



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**MISCELLANEOUS APPLICATION NO 438 OF 2015**

**MUGAMBI MUNGANIA & CO .....ADVOCATE**

**VERSUS**

**JOHN KUNGU KIARIE.....CLIENT**

**RULING (1)**

1. In his Notice of Motion application dated 26<sup>th</sup> April 2018 and filed on 27<sup>th</sup> April 2018, the Client sought that he be allowed to defend, oppose and/or submit on the Advocate' Bill of Costs. The remaining four (4) prayers were spent. His application was supported by the Affidavit of his advocate, Owino Opiyo, which was sworn on 26<sup>th</sup> April 2018.
2. The deponent contended that parties were to take a date for taxation of the Advocate-Client Bill of Costs but this was not done as the file went missing. He stated that he was surprised when he was instead served with a Ruling Notice of the taxation for 16<sup>th</sup> November 2017 and a Certificate of Costs issued on the said date. He pointed out that the matter was not listed on the Cause list for that date as was evidenced in the Cause list that he had annexed to his Supporting Affidavit.
3. He was emphatic that the Client had always been desirous of defending the said Bill of Costs and thus urged this court to set aside the said Ruling, Certificate of Costs and/or judgment.
4. In opposition to the said application, on 28<sup>th</sup> May 2018, Lawrence Mugambi Mungania, an advocate practising in the Advocate's firm swore a Replying Affidavit. The same was filed on 29<sup>th</sup> May 2018.
5. He termed the said application frivolous, unmeritorious, incompetent and an abuse of the court process. He stated that the Advocate-Client Bill of Costs was heard on 19<sup>th</sup> October 2017 and a Ruling reserved for 16<sup>th</sup> November 2017. He pointed out that the date of 19<sup>th</sup> October 2017 had been taken by the consent of the parties on 23<sup>rd</sup> August 2017. It was his contention that the Client's assertions that the court file went missing were wholly untrue, mischievous and mere inadmissible hearsay.
6. He added that the Client was fully aware of the date of delivery of the Ruling and that Rulings and Judgments were not always listed on the Cause lists. He averred that the Client only filed his present application after they served him with the Advocate's Notice of Motion application dated 28<sup>th</sup> February 2018 seeking entry of judgment on the taxed costs on 7<sup>th</sup> March 2018 and that the same was merely intended to stifle the hearing and determination of the said Advocate's Notice of Motion application. He thus prayed that the Client's application be dismissed with costs.
7. The Advocate's Chamber Summons application dated 24<sup>th</sup> January 2019 and filed on 29<sup>th</sup> January 2019 seeking reconstruction of the file was allowed by Njuguna J on 6<sup>th</sup> March 2019. This court did not therefore have the benefit of seeing the proceedings before the Taxing Master as the file could not be traced and thus had to rely on the pleadings that had been attached to the said Chamber Summons application.
8. While it was not possible for this court to establish with certainty when the court file went missing, the mere reconstruction of the file persuaded this court to accept that the court file actually went missing at some point as had been contended by the Client herein and that directions in respect of his Notice of Motion application dated 10<sup>th</sup> November 2017 and filed on 15<sup>th</sup> November 2017 seeking a stay of proceedings and Ruling slated for 16<sup>th</sup> November 2017 were not given on that date.
9. If the said application had been placed before the Taxing Master, it is expected that she would have given certain directions relating to the disposal of the said application. The directions could either have been to direct that the said application be disposed of first before delivery of the said Ruling and/ or proceed to deliver the said Ruling as had been scheduled.

10. Several letters that were written by the Advocate complaining of the non-availability of the file persuaded this court to find and hold that there had indeed been a problem in tracing the file and it was therefore not true as the Advocate had asserted, that the Client's contentions that the court file was missing were untrue, mischievous and mere inadmissible hearsay.
11. Notably, the copy of Cause list for 12<sup>th</sup> March 2018 at page 113b of the reconstructed file had a handwritten endorsement indicating that the Client's Notice of Motion application dated 10<sup>th</sup> November 2017 and filed on 15<sup>th</sup> November 2017 was fixed for hearing on 5<sup>th</sup> December 2017. There was nothing in the reconstructed file to show whether the said application was ever heard.
12. Suffice it to state that it did, however, appear to this court that the Client may not have been aware that the Ruling in respect of the Advocate- Client Bill of Costs was delivered on 16<sup>th</sup> November 2017. Indeed, the orders he was seeking had clearly been overtaken by events by the time this parties were taking a date by consent for the hearing of its application on 5<sup>th</sup> December 2017 as per the aforesaid Cause list of 12<sup>th</sup> March 2018 or when it came up for hearing on the said 12<sup>th</sup> March 2018.
13. Whereas the said Client's Notice of Motion application was now water under the bridge having been overtaken by events after delivery of the Ruling of the Advocate-Client Bill of Costs on 16<sup>th</sup> November 2017, this court discerned that he took initiative and/or action to forestall the delivery of the said Ruling, which his advocates had indicated that they did not know how the said Ruling date was taken.
14. This court did not therefore find his application to have been intended to stifle the Advocate from enjoying the fruits of his judgment as the Advocate had asserted. Indeed, he filed the present application when he was served with the Advocate's Notice of Motion application dated 28<sup>th</sup> February 2018 and filed on 2<sup>nd</sup> March 2018 on 7<sup>th</sup> March 2018.
15. Regarding the regularity or otherwise of the hearing of the Advocate- Client Bill of Costs, this court noted that vide their letter dated 4<sup>th</sup> August 2017, the Advocate invited the Client's advocates for the fixing of a date on 23<sup>rd</sup> August 2017 at the Registry. A copy of that letter on page 102 of the reconstructed file had an endorsement that on the said date, the court file was missing. Consequently, it was therefore not correct as the Advocate had contended that the date for the fixing a date was taken by consent of the parties.
16. The Client's Advocate therefore acted correctly when they received the Ruling Notice under protest as shown on the endorsement on page 81 of the reconstructed file for the reason that there was no other letter inviting them to fix a date at the Registry and/or a Hearing Notice and Affidavit of Service evidencing that they had been served with a Hearing Notice following the fixing of an *ex parte* date at the Registry.
17. Going further, the Advocate's argument that the Ruling Notice was sufficient for purposes of notifying the Client's advocate to attend the Taxing Master to take the Ruling did not find favour with this court. It took the view that failure to list matters on Cause lists causes confusion to parties as it is never clear to them whether the matters will proceed or not. Often times, litigants and their advocates, especially if they are the defendants and/or respondents, will not expend resources to attend court if a matter is not listed on the Cause list.
18. In that regard, this court was not persuaded that the Client had proper notice of the delivery of the Ruling merely because his advocate had been served with a Ruling Notice. The Ruling ought to have been listed in the Cause list. Indeed, all rulings and /or judgments should only be delivered when they have been listed on the Cause lists but if not listed as aforesaid, they should only be delivered with the consent of the parties to avoid complaints from a party who does not attend. The importance of notice to a party cannot be understated because time is normally of the essence for a party who is dissatisfied with a decision.
19. As was pointed out hereinabove, this court was unable to peruse the proceedings as the original file went missing. In it were the reasons of the Taxing Master. In the absence of those reasons, it was the considered view of this court that since the Client did not attend the Taxing Master for the delivery of the Ruling, he would be prejudiced as he would not know how to couch his reference.
20. If the Client was to file a Reference under Paragraph 11 of the Advocate (Remuneration) Order, the court would find itself in difficulties as it would not know whether the Taxing Master acted correctly and/or misdirected herself in arriving at the conclusion that she did. The Advocate did not attach a copy of the Ruling which would have assisted the Client in the filing a reference to challenge the decision of the Taxing Master. There was therefore need to have the Advocate- Client Bill of Costs heard and determined afresh.
21. Weighing the Client's right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Advocate's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Client if he was denied an opportunity to defend and/or oppose the Advocate-Client Bill of Costs.

## **DISPOSITION**

22. Accordingly, the upshot of this court's decision was that the Client's Notice of Motion application dated 26<sup>th</sup> April 2018 and filed on 27<sup>th</sup> April 2018 was merited and the same is hereby allowed in terms of Prayer No (5) therein.
23. The effect of this Ruling is that the Taxing Master's decision that was delivered on 16<sup>th</sup> November 2018 and Certificate of Taxation issued on even date be and are hereby set aside and/or vacated.
24. It is hereby ordered and directed that the Advocate- Client Bill of Costs dated and filed on 7<sup>th</sup> October 2018 be and is hereby remitted for taxation before any Taxing Master in the High Court Milimani Law Courts Civil Division other than to the Taxing Master who taxed the aforesaid Advocate-Client Bill of Costs.

25. The costs of the application will be in the cause.

26. Orders accordingly.

**DATED** and **DELIVERED** at **NAIROBI** this 30th day of **July** 2020

**J. KAMAU**

**JUDGE**