REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 213 OF 2013

BETWEEN

FRANCIS W. NGARIUKU.....APPLICANT

VERSUS

MEREKA & Co. ADVOCATES.....RESPONDENT

RULING

1. By a Chamber Summons dated **11th** October, 2018 expressed to be brought under the provisions of Rule **11 (4)** of the Advocates Remuneration Order, 2009 and all enabling provisions of the law the counsel for the applicant moved this court seeking orders:-

a. *That the Honourable Court be pleased to enlarge the time for filing the objection to the Taxation herein.*

b. *That leave do issue to the applicant to file an objection to the taxation herein.*

2. The application is premised on the grounds stated on the face of the application and the annexed affidavit of **Mr. Francis W. Ngariuku**. Essentially, the grounds are that *the respondent herein filed an advocate-client bill of costs against the applicant on 26.8.2013 and the applicant was not served with the bill of costs or taxation notices and the bill of costs was taxed ex-parte and that the respondent had extracted a notice to show cause that was due for hearing on 11.10.2018. Further that the applicant became aware of the taxation proceedings when he saw the advertisement in the daily nation indicating that the matter was coming for hearing of the notice to show cause. The applicant avers that the delay in filing the reference was occasioned by failure of the respondent to serve the applicant with the bill of costs and taxation notice.*

3. Counsel from the respondent filed a replying affidavit sworn on **7th** November 2018 averring that *despite the decision of the taxing master, there is no application to seek leave for enlargement of time to file a reference. Learned counsel averred that the court issued a decree in the instant matter and the court cannot set aside the same. Counsel added that the only remedy available is an appeal or a review and that the court had no jurisdiction to grant leave to file an objection to taxation so it can set aside a decree of a court of concurrent jurisdiction. Counsel averred that the averment that the applicant was not served with a bill of costs or taxation notices is not correct because the applicant was served and accepted service as per the affidavit of service Marked DMM4 and further the applicant proceeded to appoint advocates M/s Masara and Co. Advocates in respect of the matter as per annexure DMM5. Learned counsel averred that the said advocates objected to the bill of costs on 29th October 2013 vide letter marked DMM6 and that at all times material to the application, the counsel on record for the applicant were served with the requisite mention and hearing dates and on 28th July, 2015 the court made a ruling whereupon a certificate of taxation was served on the applicant as evidenced by DMM 9a and 9b pursuant to an application made for entry of judgement that was allowed and a decree issued hence in the instant matter the court is functus officio. Learned counsel added that the applicant's advocate ought to have made an application under Order 9 Rule 9 to come on record and further that the applicant is guilty of undue delay since the bill was taxed in 2013 and the instant application has been made almost 6 years later. Counsel urged the court to dismiss the application.*

4. Both counsels filed and adopted their written submissions. Counsel for the applicant submitted that the court is seized with jurisdiction to allow the application and cited the case of **Labh Singh Harman Singh Limited v A.G. & 2Others (2016) eKLR**.

5. Learned counsel cited the case of **Njagi Wanjeru & Co. Advocates v Ben Momanyi t/a Momanyi & Co. Associates (2014) eKLR** that relied on the case of **Leo Sila Mutiso -Vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 Of 1997 (Unreported**), where the Court expressed itself thus:-

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is

granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

6. Counsel submitted that the court must act judiciously in the instant application for the applicant has acted with undue delay being two years after the entry of judgement and three years after the taxation. Counsel submitted that the delay is not explained as the reasons given are not correct and added that there was a presumption of service as per the process server's report as was the case in **Justus Mungumbu Omiti v Walter Enock Nyambati Osebe & 2 others [2010] eKLR.** Counsel submitted that the applicant has not attached a draft reference and there are no triable issues that the court could exercise its discretion to allow the application and added that it has been seven years since counsel acted for the applicant hence he ought to realize the fruits of his labour.

7. Upon analysing the above facts, and upon studying the entire record, I find that the following issues distil themselves for determination:-

a) Whether the firm of O.N. Makau & Mulei Advocates are properly on record for the applicant and whether the application is properly before the court.

b) Whether the court has powers to grant the orders sought.

c) Whether there are grounds for this court to grant the orders sought.

8. Before addressing the above issues, I find it necessary to point out that the court record shows that on 30th October, 2013, the firm of Masara & Co. Advocates filed a notice of appointment together with an objection to the Respondent's bill of costs. However on record there is no objection to the decision of the taxing officer's decision. Curiously, the counsel for the Applicant did not address this issue at all in their submissions. I wish to point out that a court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with.

9. With regard to the first issue, Order 9 Rule 9 is the operative section and note that the instant application was filed by ***O.N. Makau & Mulei Advocates*** and yet the instant matter was concluded vide decree that was issued on 28th April, 2016 there being a notice of appointment that was filed on 30th October, 2013, by the firm of Masara & Co. Advocates. The import of the said provision of the law was discussed in **S.K. Tarwadi v Veronica Muehlemann [2019] eKLR, where** Justice Korir observed that:

"In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 as follows:

"An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first."

10. I have noted that there is no application or prayer by ***O.N. Makau & Mulei Advocates*** or any allusion to the effect that the said advocate is to come on record after the judgement in respect of this matter was issued hence as it is, the firm of Masara & Co Advocates is presumed to act on behalf of the applicant. It is trite law that an advocate may withdraw from the conduct of a case on behalf of a client where the client withdraws instructions from the advocate. This is one of the instances in which the advocate's withdrawal is necessary and in the absence of such application, then any firm other than Masara & Co Advocates purporting to be on record is not properly on record.

11. In this regard, I find that the firm of ***O.N. Makau & Mulei Advocates*** is not properly on record for the applicant; that the instant application is incompetent and I will proceed to strike out the instant application for being incompetent.

12. This being my finding, there is no need to address the other issues that had been framed for determination. The application having been struck out the costs thereof are awarded to the Applicant/ Respondent.

It is so ordered.

Dated and delivered at **Machakos** this **24th** day of **October, 2019.**

D. K. Kemei

Judge