



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 17 OF 2009

**STEPHEN CHEGE WAWERU (Suing as the administrator of the Estate
of WAWERU KININI alias WAWERU KENINI).....APPLICANT**

VERSUS

EPHANTUS MWANGI & 16 OTHERS.....RESPONDENTS

RULING

1 The Notice of Motion is dated the 23/09/2019 and is brought under the provisions of partSections 3A, 1A and 1B of the Civil Procedure Act and all the enabling provisions of the law; the applicant seeks the following orders;

- i That the order for taxation of the Bill of Costs delivered on 10th September, 2019 be set aside;
- ii The cost of this application be set aside;

2 The application is premised on the grounds on the face of the application and on the Supporting Affidavit made on the same date by **DUNCAN MINDO**;

APPLICANT'S CASE

3 Counsel for the applicant deponed that the Bill of Costs was allowed and taxed as against the applicant in the absence of the applicant's advocate who was not served with the Notice of Taxation; the Deputy Registrar did not satisfy herself on whether the Notice of Taxation had been properly served upon the applicant herein; the taxing master did not tax the items as written but made a general decision on certain items;

4 On 26/08/2019 counsel for the applicant was within the Nyeri court precincts when the applicant informed him that the matter had been listed on the same date; upon checking with the court he found that the matter had already been taxed;

5 The process server had effected service of the Bill of Costs and the Notice of Taxation upon the applicant whereas in actual fact these documents had been left with the applicant's wife at the applicant's home in Kiriaini; the applicant was away from home at that time attending a church function;that the service of the Notice upon a spouse was improper as there was an advocate on record at all material times;

6 The applicant prayed that the order be set aside in the interest of justice and that the Bill of Costs be taxed in accordance with the law.

RESPONDENTS' RESPONSE

7 The respondent in response relied on the Grounds of Opposition dated 27/11/2019; they contend that the applicant had sufficient notice as the Bill of Costs and the Notice of Taxation were duly served on the 15/08/2019 which was seven (7) days before the date of taxation; that the service was in accordance with Order 5 Rule 12 of the Civil Procedure Code; and therefore the taxation of the Bill of Costs was proper;

8. That the application lacked merit and was intended to deny the respondents immediate access to costs of the suit that they are entitled to;

9. As the application was uncontested and no appeal had been filed nor any reference filed;nor had the Certificate of Costs been set aside; the applicant prayed that judgment be entered as prayed;

ISSUES FOR DETERMINATION

10. At the hearing hereof only counsel for the applicant was in attendance; though duly served with a Hearing Notice and made aware of the hearing date of the application neither counsel for the respondents nor the respondents were in attendance; after hearing the submissions made by counsel for the applicant this court finds only one issue for determination which is whether the service of the Notice of Taxation was properly effected;

ANALYSIS

11. The applicable law is found at Order 9 Rule 5 and at Order 5 Rule 12 of the Civil Procedure Rules which provide as follows;

Order 9 Rule 5

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

Order 5 Rule 12

“Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.”

12. First of all it is not disputed that the applicant had appointed an advocate to act for him in the matter; and unless there was a change of advocate or the advocate withdrew his services or was deceased the counsel herein namely Mr.Mindo is deemed to be still acting for the applicant until the conclusion of the matter; therefore the Notice of Taxation together with the Bill of Costs ought to have been served upon the applicant’s advocates on record; and it was improper for the respondents’ advocates to have effected service directly upon the applicant and or his spouse; caselaw referred to **Moses Omolo Atieno & Another v John Njong Osingo [2015] eKLR;**

13. Secondly, upon perusal of the Affidavit of Service dated the 20/08/2019 and made by the process server by the name of **WILLIS AGAYI** this court notes that there is no averment that the said process server made any enquiry as to the whereabouts of the applicant; no enquiry was made as to whether the applicant had traveled and when he was likely to return home;

14. From the reading of the aforesaid affidavit there was no proper enquiry made as to the applicant’s whereabouts nor did the process server depose to the steps he took to establish that the applicant could not be traced before he effected service upon the spouse; the upshot is that there was no uncertainty so as to be the applicant’s whereabouts to necessitate service upon the spouse; case law referred to **Elijah C. Mwangi vs Paustine Akumu Sereje [1996] eKLR** where it was held *‘that service upon the wife of the defendant without enquiring about the defendant’s whereabouts was bad service’*;

16. Thirdly this court reiterates that the respondents’ counsel was made aware of the hearing date for the instant application and was not in attendance thus the submissions made by counsel for the applicant were uncontested; In the light of the above this court finds that from the material placed before it, the service effected offends the provisions of Order 9 Rule 5; also this court finds that the conditions as set out in Order 5 Rule 2 were not satisfied and that the service effected on the spouse was improper;

17. In conclusion the application is found to have merit and is hereby allowed.

FINDINGS AND DETERMINATION

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

- i The application is found to have merit and is hereby allowed;
- ii This court finds that the service effected upon the applicant’s spouse was improper;
- iii The order made on the 10/09/2019 in favour of the respondents against the applicant is hereby set aside; the Bill of Costs to be re-taxed before a different Taxing Master;
- iv The respondent shall bear the costs of this application.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 28th day of May, 2020.

HON. A. MSHILA

JUDGE