



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC CIVIL APPLICATION NO 290 OF 2019**

**ESSENTIAL MANAGEMENT CONSULTANCY**

**AGREEMENT LIMITED ..... APPELLANT**

**VERSUS**

**FRANCIS MANASI RODGERS..... RESPONDENT**

**RULING**

1. In its Chamber Summons application dated 27<sup>th</sup> March 2019 and filed on 2<sup>nd</sup> April 2019, the Applicant sought an order that the Taxation Ruling delivered by Hon Ocharo in **Nairobi CMCC No 2062 of 2017** be set aside and that this court be pleased to tax the Respondent's Advocates' Bill of Costs dated 5<sup>th</sup> December 2017, afresh. The said application was supported by the Affidavit of its Legal Officer, Charles Gathu, that was sworn on 27<sup>th</sup> March 2019.
2. The Applicant stated that upon entry of judgment in the lower court, it entered into a consent with the Respondent wherein it was agreed that the costs would be taxed and that the Respondent pay half of the said costs. It pointed out that a Certificate of Costs was obtained for purposes of appeal.
3. It averred that on 29<sup>th</sup> August 2019, it instructed the firm of its current advocates, M/S Kibatia & Co Advocates to come on record in place of the firm of M/S Miller & Co Advocates who were its previous advocates. It pointed out that on 30<sup>th</sup> August 2019, the Taxing Master struck out the current advocates' Notice of Change of Advocates on the ground that it was irregular despite it and the previous firm having consented to the said change of advocates. It added that the Taxing Master proceeded to allow the said Respondent's Advocates' Bill of Costs without making any changes or taxation at all on account that its previous advocates had not filed any response to the same.
4. It stated that the Taxing Master had not responded to its current advocates' Notice to Objection to her decision and that it was now seeking to rectify the error made by filing an appeal instead of a reference. It was its contention that it would suffer irredeemably and that it was in the interests of justice that its application be allowed as prayed to prevent a miscarriage of justice.
5. In opposition to the said application, on 24<sup>th</sup> June 2019, James Okao, the Respondent's advocate, swore a Replying Affidavit on his behalf. The same was filed on 25<sup>th</sup> June 2019.
6. He termed the present application as an abuse of the court process on the ground that the Applicant had withdrawn a similar application two (2) days before it filed the present application. He contended that the Applicant ought to have amended the previous application as opposed to filing a fresh application. It pointed out that the only way the Applicant could have approached the court was through a reference and not by way of an appeal.
7. It was his contention that the Applicant's Appeal did not have any chance of success but that it was aimed at denying him the fruits of his judgment. He averred that it was in the interests of justice that half of the costs be released to him while the balance was deposited in court as security, failure to which execution should issue.
8. In his Preliminary Objection dated and filed on 7<sup>th</sup> May 2019, he reiterated that the Applicant could only have commenced the proceedings herein by way of a reference. He added that this court had no discretion to grant the orders sought as the same ought to have been filed in **CMCC No 2062 of 2014 Francis Manasi Rodgers vs Essential Management Consultancy Services Limited** and that the order arising from the Notice of Objection could only have been challenged by way of an appeal. He pointed out that the Applicant had not annexed a copy of the order arising from the Notice of Objection dated 7<sup>th</sup> September 2018. He therefore asked this court to dismiss the present application.
9. The court directed that both the Applicant's Chamber Summons application and the Respondent's Preliminary Objection (P.O.) be heard together. Both parties filed their respective Written Submissions in respect of both pleadings.

10. The Applicant submitted that its application was based on the provisions of Order (sic) 11(2) of the Advocates Remuneration Order and hence this court had jurisdiction to hear and determine the Reference herein. It thus termed as incorrect, the Respondent's assertions that the order arising out of the Notice of Objection could only be challenged by way of an appeal.

11. It was emphatic that the Taxing Master had not responded to its Notice of Objection dated 7<sup>th</sup> September 2019 and that it would be a real miscarriage of justice for the said Bill of Costs to have been allowed without it being taxed as it had demonstrated in its Written Submissions.

12. On his part, the Respondent argued that the Applicant's previous advocates were duly served with the Hearing Notice and Taxation Notice and it could not therefore claim that it was not aware of the said Taxation. He stated that he was entitled to the items in the said Bill of Costs and that this court could not take the position of a taxing master and tax the said Bill afresh.

13. Paragraph 11 of the Advocates Remuneration Order provides as follows:-

**1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.**

**2. The taxing officer shall forthwith record and forward to the objector 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.**

**3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**

**4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.**

14. It was clear from the aforesaid provision that the court could extend time for an aggrieved party to file a notice of objection and/or to file a reference outside the stipulated periods in Paragraph 11 (1) and (2) of the Advocates Remuneration Order. It was irrespective that the Applicant had made blunder by filing an appeal instead of a reference and consequently, this court had jurisdiction to hear and determine the Reference herein.

15. When a reference is brought to it, the High Court can either tax the bill of costs or remit it to a taxing master for taxation. It was therefore not correct as the Respondent had submitted that the court to which a reference had been made could not tax the bill. It was, however, preferable for the bill to be taxed by a taxing master to give an aggrieved party the opportunity to file a reference to the High Court because as can be seen from Paragraph 11(3) of the Advocates Remuneration Order that an appeal to the Court of Appeal can be by leave of the High Court.

16. Having said so, it is important to point out that Paragraph 10 of the Advocates Remuneration Order provides as follows:-

**"The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks."**

17. Evidently, the Respondent's Bill of Costs dated 5<sup>th</sup> December 2017 and filed on 23<sup>rd</sup> March 2018 was taxed by Hon D.A. Ocharo (Mr), Senior Resident Magistrate. He signed the Certificate of Costs in that name and not as a taxing officer. There was no indication that he was a registrar within the meaning ascribed to the term in Paragraph 10 of the Advocates Remuneration Order. His taxation was therefore irregular as it was not provided under the law.

18. The above notwithstanding, it was clear from the Advocates Remuneration Order that bill of costs could be filed in the lower court and/or taxed. In that court, costs are assessed. In the case of **Hanif Mansoor & Another v Shariff Mwanaisha Saida t/a M.S. Shariff & Co Advocates [2017] eKLR**, this very court rendered itself as follows:-

**"13. It is important to note that the Advocates Remuneration Order does not provide for the taxation of costs in matters that had been determined by the lower court. It provides for assessment of costs. This was an issue that was addressed by this very court in the case of John Nyariki v British – American Insurance Company (Kenya) Limited [2015] eKLR and by Kasango J in the case of Angelo Gitonga vs Angelo Gitonga & Another [2010] e KLR where she held as follows:-**

**".....there is no provision on the Advocates Remuneration Order for taxation of subordinate courts costs. A practice is however arising, where parties in the subordinate court file laborious and detailed bills of costs, and then engage the magistrate in taxation. That in my view is uncalled for and should be discouraged subordinate court's party and party costs should be assessed following the provisions of Schedule VII of the order...."**

**14. In the case of Nyamogo & Nyamogo Advocates vs Pan Africa Insurance Company Limited & another [2016] eKLR, Aburili J also stated as follows: -**

**“...The successful parties before a subordinate court are not expected to draw an elaborate itemized bill of costs... I uphold the Deputy Registrar /taxing officer’s finding that she had no jurisdiction to tax a bill of costs in a matter determined by the subordinate court.”**

19. The fact that the matter emanated from the lower court meant that costs could only be assessed in the usual manner and not a bill of costs being taxed by a taxing master. In that respect, this court was persuaded that it could set aside the ruling by the said Learned Magistrate. However, it could not tax and/or remit it for taxation as the procedure that was adopted was null and void *ab initio*. It could not continue in making the same errors and/or perpetuate the illegalities emanating from the lower court. It was irrespective that the parties herein had consented to have the costs taxed.

#### **DISPOSITION**

20. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Chamber Summons application dated 27<sup>th</sup> March 2019 and filed on 2<sup>nd</sup> April 2019 was partially merited and the same is hereby allowed in terms of Prayer No (3) therein. The effect of this decision is that the Ruling of Hon D.A. Ocharo (Mr), Senior Resident Magistrate that was delivered on 30<sup>th</sup> March 2018 in **Nairobi CMCC No 2062 of 2014** be and is hereby set aside and/or vacated. The Respondent is at liberty to pursue its costs following the correct channels.

21. The court agreed with the Respondent’s Preliminary Objection dated and filed on 7<sup>th</sup> May 2019 only to the extent that this Honourable Court had no discretion to direct that the Bill of Costs be taxed afresh as the Applicant had sought.

22. This court did not agree with the line of arguments the parties had adopted. However, it agreed with some of the conclusions that they had arrived at. Accordingly, it is hereby directed that each party will bear its own costs of the Applicant’s Chamber Summons application dated 27<sup>th</sup> March 2019 and filed on 2<sup>nd</sup> April 2019 and the Respondent’s Preliminary Objection dated and filed on 7<sup>th</sup> May 2019.

23. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of June 2020**

**J. KAMAU**

**JUDGE**