



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPEAL NO. 54 OF 2014
IN THE MATTER OF THE ADVOCATES ACT CAP 16
AND
IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER
AND
IN THE MATTER OF TAXATION OF ADVOCATE/CLIENT
BILL OF COSTS
BETWEEN
BEDROCK HOLDINGS LIMITED.....APPLICANT
VERSUS
GILLYS SECURITY AND INVESTIGATION SERVICES LIMITED.....RESPONDENT
(Being an application against the decision of the Deputy Registrar in Kisumu
HCC Civil Appeal No. 54 of 2014 GILLYS SECURITY AND INVESTIGATION
SERVICES LTD VERSUS MASENO UNIVERSITY & 4 OTHERS
at Kisumu dated 1st November 2019)
RULING ON REFERENCE

By a Reference dated 13th November 2019 the Applicant, **BEDROCK HOLDINGS LIMITED**, has asked the court to set aside the decision which was delivered by the Taxing Officer on 1st November 2019.

1. It was the Applicant's prayer that the court should either proceed to re-tax the Bill of Costs dated 22nd May 2018, or should have the said Bill of Costs taxed afresh, by a different Taxing Officer.
2. This Reference is premised on the Applicant's contention, that the Taxing Officer erred in principle when making her decision. It was the Applicant's position that;

(a) The Bill of Costs and the taxation thereof were not irregular, just because the Registrar had not signed

a Judgment for costs;

(b) The Applicant was a party to the proceedings;

(c) The Judge had awarded costs to the Applicant;

(d) The costs of the taxation should have been awarded to the applicant, as there was no sound reason for taxing- off items numbered 3 to 74.

(e) The Taxing Officer failed to take into account the nature and importance of the matter; the amount involved; the interests of the parties; and the general conduct of the proceedings.

3. When canvassing the application, the Applicant submitted that it did not need to have lodged a request for judgment on the issue of costs, because the court had already marked the appeal as withdrawn, with costs to be agreed upon or taxed by the Deputy Registrar.
4. On the other hand, the Respondent submitted that the learned Judge did not expressly award any costs to the Applicant.
5. If anything, the Respondent emphasized that the Applicant herein was not a party in the Appeal.
6. The understanding of the Respondent was that the Applicant only became a party to the application for contempt.
7. As the said application for contempt was dismissed, with no order as to costs, the Respondent submitted that the learned Taxing Officer was right to have held that the Applicant herein was not entitled to costs of the withdrawn appeal.
8. Nonetheless, the Applicant reiterated that it was a proper party to the suit, and had been properly enjoined.
9. The Applicant submitted thus;

“The Respondent has always treated the Applicant as a party and it is late in the day to assert that the Applicant was not a party to the Proceedings.”

10. I understand the Applicant to be advancing the contention that the Respondent is estopped by its conduct, from denying that the Applicant was a party to the proceedings.
11. The Applicant also reasoned that estoppel by election or waiver was applicable in this instance. This is how the Applicant argued its case;

“The Court in very many cases has considered estoppel by conduct and estoppel by election or waiver. The latter is an intentional relinquishment or abandonment of a known right or privilege. A person who is entitled to rely on a stipulation existing for his benefit in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist.”

12. The Applicant did not specify the stipulation in any contract between it and the Respondent, or any statutory provision which the Respondent had been entitled to rely upon for its benefit, but which the Respondent had intentionally relinquished or abandoned.
13. It is to be noted that the Applicant put in a bid in answer to an advertisement which **MASENO UNIVERSITY** had put out, for Security Services.
14. After going through the tendering process, the Applicant was declared as the successful bidder and it executed a contract with **MASENO UNIVERSITY**.
15. However, **GILLYS SECURITY AND INVESTIGATION SERVICES LTD** were dissatisfied with the decision of the Public Procurement Oversight Authority, prompting it to lodge **CIVIL APPEAL NO. 54 OF 2014**.
16. The Applicant acknowledges that it was not named as a party to that Appeal.
17. However, the Applicant was of the view that any decision which would be made in the Appeal, would affect it. Therefore, the Applicant lodged an application seeking to be enjoined to the Appeal, which was between **GILLYS SECURITY AND INVESTIGATION SERVICES LIMITED** (on the one hand), and **MASENO UNIVERSITY** (on the other hand).
18. The application for joinder is dated 17th July 2014. It was supported by the affidavit sworn by **STEPHEN O. AYUGI**, who is a Director of **BEDROCK HOLDINGS LIMITED**.
19. Stephen O. Ayugi deponed that the Applicant first became aware that the contract signed between the Applicant and the University would be either suspended or terminated, when they attended a meeting at the University on 16th July 2014.
20. It is then that the Applicant moved swiftly, by lodging the application dated 17th July 2014.
21. The point is that the Applicant was enjoined to the proceedings at its own instance.

22. Having been so enjoined, the Applicant became an Interested Party.
23. On 20th April 2017 the Appellant, **GILLYS SECURITY & INVESTIGATION SERVICES LIMITED**, filed a Notice of Withdrawal of its Memorandum of Appeal dated 22nd May 2014.
24. Although the Appellant's Notice of Withdrawal of the Appeal had indicated that the Appellant wished to withdraw the appeal, with no order as to costs, Majanja J. did not grant that wish.
25. The learned Judge ordered that the matter be withdrawn;

“... with costs to be agreed upon or taxed by the Deputy Registrar.”

26. If there had been only two parties to the appeal, it would mean that the Respondent had been awarded the costs thereof.
27. However, in this instance, the Appellant had lodged the appeal against the Respondent; and thereafter the Applicant herein was enjoined to the matter, as an Interested Party.
28. In the Ruling I delivered on 7th March 2019, I expressed myself thus;

“The learned taxing officer erred by dismissing the Bill of Costs. Nonetheless, the taxing officer who will now have the task of handling the issue of taxation, will have the discretion to determine whether or not the order in issue awarded costs to the Interested Party.”

29. Hon. A. Odawo addressed the issue as follows;

“In my view therefore, costs were awarded by the Hon. Judge, though he did not specify to which party.

Any party who feels entitled to costs therein, could seek the same.”

30. The learned taxing officer noted that the Applicant ought to have invoked the provisions of **Order 25 Rule 3** of the **Civil Procedure Rules**, in order to have the Registrar enter judgment on the issue of costs.
31. As the Applicant had not invoked **Order 25 Rule 3**, the Taxing Officer held that the entire Bill was irregular.
32. However, the taxing officer went ahead and conducted the process of taxation.
33. Following the decision to carry out the process of taxation, it became a moot point whether or not the Bill was irregular.
34. The first item on the Bill of Costs was in respect to;

“Instruction to file an appeal to

object the contract of Kshs

48,000,000/=”

35. As indicated earlier herein, the appeal in issue was filed by **GILLYS SECURITY AND INVESTIGATION SERVICES LIMITED**. Therefore, I find that the Applicant cannot be entitled to claim Instruction Fees in respect to the filing of the appeal.
36. The first step taken by the Applicant was the application seeking to be enjoined to the appeal.
37. Therefore, the taxing officer was right to have concluded that the Bill of Costs was excessively exorbitant.
38. I so hold because the Applicant did not lodge the appeal. In the circumstances, the Applicant was only entitled to Instruction Fees in respect to the filing of the application dated 17th July 2014.
39. Secondly, I find that the appeal had not yet even been admitted to hearing. The court was yet to give directions regarding the manner in which the appeal would be heard.
40. In the circumstances, the taxing officer was right to have disallowed the claim for Getting Up Fees.
41. In aggregate, the sums disallowed for the Instruction Fees and the Getting Up Fees is Kshs 7,500,000/=.

42. In the light of the fact that the total fee claimed in the Bill of Costs was Kshs 9,593,925/=, I find that the taxing officer correctly concluded that the amount taxed-off was in excess of one-sixth (1/6) of total amount sought.

43. In the event, the taxing officer cannot be faulted for invoking **Rule 77 (1)** of the **Advocates (Remuneration) Order**, and thus disallowing the Applicant, the costs of the taxation.

44. However, as regards the itemized claims in the Bill of Costs, I find that the taxing officer was obliged to make a finding in respect of each such item.

45. A party with a Bill may claim that a document was, say, 4 folios; the taxing officer ought to verify the actual number of folios.

46. I have noted claims for items such as Making four copies of the replying affidavit of the Maseno University Vice Chancellor. The taxing officer must seek to verify why the Applicant would be entitled to claim fees for the alleged 4 copies.

47. Item numbered 17 in the Bill of Costs is described as

“Making 2 folios of the same.”

48. The taxing officer would need to determine whether or not that claim was justified.

49. There are also several claims for the costs (or fees) for effecting Service upon the other parties. The said claims range from Kshs 1,400/= for service in Kisumu; to Kshs 15,000/=, Kshs 25,000/= and Kshs 28,000/= for service upon legal representatives who are based in Nairobi.

50. Apart from the need to verify whether or not the sums claimed were in conformity with the provisions of the Remuneration Order, the taxing officer will also need to extract an explanation from the Applicant about why some of the said sums were not actually listed under “Disbursements”, whilst a few others were listed under “Disbursements.”

51. In conclusion, the reference is allowed, but only because the taxing officer had not undertaken a close and detailed analysis of the itemized claims.

52. The substantive findings by the taxing officer were largely upheld.

53. But even if they had not have been upheld, I find that the Applicant could not be awarded costs of the application, because the Respondent was not responsible for any omissions or errors of commission which might have been made by the taxing officer.

54. Accordingly, I order that each party will bear his own costs of the reference dated 13th November 2019.

55. The taxation will be conducted by a taxing officer other than Hon. A. Odawo: and the process will be guided by the findings already made herein.

DATED, SIGNED and DELIVERED at KISUMU

This 27th day of July 2020

FRED A. OCHIENG

JUDGE