



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT GARISSA
MISC.APPLICATION NO. 3 OF 2017
IN THE MATTER OF ADVOCATES ACT

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

BETWEEN

CAROLYN K. MUMBO & CO ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

MULU MBUVI a.k.a JOHN MULU MBUVI.....RESPONDENT/CLIENT

RULING

Introduction:

1. The genesis of the instant proceedings is the Respondent Chamber Summons Application dated 8th February, 2019 brought under the provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rule, 2010 and other enabling Provisions of law, seeking the review of the herein taxing master ruling dated 30th May, 2018, they seek the following orders:-

- 1) **THAT, the court be pleased to review the order made on the 30th May, 2018, setting the sum payable by the applicant herein to the Respondent at Kshs. 810,000/=.**
- 2) **THAT, the Honourable Deputy Registrar made an arithmetic error in tabulating the final sum to the Respondent herein, despite having clearly illustrated the tabulation sequentially in the ruling.**
- 3) **THAT, the actual total final sum payable by the Applicant if tabulated sequentially as reflected in the ruling is Kshs.433,905.94/= instead of Kshs. 810,000/=.**

2. In response to the above application the applicant/Advocates filed the instant Notice of Preliminary Objection dated 12th March, 2019 raising the following grounds:-

- 1) **THAT, the Chamber summons Application dated 8th February, 2019 offends the mandatory provisions of paragraphs/Section 11 of the Advocates (Remuneration) Order.**
- 2) **THAT, the issues raised are *Resjudicata*, this Honourable Court having delivered a ruling on 30th May, 2018(by Deputy Registrar) and on 10th December, 2018(by the Learned Judge).**
- 3) **THAT, the Court is therefore *Functus Officio*.**
- 4) **THAT, the Respondent is merely attempting to re-introduce and/or revive and or/breathe life into the very same issues that were raised and/or canvassed vide Notice of Motion Application dated 21st December, 2018, which issues were deliberated upon and the application rejected.**
- 5) **THAT, the procedure that is being adopted by the respondent is alien and/or un-prescribed and/or is a backdoor procedure that greatly offends the requirement of the applicable Law.**

6) THAT, the application is therefore incurably defective, an abuse of the Court process and should be struck out and/or dismissed with punitive costs to the applicant/Advocate.

3. Both Parties filed their written submission. The applicant/Advocates submissions are dated 8th April, 2019 and filed on 17th April, 2018 whereas the Respondent written submissions are dated 14th May, 2019 and filed on 15th May, 2019. The matter came up for highlighting of submissions on 19th June, 2019.

The Applicants/Advocates Case:

4. Counsel Mrs Muumbo for the applicant submitted that the matter before the court was commenced under the Advocates Remuneration Order for taxation of Advocate- client bill of costs in HCC NO. 11 of 2012, consequently, the Deputy Registrar of this Court taxed the bill, and thereafter both parties being dissatisfied with the same each filed a reference before this Court, however the said references were dismissed for being incompetent by the Hon. Justice Dulu. The applicant Reference is dated 8/6/2018 whereas the Respondent Reference is dated 21/9/2018.

5. In addition, she submitted that upon the said respective References being dismissed, a certificate of taxation was issued by the Deputy Registrar of this Court, which they subsequently served it upon the Respondent Advocates. Thereafter the Respondent changed advocates and appointed the current Advocates on record who subsequently filed the application dated 5/2/2019 under the Civil Procedure Act seeking review of the Deputy Registrar ruling necessitating the instant Preliminary Objection dated 12/3/2019.

6. In support of their Preliminary Objection, Counsel submitted that the Advocates Remuneration Order(A.R.O) has established its own procedure to be applied for purposes of taxation, which procedure must be strictly adhered to, and that the provisions of the Civil Procedure Act does not apply.

7. Counsel referred the court to Paragraph 11(1) and (2) of the Advocates Remuneration Order, which section sets down the procedure to be followed in the event one is dissatisfied with the decision of the Deputy Registrar. This takes the form of a party filing a reference to the High Court, and not invoking the provisions of the Civil Procedure Act as undertaken by the Respondent. They argue that the Deputy Registrar exercises a special Jurisdiction, whose decisions can only be challenged by way of review to the High Court. Counsel further relied on their authorities submitting that both the High Court and the Court of Appeal have reached a finding that the Civil Procedure Act does not apply in cases arising out of the Advocates Remuneration Order.

8. The second issues addressed by the applicant counsel is the argument that the matters raised by the Respondent application dated 5/2/2019 are Res judicata , as the same were the subject of the proceedings before Hon. Justice Dulu who dismissed the same vide a ruling delivered on 10th December, 2018.

9. Subsequent to the above issue, Counsel submitted that this court stands *functus* officio after dismissing the applications by both the applicant and the respondent , and that the said application is an attempt to resuscitate the matter which is already dead and thus the same is an abuse of the court process calling for dismissal with costs.

10. In support of their preliminary Objection they relied on the following Authorities *Hezekiel Oira t/a Oira Advocate vs Kenya Broadcasting Corporation Nairobi Misc. App No. 36 of 2011, Himatlal Moranji Manek vs Ratilal Gova Sumaria Nairobi High Court Civil Suit No. 232 of 2005, Machira & Co. Advocates vs Arthur K. Magugu & Another Civil Appeal No. 199 of 2002* and *Wambugu Kariuki & Co Advocate vs Invesco Assurance Co. Limited Misc. App No. 6 of 2017*, which authorities have been considered.

The Respondent/ Client Case:

11. Counsel Mr. Ouma submitted in support of the Respondent case in opposition to the Applicants Preliminary Objection. Counsel submitted that their application dated 5/2/2019 is an application seeking the review of the ruling delivered by the taxing officer, and that the same is principally seeking to correct mathematical errors allegedly committed by the taxing Officer in his calculations.

12. It is their position that since they are only seeking for review of taxing master ruling for errors apparent on record, the applicable law in their submission is section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 and not the provisions of Paragraphs 11(1) and (2) of the Advocates Remuneration Order as alleged by the applicant which provides for objections as opposed to review in their view.

13. On the issue of Res Judicata, Counsel submitted that the core issue in their application is the correction of clerical or tabulation errors. It is their argument that the ruling dated 10/12/2018 by Hon Justice Dulu was based on different matters and not the issues raised in their impugned application. He submitted that the impugned application is seeking to avoid unfair enrichment and urged the court to invoke section 99 of the Civil Procedure Act and reach a finding that it is not *functus officio*. In sum the respondent submits that the issues raised in the application have never been canvassed before.

14. In support of their case the Respondent rely on the following authorities *Republic vs Attorney General & 2 Others Ex parte Tom Odoyo Oloo (2016)e KLR, Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited(2014) eKLR* and *Chacha Mwita Mosenda vs. Baya Tsuma Baya & 2 Others (2017) eKLR*, which authorities have equally been considered.

Issues and Analysis:

15. The following are the germane issues that arise from the foregoing: -

a) Whether section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules enables the Taxing Officer to review his ruling regarding taxation under the Advocates Remuneration Order.

b) whether the application herein dated 5/2/2019 is Res Judicata

a) Whether section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules enables the Taxing Officer to review his ruling regarding taxation under the Advocates Remuneration Order.

16. The summary of the applicant position herein is their contention that an order of a taxing master concerning taxation of an advocate/client/bill of costs can only be challenged before a judge by way of a reference initiated by way of a chamber Summons as required by the provisions of paragraph 11(2) of the Advocates Remuneration Order and not by way of a review under the provisions of Section 80 and Order 45 Rules 1 of the Civil Procedure Act and Rules respectively.

17. The Respondent on the other hand contends that the Advocates Remuneration order could only apply where the bill of costs was taxed by the taxing officer and the order of taxation is being objected to. It is their position that the envisaged reference pursuant to paragraph 11 (2) of Advocates Remuneration Order comes into play when an objection is lodged and not when a review is filed.

18. They argue that when one is seeking to correct mathematical errors or errors apparent on the taxing master's decision, then the applicable law is the provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010.

19. Paragraph 11 of the Advocates (Remuneration) Order provides for Objection to decision on taxation and appeal to Court of Appeal, it states: -

i. 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

ii. 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.

iii. 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.

iv. 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.

20. Section 80 of the Civil Procedure Act on the other hand provides for Review, it states: -

Any person who considers himself aggrieved-

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

b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

21. Order 45 of the Civil Procedure Rules provides for Review of Court decree or Orders where no appeals have been preferred. Order 45 Rule 1 and 2 provides-

(1) 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

22. Although both provisions of the Civil Procedure Rules and the Advocates Remuneration Order Rules are subsidiary legislations, on a closer look at the Advocates Remuneration Order Rules, it is notable that they are specifically tailored to address issues that arise from and

during taxation of bills of costs.

23. It is also apparent that no appeal is envisaged in those rules. Only a reference is allowed, which takes the form of a review of the taxing master's decision, which review is to be presented vide a Reference to the High Court and not to the same taxing master as provided for under Clause 11(1) of the Advocates Remuneration Order.

24. On the other hand a review under Order 45 Rule (2) shall be made only to the judge who passed the decree or the order sought to be reviewed. In this case the orders were issued by the Deputy Registrar sitting in his capacity as the taxing master and therefore if the provisions of Order 45 rule 2 were to apply, then the Deputy Registrar would be the one to undertake the review, however it is clear in my view that no such powers are granted under the relevant provisions of the Advocate Remuneration Order hereinabove, which on the other hand has established its own review procedure. Furthermore, there is no other provisions of the law empowering him to do so.

25. In Hezekiel Oira v/a Oira Advocate vs Kenya Broadcasting Corporation 2015 eKLR the court when confronted with a similar application as the one herein stated as follows:-

“In my view, the applicant was required to file a reference to this court to challenge the decision of the taxing officer and not an application for review under Order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act.

Further, the advocate would only be so entitled to apply to this court for review or appeal, under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules if he was able to satisfy the court that the decision rendered by the taxing officer was the kind of decision that can be appealed to this court, under Section 79G of the Civil Procedure Act or reviewed as provided by Section 80 and Order 45 of the Civil Procedure Act and Rules respectively.

Under the said Paragraph 11, of the Advocates Remuneration Order, an “appeal” against the decision of a taxing officer in a taxation matter is not provided for. The only procedure provided for an “appeal” or “review” against the decision of a taxing officer is by way of a reference.

In my view, the applicant cannot invoke the Civil Procedure Act and Rules made thereunder to circumvent the procedure provided under the Advocates Act and the Advocates Remuneration Order in regard to review of a decision of the taxing officer in an advocate/client bill of costs where the taxing officer exercises the special jurisdiction conferred upon him or her under the Advocates Remuneration Order and NOT in his capacity as the Deputy Registrar of this court.”

26. In the instant case the applicant's main grievance is that there were arithmetic errors committed as a result of tabulations within the Deputy Registrar ruling delivered on 30th May, 2018. The relevant part in their submissions is at Paragraph 6 which states as follows-

“Going sequentially with the court's tabulation within the ruling dated 30th may, 2018, total sum taxed off is Kshs. 714, 412/= subtracted from the initial sum of Kshs1,461, 658.50/= gives a sum of Kshs. 747,246.50/= as the amount payable by the Respondent. Add V.A.T at 16%(Kshs. 119,559.44/=) gives a total of Kshs. 866,805.94 as the total sum payable by the Respondent and not Kshs. 1,232, 910/-. This is further reduced by the amount already paid by the Respondent, that is Kshs. 422,900/= , hence the final sum payable is Kshs. 443, 905.05/= and not Kshs. 810,000/= as typed in the ruling”

27. The Contrasting part to the above is the last paragraph of the Taxing Officer ruling delivered on 30th May , 2018 which provides as follows:-

“In Conclusion, the total costs taxed off are Kshs 426,613/=. Therefore, the bill of costs is hereby assessed at Kshs. 1,232,910/=. From this amount, the sum of Kshs. 422,900/=:, being the sum paid by the Respondent to the applicant is deducted leaving a balance of Kshs. 810,010/=:; Therefore, the sum payable by the Respondent to the applicant is Kshs. 810,010/=:.”

28. Therefore, in my opinion, it seems the Respondent is challenging the entire decision of the taxing master, and their application dated 5/2/2019 has nothing to do with correction of arithmetic errors. It is geared towards pushing for a review of the entire ruling.

29. The Court of Appeal in Machira & Company Advocate vs Arthur K. Magugu (2012) eKLR in this regard stated:

“Appeals require the typing of proceedings compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions a kin to those of Section 80 of the Civil Procedure Act, of discovery of new and important matters, errors on the face of the record and so on. In our view, the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with the decisions on advocates bill of costs through references under Rule 11 to a judge in chambers.”

30. It further held:

“10. The appellate jurisdiction of any court is a creature of the statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to the advocates bills of costs, we agree with the decision of Ringera J (as he then was) in Machira Vs Magugu (1) that the Advocates Remuneration Order is a complete code which does not provide for appeals from the taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such

decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used....”

31. Guided by the above this Court is therefore inclined to reach a finding that indeed there is a specific procedure under the Advocates Remuneration Order, which provides for the specific mechanism in the form of a reference to this Court for purposes of review and or challenging of the taxing master decision, therefore in my view paragraph 11 of the Advocates Remuneration Order cannot be short circuited by filing for review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules as undertaken by the Respondent herein.

32. On whether Article 159(2) can aid the Respondent, Republic vs The Land Disputes Tribunal, Mukurweni, Misc. Application No. 405, the Court noted in this regard that:-

“In my view Article 159(2) of the Constitution is meant to ensure that justice is done to the parties in cases where the court is properly seized of the matter without locking out the parties for failure to comply with matters of procedure.

Where, however, the matter is not before the court in that a party has failed to bring himself within the circumstances which clothe the court with powers to grant him the remedies sought, it would be stretching the provisions of Article 159 (2) of the Constitution too far if the court were to ignore all statutory provisions in order to accommodate a party who without any justifiable reason failed to adhere to the provisions of the law.”

33. Further, in Abok James Odera T/A A.J. Odera & Associates vs John Patrick Machira t/a Machira & Company Advocates (2013) eKLR, the Court of Appeal JJA cited with approval the finding Karuturu Networks Ltd & Another vs Dally Figgis Advocates, Nairobi Court of Appeal CA No. 293/2009 where it was held that:

“The application of the overriding objective principle does not operate to uproot the established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness and that in interpreting the law or rules made there under, the court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals.”

34. Applying the above decisions to this review application. I am satisfied that Article 159(2) (d) does not oust the jurisdiction of this court to determine that the application was filed under the Civil Procedure Rules when there are clear procedures under the Advocates Act, and is therefore in my view the same is incompetent *in limine* warranting the striking out. Consequently, the application before court cannot be salvaged under Article 159(2) of the Constitution or vide the application of the Overriding Principle as the matter is not properly seized by the court. And therefore ought to be dismissed with costs.

b) Whether the application dated 5/2/2019 is Res Judicata

35. The doctrine of *res judicata* is set out in the Civil Procedure Act at Section 7 as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

36. The Civil Procedure Act also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

“Explanation. (1) - The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2) - For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3) - The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

37. Further, an explanation was rendered in the English case of Henderson Vs Henderson (1843-60) All E.R.378, where it was observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

38. It therefore follows that a Court will as well invoke the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties.

39. Applying the foregoing to the present case, I note that the gist of the Respondent Application dated 21st September, 2018 and filed on 26th September, 2018 the Respondent sought among other prayers the setting aside of the taxing master's decision on some items and more importantly he prayed at Prayer 3 as follows; -

“THAT this Honourable Court be pleased to vary the method of computing the costs payable to the respondent and proceed to properly compute the same”

40. However, it is noteworthy that the above application was dismissed by Hon Justice Dulu vide his ruling dated 10th December, 2018 for being incompetent as it was filed when there was already another reference filed by the applicant over the same issues. The Court in the same ruling dismissed the said reference dated 8th June, 2018 by the applicant for the reason that the same did not comply with the provisions of the Advocate Remuneration Order, in that it was prematurely filed.

41. It is therefore apparent that there was no determination on merit of the issues raised in the application. Hence if the applicant had filed a proper reference and may be sought extension of time for filing, this Court in my view might have been inclined to hear and determine the same.

CONCLUSION:

42. In conclusion the Respondent application dated 5/2/2019 cannot stand because it has been filed under the provisions of the Civil Procedure Act whereas the applicable Law is the Advocate Remuneration Order, and based on the foregoing authorities, it clear that such defect is incurable. Further, nothing has been tendered by the Respondent that can be considered so compelling for this court to invoke Article 159 of the Constitution.

43. In regard to the application being res judicata, it is my considered opinion that the application does not amount to *Resjudica* as there was no determination of the issues raised by the parties in their respective References. The subject references were dismissed by Hon. Justice Dulu for incompetence; therefore the court never delved into the merits of the two applications, thus one cannot reach a conclusion that the instant application is res judicata. Therefore if the Respondent had filed a proper application, this court in line with Paragraph 11(4) of the Advocate Remuneration Order which allows this court to enlarge time, Article 165 (3) Constitution that spells out the jurisdiction of the Court and Article 159 2 (d) of Constitution which mandates that justice should be administered without undue regard to technicalities.

44. In sum, it is my finding that the Preliminary Objection is meritorious and ought to succeed.

45. Thus court makes the following orders:-

i. The application dated 8/2/2019 is hereby struck out for being an abuse of court process.

ii. Costs to the Respondent.

SIGNED, DATED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF JULY, 2019

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C. KARIUKI

JUDGE