



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

MISCELLANEOUS CIVIL APPL. NO. 336 OF 2018

IN THE MATTER OF ADVOCATES – CLIENT BILL OF COSTS

B. M. MUNG'ATA & CO. ADVOCATES.....APPLICANT

VERSUS

MUTUNE DAVID MASAI AND HENRY KIOKO MUTISYA

(Being sued as the legal representatives of the Estate of the late

CHARLES MUSILI MASAI).....RESPONDENTS

ARISING FROM SALE AGREEMENT BETWEEN

CHARLES MUSILI MASAI.....SELLER

AND

GEOFFREY MUSILI MASAI

LEAH NZISA NZAU).....BUYERS

R U L I N G

1. The Applicant filed a Notice of Motion dated 27/03/2020 seeking for entry of judgement in the sum of **Kshs. 53,203/=** plus interest being the taxed sums due and owing from the Respondents being in respect of legal fees incurred during a representation of the a deceased in which the respondents are administrators for his estate in a conveyancing transaction wherein the deceased had been a vendor.
2. The application was opposed vide a replying affidavit sworn on 16/07/2019 where the Respondents raised several averments inter alia: that during the succession proceedings the Applicant had filed an objection as it needed to have its client be included as a beneficiary in the estate which request was duly granted; that the Applicant seems to have conveniently forgotten to claim their costs of **Kshs. 53,203/=** from the estate of the deceased and hence the claim is an afterthought; that the Applicant has never issued a notice of taxation to the estate of the deceased; that the Applicant has not furnished them with a copy of sale agreement to prove that it had acted for the deceased; that the Applicant has no claim against the estate of the deceased as the same is non-existent.
3. The Applicant filed a further affidavit sworn on 26/08/2019 and averred that the Respondents if aggrieved by the taxation ought to file a reference as required by law since the bill of costs remains unchallenged.
4. Parties agreed to canvas the application by way of written submissions. The Applicants submissions are dated 26/08/2019 while those of the Respondents are dated 15/11/2019.
5. Learned counsel Mr. Nthiwa for the Applicant submitted that the Applicant had represented the deceased in a sale transaction and it duly served the Respondents with the bill of costs plus hearing notice via registered post using the Respondents known address which is confirmed by an affidavit of process. It was also submitted that the same address for service has been used by the Respondents vide the

replying affidavit thereby leaving no doubt that indeed service had been effected. It was also submitted that the Respondents have not lodged a reference pursuant to rule 11 of the Advocates Remuneration Order. Reliance was placed in the cases of **Kithi & Co. Advocates –vs- Menengai Downs Limited [2015] eKLR**, **Alfred Ochieng Opiyo T/a Ochieng Opiyo & Co. Advocates –vs- Export Hydro Pump & Services (EA) Ltd [2018] eKLR**, **Machira & Co. Advocates –vs- Magugu [2002] 2EA 428**. Finally it was submitted that the Respondents had to discharge the burden of proof on the allegation that the deceased had already paid legal fees to the Applicant.

6. Learned counsel Mr. Ratemo raised two main issues for determination namely whether there was an Advocate – Client relationship between the Applicant and the deceased. Secondly whether the Applicant effected proper service of the notice of taxation and bill of costs to the Respondents. On the first issue, it was submitted that the costs claimed is purely based on an undisclosed transactions as the Applicant has declined to supply the sale agreement if any so as to ascertain the truthfulness of the alleged transaction and to back up the relationship of Advocate – Client. Reliance was placed in the cases of **Wilfred Konosi T/a Konosi & Co. Advocates –vs- Flamco Ltd [2017] eKLR** and **County Council of Bureti –vs- Kennedy Nyamokeri T/a Nyamokeri & Co. Advocates [2006] eKLR**. Counsel pointed out that in the absence of written instructions then the bill of costs cannot be sustained.

On the issue of service, it was submitted that there was no proper service effected upon the Respondents in line with section 20 of the Civil Procedure Act and Order 5 of the Civil Procedure Rules. It was submitted that no evidence was shown that the personal service could not be effected before resorting to substituted service via registered post. It was also submitted that no leave of court was obtained. Reliance was placed in the case of **Omar Shalo –vs- Jubilee Party of Kenya & Another [2017] eKLR** where it was held:-

“The essence of service is to notify a party of a case against him in order to respond appropriately and defend himself. It is premised on the right of every person to be heard. Personal service remains the best form of service.”

It was the view of counsel for the Respondent that the Applicant’s application dated 27/03/2019 ought to be dismissed with costs.

7. I have considered the application as well as the rival affidavits. I have also considered the submissions and authorities cited. I find the following issues necessary for determination namely:-

- i. Whether there was an advocate- client relationship between the Applicant and the deceased.**
- ii. Whether proper service was effected upon the Respondents.**
- iii. What orders may the court grant?**

8. As regards the first issue, it is a known fact that there must exist an Advocate/Client relationship so as to give jurisdiction to the taxing master to entertain a bill of costs. This position was clearly spelt out by the court of appeal in the case of **Wilfred –vs- Flamco Ltd [2017] eKLR** when it held thus:

“The issue whether an Advocate – client relationship exists in taxation of a Bill of costs between an Advocate and his or her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the Advocates Act and the Advocates Remuneration Order.

The nexus between the advocate and his or her client is the Advocate/client relationship which springs from instructions by the client to the Advocates. Absent such relationship, the Taxing officer would be bereft of jurisdiction to tax a bill.”

The Respondents have vehemently maintained that there was no Advocate/Client relationship in existence since the Applicant has failed to avail copies of sale agreement and letter of instructions. I have perused the pleadings filed alongside the bill of costs and note that indeed there is a sale agreement involving the deceased and the purchaser. There are correspondences between the Applicant as the Advocate for the vendor (deceased) and the purchasers Advocates. There are correspondences indicating that the Applicant had authority to receive the purchase price on behalf of the deceased who was its client. There is evidence that the Applicant even went ahead to give its professional undertaking on behalf of the deceased to the Advocates for the purchasers. It would therefore be inconceivable for an Advocate to go to that length to act for a client if there were no instructions from such a client. Even though no letter of instructions was presented by the Applicant, I find that from the sale agreement and correspondences between the Advocates for the vendor and purchasers there indeed existed an Advocate/client relationship. If the Applicant could receive proceeds of the sale transaction on behalf of the deceased, then clearly it is obvious that there existed an Advocate/Client relationship. The Applicant presented the requisite documents which satisfied the Taxing officer and who subsequently proceeded to tax the bill of costs.

Having established that the taxing officer had jurisdiction to tax the bill of costs, the next issue for determination is whether the Respondents have filed a reference. Rule 11 of the Advocates Remuneration order provides for the procedure for challenging decisions of a taxing master as follows:-

“(i) should any party object to the decision of the taxing officer, may within fourteen (14) days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(ii) the taxing officer shall forthwith record and forward to the objectors the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a Judge by chamber summons which shall be served on all the parties concerned, setting out the grounds of his objection.”

From the above provision, it was incumbent upon the Respondents to file a reference if they are aggrieved by the taxation. The Respondents

even at the time of filing replying affidavit were fully aware of the issue of the taxation and were thus obliged to lodge the requisite reference if any and also to seek time to lodge the same if time had elapsed. They have not done so yet that is the requisite procedure of challenging an already taxed bill. I seek to associate myself with the decision of Ringera – J (as he then was) in the case of **Machira & Co. Advocates –vs- Magugu [2002] 2 EA 428** when he held thus:-

“As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

The Respondents cannot therefore convert their replying affidavit into a reference. They must file the appropriate application in line with paragraph 11 of the Advocates Remuneration Order.

9. As regards the second issue, it is noted that the Respondents have denied being served with the bill of costs as well as the hearing notice and have claimed that the provisions of Section 20 of the Civil Procedure Act and Order 5 of the Civil Procedure Rules have not been complied with as the process server has not shown that efforts to trace the Respondents turned futile thereby resorting to service via registered post.

The issue of process of service of pleadings and summons is a key component in the determination of disputes between parties. A court must ensure that the person sued has been properly served before any adverse orders can be issued against such a person. Section 20 of the Civil Procedure Act requires that upon institution of a suit the Defendant should be served in the prescribed manner in order to enter appearance and answer the claim. Order 5 of the Civil Procedure Rules deals substantially with service of process. Some of the salient provisions are as follows:-

Rule 5(1) – when a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein.

5(6) – mode of service is by delivering or tendering a duplicate thereof signed by the Judge, or such officer as he appoints in his behalf and sealed with the seal of the court.

5(8) - service be made in person where it is practicable unless the defendant has empowered an agent to accept service on his behalf.

5(12) - where the defendant cannot be found service may be effected through an agent or adult member of the family.

5(15) - the service officer in all cases shall swear an affidavit of service stating the time and manner in which summons was served.

5(17) - provides for any other mode of service such as substituted service and this is with the leave of the court. This is resorted to where service cannot be effected through the ordinary means of service.

From the averments in the rival affidavits it is clear that the Respondents were not personally served with the Bill of costs and the hearing notice. The process server filed an affidavit of service annexing a copy of dispatch receipt from Postal Corporation of Kenya dated 25/01/2019. There is no evidence that the documents dispatched to the Respondents address were returned back to the sender and this then implies that the same duly reached the recipient who are the Respondents. Even though the Respondents were to be personally served, I find the fact that a different mode of service was adopted by the Applicant does not render the service as null and void. My considered view is that as long as a process server has filed the requisite affidavit of service such a mode of service suffices. In any event Article 159 (2)(d) mandates the courts to administer justice without undue regard to procedural technicalities. Forms of service are currently taking a new paradigm shift in that with the advancement in technology it is now possible even to effect service via electronic means. The aim is to use whatever reasonable and approved methods to ensure parties to a suit are served timely and with ease. Currently, there are practice directions on electronic case management and that electronic service is now being applied.

From the affidavit of the process server, I have no doubt in my mind that the Respondents were duly served with the Bill of costs and hearing notice. The address used by the Respondents namely P.O Box 12 – 90100 Machakos in the replying affidavit is the same one used by the Applicant and the process server to contact them. The Respondents have not disowned the said address and have not sought to have the process server cross – examined regarding the averments on the affidavit of service. I am not therefore persuaded by the Respondents assertion that they have been condemned unheard. I have no reason to doubt the averments of the process server and the Applicant that the Respondents were made aware of the issue of the Bill of Costs. As no good reasons have been furnished by the Respondents as to their absence during the taxation of the Bill of Costs, I have no reason to interfere with the said taxation. The Taxing Officer has duly considered all the items in the bill and came up with the reasonable amounts due to the Applicant. No sufficient reasons have been presented to warrant the setting aside of the taxation. In any case the respondents have not lodged a reference if they are aggrieved over the taxation.

10. As regards the last issue and I view of the foregoing observations it is my finding that the Applicants application dated 27/03/2019 has merit. The same is allowed as prayed.

It is so ordered.

Dated and delivered at Machakos this 29th day of May, 2020.

D. K. Kemei

Judge