



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**MISC NO. 140 OF 2013**

**SINGH GITAU ADVOCATES.....APPLICANT**

**- VERSUS -**

**INTRA LAB SERVICES LIMITED.....RESPONDENT**

**RULING**

1. Singh Gitau Advocate (the advocate) has filed a Notice of Motion application dated 9<sup>th</sup> December 2019. He seeks an order of review of this court's Ruling dated 28<sup>th</sup> November 2019.

2. Background of this matter is that Intra Lab Services Limited (the client) was a client of the advocate. The advocate filed an Advocate/Client bill of costs which was taxed on 17<sup>th</sup> May 2013. The client by its Notice of Motion application dated 28<sup>th</sup> May 2018 alleged it had not been served with that bill of costs nor the notice of taxation. The client alleged that it had been denied the right to participate in the taxation. By this court's Ruling dated 28<sup>th</sup> November 2019 the court set aside the certificate of taxation. It is that Ruling that the advocate by his application dated 9<sup>th</sup> December 2019 seeks a review.

3. The court's Ruling dated 28<sup>th</sup> November 2019 found that indeed the client had not been served with the bill of costs nor with the Notice of taxation. This is what the court stated:

**“The advocate did not provide proof that the client was either served with the bill of costs or the Notice of Taxation. With that view the client's contention that it was served is uncontroverted.”**

4. The advocate seeks review of the above Ruling on the basis that the client had been served with the bill of costs and the certificate of taxation. This is what the advocate deposed:

**“That the Applicant thus seeks a review of the Ruling of this Honourable court to uphold the taxation considering the discovery of new and compelling evidence as to service of the notice of taxation...”**

5. To support the above deposition the advocate attached an affidavit of service by Silvester M. Kitheka dated 14<sup>th</sup> May 2013. I will reproduce that affidavit as follows:

**AFFIDAVIT OF SERVICE**

I, **SILVESTER M. KITHEKA** of P. O. Box 10070-00100, Nairobi within the Republic of Kenya make oath and state as follows:-

**1. THAT** on 10<sup>th</sup> May 2013, I received copies of Notice of Taxation coming up on 15<sup>th</sup> May 2013 and Bill of costs dated 16<sup>th</sup> April 2013 with instructions from Singh Gitau Advocates to cause service upon Intra Lab Services Limited, the Respondent.

**2. THAT** on the same day, I served the Respondent via registered post to their post office Box number 72608-00200 Nairobi. I now produce and mark exhibit SMK 'I' a copy of registration slip as a proof of postage.

3. **THAT** I now return herewith to this Honourable Court the Notice of Taxation and Bill of Costs duly served upon the Respondent.

4. **THAT** what is stated hereinabove is true to the best of my knowledge, information and belief.

6. The client did not appear at the hearing of the application and the application was therefore not opposed.

### **ANALYSIS**

7. Review is sought under the provisions of Order 45 Rule I (1) of the Civil Procedure Rules. That Rule provides:

**“Any person considering himself aggrieved**

**a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay”.**

8. How that Rule is operationalized was considered in **Republic v Public Procurement administrative Review Board & 2 Others (2018) eKLR where the court stated:**

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”**

9. The advocate did not explain why the affidavit of service of Silvester M. Kitheka was not brought to the attention of the court when the court entertained the client’s application to set aside the taxation, on the ground the client was not served with the bill of costs and the notice of taxation. In seeking this review the advocate failed to state why even with exercise of due diligence that affidavit could not be brought to the attention of court. It will be recalled above the court reproduced part of the Ruling the subject of this review application. In that reproduced portion of that Ruling it was noted by the court that the advocate failed to controvert the client’s assertion that it was not served with the bill of costs and the notice of taxation.

10. The advocate also failed to state where he obtained the address used to send the bill of costs and the notice of taxation. The affidavit of service of Silvester M. Kitheka shows that the client was served through P.O. Box 72608-00200 Nairobi. The address shown in the affidavit dated 22<sup>nd</sup> May 2018 of the client’s director, Magugu Watene, is P.O. Box 4845-00200 Nairobi.

11. Further the advocate did not attach to the affidavit of service by Silvester M. Kitheka the notice of taxation allegedly served on the client. The client by its affidavit dated 28<sup>th</sup> May 2018, the affidavit in support of the chamber summons dated the same date, annexed a notice of taxation, of this matter, which notice was undated. That it did not bear the date the taxation was to proceed. Is that the notice Silvester M. Kitheka served the client? If it was then it follows that the client was not served with a dated notice of taxation and there is therefore no basis to review this court’s Ruling dated 28<sup>th</sup> November 2019. It would therefore seem that the client, if indeed was served did not know the date of taxation.

### **CONCLUSION**

12. The Notice of Motion dated 9<sup>th</sup> December 2019, for the reasons set out above, is misconceived and without merit. It is hereby dismissed.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>th</sup> day of JUNE 2020.**

**MARY KASANGO**

**JUDGE**

Before Justice Mary Kasango

C/A Sophie

For the Applicant:

For the Respondent:

**ORDER**

This decision is hereby virtually delivered this 24<sup>th</sup> day of **June, 2020**.

**MARY KASANGO**

**JUDGE**