



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

MISCELLANEOUS CAUSE NO. 9 OF 2017

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT

BETWEEN

GEORGE MIYARE T/A MIYARE & COMPANY ADVOCATES...ADVOCATE/APPLICANT

VERSUS

EVANS GOR SEMELANG'O.....CLIENT/RESPONDENT

RULING

1. The Judgment Debtor/Applicant through a Notice of Motion dated 6th March 2019 brought pursuant to Article 159 of the Constitution of Kenya 2010, Section 1A, 1B and 3A of the Civil Procedure Act, order 9 Rule 9, order 22 Rule 22, order 50 Rule 6 of Civil Procedure Rules 2010, paragraph 11(4) of the Advocates Remuneration Order and other enabling provisions of the law seek the following orders:-

a) That pending the hearing and determination of this Application the Notice to Show Cause dated 18/1/2019 be stayed.

b) That pending the hearing and determination of this Application there be a stay of execution of the Taxation ruling delivered on 31/8/2017 by the Honourable E.W. Mburu (Mrs) Deputy Registrar) in Miscellaneous Cause No. 9 of 2017.

c) That leave be granted to the Applicant to file a Reference against the Taxation ruling delivered on 31/8/2017 by the Honourable E.W Mburu (Mr) (Deputy Registrar) in Miscellaneous Cause No. 9 of 2017 out of time.

d) That the Honourable Court be pleased to set aside the Taxation ruling delivered on 31/8/2017 by the Honourable E.W Mburu (Mrs) (Deputy Registrar) in Miscellaneous Cause No. 9 of 2017 and the certificate of taxation upon such terms as are just.

2. The application is based on the grounds on the face of the application running from nos 1 – 8, the main ground being that the Applicant did not participate in the taxation proceedings, leading to the Respondent's Bill of costs being taxed at Kshs.1,187,084/-. The applicant urges the bill was not done to the scale and as such the same he urges is inflated. That the Applicant intends to file a reference against the same and prays for court's leave as the time for filing of a reference has since lapsed.

3. The application is supported by supporting affidavit of Evans Gor Semalang'o sworn on 6th March 2019. He contends in his supporting affidavit, that the Respondent took a Notice to Show Cause dated 18/1/2019 against the Applicant requesting him to appear before court on 11/3/2019 or pay a sum of Kshs.1,422,522/35 for enforcing a taxation ruling delivered on 31/8/2017 in respect of Bill of Costs taxed at Kshs.1,187,084/-. He deposes that he did not attend taxation so he was never heard. That the time within which he was required to file a reference has since lapsed.

4. The application is opposed. The Respondent relies on Replying affidavit dated 21/3/2019.

5. I have considered the application, the Replying affidavit, counsel rival oral submissions and issues arising thereto are as follows:-

a) Whether prayers nos. 2, 3 and 4 of the Notice of Motion dated 6th March 2019 are spent?

b) Whether the Applicant has met the threshold to warrant leave to be granted for Applicant to file a Reference against the taxation ruling delivered on 31/8/2017?

c) Whether this court can set aside the Taxation ruling delivered on 31/8/2017 and certificate of taxation?

A) Whether prayers nos. 2, 3 and 4 of the Notice of Motion dated 6th March 2019 are spent?

6. The Applicant under prayer nos. 2 in which leave was sought for the firm of M/s Odhiambo Oronga & Co. Advocates to come on record for the Applicant after entry of judgment in place of Nyagilo & Associate was withdrawn on 14th March 2019 at the instance of Miss Adongo, Advocate appearing for the Applicant, consequently that prayer remains marked as withdrawn.

7. On prayers Nos. 3 and 4 the Applicant sought orders pending the hearing and determination of the present application. The Applicant under prayer No.3 sought orders pending hearing and determination of the application there be stay of the Notice to Show Cause and under payer No.4 pending hearing and determination of the application there be stay of execution of the Taxation ruling dated 31/8/2017. The Application under prayer No.3 and 4 sought stay pending hearing and determination of the Application and not beyond that point, as I understand the prayers. The court having heard the application and upon its determination the prayers are spent and the same cannot in my view be granted beyond determination of the current application.

B) Whether the Applicant has met the threshold to warrant leave to be granted for Applicant to file a Reference against the taxation ruling delivered on 31/8/2017?

8. The Applicant seeks leave under prayer No.5 to be granted to him so as to file a reference against taxation delivered on 31/8/2017. The Counsel urged that he sought prayer Nos. 3 – 7 of the application dated 6/3/2019. The Applicant is seeking leave to file reference against the taxation ruling delivered on 31/8/2017 relying on the grounds on the face of the application, urging that the main ground is that the Applicant did not participate in the taxation proceedings as the Applicant had not been served. That he was not aware of the taxation date and is therefore aggrieved by failure of service with Taxation Notice. It is on the other hand urged by the Respondent that the issue for preferring a reference has since lapsed. The Applicant therefore prays for extension of time and pray for stay of execution of the taxation ruling delivered on 31/8/2017 and Notice to Show Cause pending filing of reference.

9. The Respondent/Decree-holder is opposed to the granting of the prayers sought. It is Respondents case that the Bill of Costs dated 23rd May 2017 was duly served upon the Applicant and affidavit of service filed dated 23rd May 2017. That parties appeared before court when directions were given to proceed by way of written submissions. That the Applicant had been served with hearing notice and various affidavits filed.

10. The court record reflects, that a Bill of Costs dated 25th April 2017 seeking Kshs.13, 980,963 was lodged with the registry on 2/5/2017 and Notice of Taxation issued on even date; which as per affidavit of service dated 23rd May 2017 was served on 3rd May 2017 for hearing on 24th May 2017. On 24th May 2017 the Applicant failed to appear. The court ordered the bill be taxed by way of written submissions and Respondent to file submissions within 14 days from then and effect service for the Applicant to file response within 14 days from the date of service. Matter was set down for mention on 21/6/2017. The Applicant was served again as per affidavit service sworn on 11th July 2017 by Samson Otieno Ochola with a letter dated 28th June 2017 and Respondent's submissions dated 21st June 2017 and Respondents' list of documents dated 21st June 2017 and mention notice of 27th June 2017. Further as per Affidavit of service sworn by Salomon Otieno Achola dated 18th July 2017, the Applicant was served with a Ruling Notice dated 13th July 2017, on the same day setting date for ruling on 31st August 2017 at 2.30 p.m.

11. From the court record it is evidently clear, that the Applicant herein was duly served with relevant documents and hearing notices. In his application he has not alluded to the fact that he was not served as urged by his counsel but contends he did not participate in the taxation of the Bill of costs, and in doing so exercised his constitutional right not to take part in the taxation. He cannot blame anyone but himself for failure to participate in the taxation. I find the court gave the Applicant sufficient opportunity to take part in the taxation but failed to do so.

12. The Taxation Ruling from which leave is sought to file a reference was delivered on 31/8/2017. The present application was not filed until 7th March 2019, after a lapse of a period 1 year and 7 months; which period of delay by all standards is an ordinate delay. Secondly the Applicant had not given sufficient or cogent reasons for the delay of 1 year and 7 months without taking any action, against the court's Ruling. I find that there are no good reasons advanced before the court to call for an exercise of court's discretion and allowing of the Applicant's application.

13. The upshot is that the Applicant's application dated 6th March 2019 has not met the threshold to warrant leave to be granted for Applicant to file a reference against the taxation ruling delivered on 31/8/2018.

C) Whether this court can set aside the Taxation ruling delivered on 31/8/2017 and certificate of taxation?

14. The Applicant seeks setting aside the Taxation ruling delivered on 31/8/2017 by the Honourable E.W. Mburu (Mrs), Deputy Registrar in Miscellaneous Case No.9 of 2017 and the certificate of taxation upon such terms as may be just. In the instant matter the Applicant is yet to file reference nor has the Applicant sought setting aside the *ex-parte* orders before the Taxing Master. In view of the aforesaid, I find the prayer herein untenable and without reference having been filed before this court, I am of the view that this court has no jurisdiction to purport to set aside the taxation ruling delivered on 31/8/2017.

15. Having considered the application and upon considering the court record, and the relevant law, I find the Applicant's application dated 6th March 2017 devoid of merit. I accordingly dismiss the application dated 6th March 2017 with costs.

Dated, signed and delivered at Nairobi this 26th day of September, 2019.

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J .A. MAKAU

JUDGE