit a sum of Kshs. 2,000,000/= to be held in an interest-earning account in the joint names of the parties' advocates pending the taxation of the Bill of Costs.

e. The parties shall bear their own costs for this application.

Dated, signed and delivered at Kisii this 11th day of March 2020.

R.E.OUGO

JUDGE

In the presence of;

Miss Olago h/b Mr. Madara For the Applicant

Respondent In person

Ms. Rael Court Assistant