



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 225 OF 2016**

**MUEMA KITULU T/A**

**MUEMA KITULU & COMPANY ADVOCATES.....APPLICANT**

**VERSUS**

**GATEWAY INSURANCE COMPANY LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant's Notice of Motion application dated 7<sup>th</sup> February 2018 and filed on 14<sup>th</sup> February 2018 was filed pursuant to the provisions of Section 51(2) of the Advocates Act Cap 16 Laws of Kenya, Section 3 & 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order L (sic) Rules 1 of the Civil Procedure Rules and all their enabling provisions of the law. It sought the following orders:-

- 1. THAT this Honourable court be pleased to enter judgment against the Respondent for the sum of Kenya Shillings One Hundred Thousand Five Hundred and Seventy Six (Kshs 100,576.00) only being the taxed and certified costs.**
- 2. THAT this Honourable Court be pleased to award interest at 14% from the date of filing the bills of costs (24<sup>th</sup> May 2016) until payment in full.**
- 3. THAT the cost of this application be borne by the Respondent.**

2. Subsequently, the Respondent filed a Notice of Motion application dated 4<sup>th</sup> April 2018 on 18<sup>th</sup> April 2018. It was filed pursuant to the provisions of Rules 11 (4) Advocates Remuneration Order, Sections 3 and 3A Civil Procedure Act, Cap 21 Laws of Kenya and all enabling provisions of law. Prayers Nos (c) and (d) were spent. It sought the following remaining orders:-

- a. THAT this Honourable court be pleased to extend the time for lodging a Notice of Objection to the taxation award made on the 14<sup>th</sup> December 2017.**
- b. THAT further to the foregoing this Honourable court be pleased to grant the Respondent/Applicant leave to file its objection to the Taxation award issued on 14<sup>th</sup> December 2017 upon supply of the detailed decision on disputed items.**
- c. Spent.**
- d. Spent.**
- e. THAT the costs of this application be in the cause.**

3. On 4<sup>th</sup> October 2018, both parties agreed that the two (2) applications would be heard together and the outcome of one could abide by the other.

4. The Applicant's Written Submissions were dated and filed on 26<sup>th</sup> October 2018 while those of the Respondent's were dated 7<sup>th</sup> December 2018 and filed on 19<sup>th</sup> December 2018.

5. The parties requested the court to render its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

## **I. THE APPLICANT'S NOTICE OF MOTION APPLICATION DATED 7<sup>TH</sup> FEBRUARY 2018 AND FILED ON 14<sup>TH</sup> FEBRUARY 2018**

6. The Applicant's present application was supported by an Affidavit of Muema Kitulu that was sworn on 7<sup>th</sup> February 2018.

7. He pointed out that the Respondent instructed him to act for it in a material damage claim following a road traffic accident. However, the Respondent defaulted in paying him leading him to file a Bill of Costs that was taxed on 14<sup>th</sup> December 2017 and an award of taxed costs in the sum of Kshs 100,576/= was given in his favour.

8. He said that he wrote to the Respondent seeking payment of the said sum but it failed to pay the same. He therefore urged this court to allow his application as prayed.

9. In response to the said application Joan Oburu, the Legal Officer of M/S Sanlam Insurance Co Ltd, formerly Gateway Insurance Company Limited, swore the Replying Affidavit on behalf of the Respondent herein on 5<sup>th</sup> April 2018. It was filed on 18<sup>th</sup> April 2018.

10. The Respondent raised several objections herein. It contended that the Applicant's Bill of Costs ought to have been filed at High Court of Kenya Nyeri as the same arose out of the proceedings in **Nyeri PMCC No 306 of 2008 Mathew Maina vs William Kamunya Mwangi** and that it was erroneously consolidated with nine (9) other matters.

11. It also stated that the said consolidation failed to address the unique issues arising out of each Bill of Costs and it was at the earliest instance, filing an application seeking leave to extend time for lodging of a Notice of Objection to the taxation award.

12. It further contended that upon perusing the court file, it noted that the Bill of Costs was taxed in the absence of the primary file and consequently, the taxation was irregular. In addition, it averred that the Applicant failed to serve it with a demand note or fee note prior to the filing of the said Bill of Costs. It stated that he was not entitled to interest as he failed to inform it of the Bill of Costs as was required by procedure.

13. It therefore urged this court not to allow the said application.

## **II. THE RESPONDENT'S NOTICE OF MOTION APPLICATION DATED 4<sup>TH</sup> APRIL 2018 AND FILED ON 18<sup>TH</sup> APRIL 2019**

14. The Respondent's present application was supported by the Affidavit of Joan Oburu, a Senior Legal Officer at Sanlam Insurance Company Limited that was sworn on 5<sup>th</sup> April 2018.

15. It pointed out that it had found some receipts the Applicant's had been issued with, which was proof of an acknowledgment of payments. It stated that after the exercise of due diligence, the said receipts could not have been produced and/or availed to the Taxing Master before the taxation was done.

16. It was emphatic that the Applicant had been paid a deposit in the sum of Kshs 24,905/=, information which it did not have at the time the Bill of Costs was being taxed and that if the Ruling of the Taxing Master was not reviewed, it would result in unjust enrichment of the Applicant herein.

17. It also reiterated the issue of jurisdiction of the High Court of Kenya Nyeri and the fact that the Bill of Costs was taxed without the primary file having been availed which was contrary to the procedure.

18. It therefore urged this court to allow its application.

## **LEGAL ANALYSIS**

19. This court did not see any response by the Applicant to the Respondent's present.

20. Be that as it may, the Applicant argued that the said Joan Oburu did not demonstrate that she had authority to swear the Replying Affidavit on behalf of the Respondent herein contrary to Order 4 Rule 1(4) of the Civil Procedure Rules.

21. He added that the Respondent did not object to the jurisdiction of the Taxing Master at the material time and that in any event the High Court of Kenya, had unfettered jurisdiction to try all suits of a civil nature as provided for in Section 5 of the Civil Procedure Act Cap 21 (Laws of Kenya).

22. Further, he stated that Rule 49 (1) of the Advocates Remuneration Order defines a "court" as "**the High Court or any judge thereof or a resident magistrate's court or any magistrate sitting as a member of a resident magistrate's court.**"

23. He added that there was no provision of the law requiring a taxing master to have the primary file as he or she had power to call evidentiary material or summon witnesses under Rule 13A of the Advocates Remuneration Order.

24. He pointed out that he expected the sum of Kshs 24,905/= to be deducted from the taxed costs and that the Taxing Master was satisfied that he had rendered to the Respondent services that were way beyond the said deposit.

25. He dismissed the Respondent's assertion that it was never served with a demand and notice to sue and its contention that the Taxing Master was denied an opportunity to interrogate unique issues arising out of the individual Bill of Costs because the same was not raised during the Taxation of its Bill of Costs. He was emphatic that the Respondent had dwelt on matters that were totally unrelated to its application.

26. He submitted that the Certificate of taxation that it was issued by the Taxing Master was final as to the costs unless it had been set aside as it provided in Section 52 (2) of the Advocates Act Cap 16 (Laws of Kenya).

27. Notably, Section 52 of the Advocates Act stipulates as follows:-

**“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”**

28. It provides that where a retainer has not been disputed or the certificate of costs which is final as to the amount of costs has not been set aside or altered, judgment shall be entered for the sum certified to be due with costs.

29. It is clear that a certificate of costs can be altered or set aside by the court. “Court” in this case refers to the meaning assigned to it by Paragraph 49(1) of the Advocates Remuneration Order. The said Paragraph 49(2) of the Advocates Remuneration Order stipulates that:-

**“In this Part, the expression “the Court” means the High Court or any judge thereof or a resident Magistrate Court or any magistrate sitting as a member of a resident Magistrate Court.”**

30. It is evident from Paragraph 11 of the Advocates Remuneration Order that a party who is dissatisfied with the decision of a Taxing Master can file a reference at the High Court and if aggrieved by the decision of the High Court to the Court of Appeal. The said Paragraph 11 of the Advocates Remuneration Order stipulates that:-

**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.**

31. From the circumstances of the case herein, the Respondent could not file a reference to the High Court as it was late in doing so. It was time barred. However, it was clear that an aggrieved party has a right to file a reference. Similarly, the party in whose favour an award has been made also has a right to be granted an order for entry of judgment on the taxed costs.

32. When a court is faced with such a scenario, it must cut a delicate balance not to deny a client its right to challenge a decision that has aggrieved it and also not to deny an advocate enjoyment of its hard earned money after having rendered services to that client. Indeed, unless an advocate expressly says so to a client, he does not offer the client charitable services. His professional fees for services must be paid. This is not negotiable.

33. From the circumstances of the cases herein, it was not in dispute that the Applicant rendered legal services to the Respondent and it was entitled to fees. The Applicant was agreeable to having the sum of Kshs 24,905/=, the Respondent stated it had discovered it paid it, deducted from the taxed costs is the sum of Kshs 100,576/=. The matter would have ended there.

34. However, bearing in mind that the Respondent had raised an issue of consolidation of nine (9) matters arising from the Bill of Costs filed by the Applicant herein, this court was not in a position to state with certainty whether or not there were unique issues that the Respondent argued arose from those consolidated files was a material or relevant fact herein unless the decision of the Taxing Master was placed before it as provided by Paragraph 11 (2) of the Advocates Remuneration Order. Indeed, perusal of the proceedings before the Taxing Master would clarify issues.

35. In the circumstances foregoing, this court found that there was merit in allowing the Respondent's Chamber Summons application dated 4<sup>th</sup> April 2018 and filed on 18<sup>th</sup> April 2018 so that this court could interrogate the decision of the Taxing Master before considering Applicant's application, if the Respondents reference was to be dismissed.

36. In other words, if the High Court were to find that there was no merit in the Respondent's reference, then it would dismiss the same and enter judgment in favour of the Applicant as it had sought in its Chamber Summons application dated 7<sup>th</sup> February 2018 and filed on 14<sup>th</sup> February 2018.

### **DISPOSITION**

37. For the foregoing reasons, the upshot of this court's decision was that the Respondent's Notice of Motion application dated 4<sup>th</sup> April 2018 and filed on 17<sup>th</sup> April 2018 was merited and the same is hereby allowed in terms of Prayer Nos (a) and (b) therein as follows:-

- 1. THAT this Honourable court be pleased to extend the time for lodging a Notice of Objection to the taxation award made on the 14<sup>th</sup> December 2017.**
- 2. THAT further to the foregoing this Honourable court be pleased to grant the Respondent/Applicant leave to file its objection to the Taxation award issued on 14<sup>th</sup> December 2017 upon supply of the detailed decision on disputed items.**
- 3. The Taxing Master is hereby directed to furnish the Respondent with reasons of her decision, if not already given within fourteen (14) days from todate i.e by 12<sup>th</sup> June 2019.**
- 4. The Respondent is hereby directed to file and serve its reference within seven (7) days if it has already been furnished with reasons by the Taxing Master and if not received, within fourteen (14) days from the date it shall be furnished with the said reasons.**
- 5. So as to comply, the Respondent is hereby directed to take all necessary steps to apply for reasons of the Taxing Master if not already done so failing which the Applicant will be at liberty to move the court to appropriate orders to safeguard his interests.**
- 6. Costs of the Respondent's application will be in the cause.**

38. For the avoidance of doubt, it is hereby directed that Applicant's Chamber Summons application dated 7<sup>th</sup> December 2018 and filed on 14<sup>th</sup> December 2018 be and is hereby kept in abeyance pending the hearing and determination of the Respondent's reference and/or until further orders and/or directions by the court.

39. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of May 2019**

**J. KAMAU**

**JUDGE**