



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CAUSE NO. 69 OF 2018

CHRIS N MUTUKU, ADVOCATE.....ADVOCATE/APPLICANT

VERSUS

CHAI DIAMOND INVESTMENT CO. LIMITED.....RESPONDENT

RULING

1. The firm of **Chris N. Mutuku Advocate** (hereinafter "**the Advocate**") filed the Advocate/Client Bill of Costs dated **19th February 2018** and amended **on 29th April, 2018** herein for taxation in connection with services rendered to the Client, **Chai Diamond Investment Company Ltd.** The Advocate contended that the Bill is in respect of the instructions it had been given by the Respondent with respect to transfer and registration for a consideration of **Kshs. 142,600,000/=** on property **Donyo Sabuk/Komarock Block No. 1/67184** on its behalf. In response to the Bill of Costs, the Client filed a Notice of Preliminary Objection on **3rd April, 2018** denying the advocate-client relationship, the discharge of advocate-client duties and asking that the Bill of Costs be dismissed with costs. The Preliminary Objection was taken before the Deputy Registrar in her capacity as the Taxing Officer, and a decision rendered by her on **22 May 2018**. The Taxing Officer was of the view that the Respondent's advocate was not properly on record for the Respondent and the same was struck out vide decision made on **5th July, 2018**. The Respondent filed another Preliminary Objection dated **6th July, 2018** raising the same grounds.

2. The Client, being aggrieved by the decision to tax the bill of costs filed the Notice of Motion dated **23 August 2018**, seeking the following orders:

[a] That the Taxing Master's decision delivered on 9 August 2018 in which she taxed the bill of costs at Kshs 2,319,130/= be set aside;

[b] That the Preliminary Objection by the Client dated 6th July, 2018 be heard, determined and dispensed with;

[c] That the costs of the application be provided for.

3. The application was filed pursuant to Paragraph 11 of the **Advocates (Remuneration) Order**, and was premised on the grounds that the Taxing Master arrived at the decision she took by failing to appreciate that there was a Preliminary Objection on record and thus the client ought to be accorded a fair hearing and the preliminary objection ought to be considered.

4. While the said application was pending hearing and determination, the Advocate filed the notice of motion application dated **30 August 2018** seeking that judgement be entered against the respondent and a decree be issued in terms of the taxed bill.

5. The application was filed pursuant to Section 51 (2) of the **Advocates Act, Order 51 (1) of the Civil Procedure Rules and Section 1, 1A, 3 & 3A of the Civil Procedure Act**. The application was premised on the grounds that the bill of costs was on **9th August, 2018** taxed to the claimed amount and the same was served on the respondent and no settlement was forthcoming.

6. Similarly, on the said **30th August 2018**, the applicant filed a preliminary objection challenging the legality of the application dated **23rd August, 2018**.

7. On **11th October, 2018** the respondent filed grounds of opposition to the advocate's application for entry of judgement on the grounds that the respondent has applied for a reference to the ruling of the taxing master dated **9th August 2018** vide an application dated **23rd August, 2018**.

8. The various applications were dispensed with vide sub-missions.

9. On the application dated **30th August, 2018**, the advocate submitted that his application for entry of judgement is properly before the court

and therefore he is entitled to the orders sought in the application dated 30th August, 2018. He submitted that the client had opted to respond to the application vide grounds of opposition and there is no order staying the decision of the taxing officer. The advocate further submitted that the procedure for filing a reference is provided for under Section 11 of the Advocates Remuneration order, and the client has not followed the requisite procedure hence there is no reference before the court.

10. On the application dated 23rd August, 2018, the advocate submitted that the application is brought under the wrong provisions of the law and therefore it is unprocedural; that the client has considered the same as a reference for purposes of Section 11 of the Advocates Remuneration Order, however it is not in compliance with the said Section and therefore the court has no jurisdiction to grant the order sought. Similarly, the application does not meet the test of being a review for it is not before the officer who made the decision and neither is it an appeal because it does not comply with the provisions of Order 42 of the Civil Procedure Rules. The advocate has challenged the authority of Grace Wachuka Miano to swear the affidavit on behalf of the client in terms of the provisions of Order 9 Rule 2(c) of the Civil Procedure Rules and therefore the supporting affidavit ought to be struck out.

11. The client submitted that the issues for consideration before the court are as follows; Firstly, whether the court achieved the overriding objective by not considering the Respondent's notice of preliminary objection dated 6.7.2018; Secondly, whether the ruling dated 9.8.18 and the certificate of taxation dated 17.8.2018 should be set aside and the preliminary objection dated 6.7.18 should be heard and determined and dispensed with first and finally, whether the court should enter judgement without considering the respondent's notice of preliminary objection.

12. On the first issue, counsel submitted that the notice of preliminary objection ought to be heard and determined on merit. On the second issue, counsel submitted that there was no advocate-client relationship that was established between the parties and thus the preliminary objection ought to be allowed. He cited the case of **Machira & Co. Advocates v Arthur K. Magugu & Another (2012)**. On the final issue, counsel reiterated his prayer that the preliminary objection ought to be considered before the taxation was done.

13. Having given consideration to the arguments advanced herein and the authorities relied on by Learned Counsels, the issues for determination are firstly, whether the preliminary objection by the client should be allowed; Secondly, whether there is a reference on record and if it should be heard; Finally whether the application dated 30th August, 2018 for entry of judgement should be allowed.

14. If a preliminary Objection is raised as a matter of law at the outset or earliest opportunity in a suit for the Court to determine whether the suit before the Court is competent or not then the same ought to be dispensed with just as per the landmark case of **Mukisa Biscuit Company v Westend Distributors(1969) E.A.696**. This objection goes to the root of the suit and must always be dealt with first so as to confirm a valid suit or claim or to strike it out. A look at the Preliminary Objection indicates that it relates to matters of fact that ought to be proved and the issues raise therein are not such that could be disposed of by way of preliminary objection. In that regard the same is dismissed Even if for argument's sake, if the Preliminary Objection raised now were to apply, there is no evidence on record to dispute the advocate's claims whether by affidavit or otherwise and therefore that part of the suit or proceedings is complete and there is a judgement to the extent of the taxed bill of costs. In **Lumumba Mumma Kaluma v Sachin Shaha (2013) eKLR**, a Preliminary Objection had been taken to the taxation of the Advocate/Client Bill of Costs on the grounds that no instructions had been given to the Advocate and the same was dismissed.

15. This brings me to the 2nd issue. In **Ochieng Onyango Kibet & Ohaga vs. Adopt A Light Limited [2007] eKLR** it was held that the only way that the client could challenge the decision of the taxing officer was by appealing before a judge, and that an appeal can be by way of application since no procedure has been provided for in the Advocates Act. The Advocate's arguments appear to be levelled against the so called Reference as opposed to whether the the client has raised sufficient grounds to set aside the taxing officer's decision. I find that the attack on the procedure used has been overtaken by events for the application dated 23rd August, 2018 has already been admitted by the court and therefore there is a reference on record indicating dissatisfaction with the decision of the Taxing Officer. Therefore I shall go to the merit of the application.

16. In **Machira and Co. Advocates v Arthur K. Magugu [2002] 2 EA 428 at page 433**, it was held that:

“... any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

17. In this regard, having given the client an opportunity to ventilate its “reference” I would need to be satisfied that it has raised sufficient grounds to warrant interference with the decision of the taxing officer. A look at the application and the affidavit in support indicates that the client faulted the taxing officer for carrying out the taxation without consideration of its preliminary objection. Having made my decision on the preliminary objection, I find the same has no merit and therefore there being no other reason given as to why the decision of the taxing officer should be set aside, I take the view that this court has not been satisfied that the client warrants the order to set aside the taxing officer's decision. Therefore the application dated 23rd August, 2018 fails and is dismissed.

18. This leaves me with the application for entry of judgement dated 30th August, 2018. There are grounds of opposition but there is no affidavit in reply to the application and therefore there are no facts before the court to dispute the application. The application is made under **Section 51 (2) of the Advocates Act Cap 16**. That section provides as follows:

“(2) The certificate of 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.”

19. Because the court has declined to set aside the taxed costs, there is no reason why judgement should not be entered as prayed for by the

advocate.

20. In conclusion therefore, the following are the orders of the court:

(a) The application dated 23rd August 2018 is dismissed with costs to the advocate.

(b) The application dated 30th August 2018 is granted as follows:

(i) Judgement is hereby entered in favour of Chris N. Mutuku Advocate as against Chai Diamond Investment Co Ltd for Kshs. 2,319,130/=.

(ii) The advocate is awarded costs of the Notice of Motion dated 30th August 2018.

(c) The Preliminary objection dated 6th July, 2018 and 30th August, 2018 as well as the grounds of opposition dated 9th October, 2018 are dismissed with costs

Orders accordingly.

Dated and delivered at **Machakos** this 22nd day of **May, 2019**.

D. K. KEMEI

JUDGE