



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 130 OF 2015

BETWEEN

MBALUKA & CO ADVOCATES.....APPLICANT

VERSUS

B2 YATTA RANCHING COOPERATIVE SOCIETY LIMITED.....RESPONDENT

**ADVOCATE/CLIENTS BILL OF COSTS ARISING FROM HCCC 9 OF 2008 BETWEEN B2 YATTA RANCHING
COOPERATIVE SOCIETY LIMITED VERSUS**

CITY COUNCIL OF KITUI & 11 OTHERS

RULING

1. The respondent commenced the application dated 15th June, 2015 under Sections 3 and 3A of the Civil Procedure Act, Order 11 of the Advocates Remuneration Order and all other enabling provisions of the law and what remains of the prayers are an order to set aside the taxation in **High Court Misc. Civil Application No. 54 of 2014** and the consequential certificate of costs as well as an order for reconstruction of the file **Hc Misc. Civil Application 54 of 2014**.
2. The grounds of the application were that the applicant firm filed a bill of costs that was taxed at Kshs 3,748,651 on 27th April, 2015 and a certificate of costs was issued on 28th April, 2015 and that the respondent became aware of the said taxation when a notice was served on them. However at the High Court Registry the respondent was informed that the file could not be traced and hence the respondent could not file this reference on time. It was alleged that there was no basis to award the sum demanded by the applicant as there was no documentation in support of their claim and that the applicant and the respondent had earlier agreed on a fee of Kshs 750,000/- as legal fees for handling the matter. Further that the applicant did not do any work with regard to **HCCC 9 of 2008**.
3. The application was supported by an affidavit deponed by Geoffrey Musya Katabwa on 15th June, 2015 and who reiterated the grounds in the notice of motion.
4. The applicant opposed the application vide a replying affidavit deponed by Rosemay Monyangi who found the instant application an abuse of court process and that the failure by the respondent to pay the taxed costs has caused the applicant financial loss. It was averred that the respondent was aware of the taxation as evidenced by the court attendance memos from the applicant advocate marked RM 1, 2 and 3. It was averred that a notice was issued to the respondents with regard to the ruling in the instant matter and were thus aware of the instant matter. Further, that the Kshs 750,000/- was agreed as legal fees but however it was not to apply as the full legal fees and in placing reliance on Section 46(d) of the Advocates Act Cap 26 it was averred that an agreement for fees less than scale is not valid and in this regard the deponent urged that the court dismiss the instant application.
5. There is a supplementary affidavit on record on behalf of the respondent where the deponent averred that they never received a ruling notice and that the property that is the subject matter of the taxation was not valued at Kshs 2.8 billion as claimed and reiterated that the applicant did not render any legal services and who is now seeking to reap where it did not sow.
6. The parties were directed to file written submissions. Counsel for the respondent in placing reliance on the case of **Kezia Gathoni Supeyo v Yano T/a Yano & Co Advocates (2019) eKLR** in which an application/reference against a taxed amount was allowed and re-taxation ordered and urged the court to allow the application.
7. Counsel for the applicant in the submissions in reply framed three issues for determination. Firstly whether the taxation and ruling in **Hc Misc Application 54 of 2014** was procedurally done; secondly whether stay of execution of the taxed bill will be prejudicial to the Respondent and finally whether a balance of convenience tilts in favour of granting the prayers sought. On the first issue, counsel submitted that the application for taxation in respect of **HCCC 9 of 2008** was made and served on the respondent together with the bill of costs and

they replied vide an affidavit by Miriam Mbithe David filed on 5th May, 2014 objecting to the bill. Further that the parties appeared before the deputy registrar and a hearing date was fixed by consent and a ruling was delivered on 25th April, 2015 whereupon a certificate of costs was issued. Counsel submitted in this regard that the respondent had an opportunity to object to the bill of costs and the deputy registrar heeded to their objection and awarded costs at Kshs 3,748,651/- instead of the claimed Kshs 10,646,290/-. Counsel submitted that a determination in taxation is conclusive and placed reliance on the case of **Kinyua Muyaa & Co Advocates v KPA Pension Scheme & 8 Others (2015) eKLR**. On the 2nd issue, counsel submitted that the bill was taxed in 2015 and setting aside the same will inconvenience the applicant in balancing his books. On the 3rd issue, in placing reliance on the case of **First American Bank of Kenya v Shah & Others (2002) 1 EA 64** where it was observed that the court cannot interfere with the decision of the taxing master unless it was based on an error of principle. Counsel submitted that the prayers sought ought not to be granted.

8. Having considered the pleadings in respect of the instant application as well as the submissions of parties, the issue for determination is whether the court should grant the orders sought.

9. The 1st prayer sought is that of reconstruction of the file in respect of **Hc Misc Civil Application 54 of 2014** that the respondent has averred is missing and or cannot be traced. In the 2nd Edition of the **High Court of Kenya Registry Operation Manual** at pages 33-34, paragraph 4.6 the following guidelines on tracing and reconstruction of missing files are found: -

“If a file is missing, the Registry will take the following steps:-

a) The Registry Supervisor checks the file movement register to identify the person in whose possession the file was last recorded. The Supervisor instructs him/her to trace the file.

b) If the file is not traced, the Registry Supervisor circulates a memo to all staff in the Station/Registry asking them to check whether the file is in their possession. If the file is not found within 24 hours, the Supervisor will notify the Deputy Registrar.

c) The Deputy Registrar then initiates a special search.

d) If the file is not traced after this first search, the Registry Supervisor writes the words ‘original file missing’, in pencil, on the relevant case register.

e) The Registry Supervisor then enters the details of the missing file in the register of missing files which is maintained by the Registry Supervisor.

f) After a fruitless search of 14 days, the Deputy Registrar issues a certificate to confirm the loss and recommends the reconstruction of the file.

g) Parties are informed of the non-availability of the file in writing by the Deputy Registrar with a recommendation for reconstruction.

h) In the event that a missing file is traced, the date of recovery is recorded in the case register and its availability is communicated to the parties concerned by the Deputy Registrar within 24 hours of its tracing. A certificate confirming the recovery is issued.

i) The file once traced is merged with any skeleton file that may have been opened.”

10. In light of the foregoing, there is no need for a formal application for opening of a skeleton file, as suggested by the Applicant since the need for the same is covered under the Manual. In this regard, I shall direct that the Registry staff shall follow the said procedure to enable the availability of the said file in **Hc Misc Civil Application 54 of 2014** whether in original or skeleton form.

11. The next matter to be considered is Whether the Taxation award given by the Taxing Officer in **Hc Misc Civil Application 54 of 2014** should be set aside.

12. In determining the issue, I will bear in mind the principle established by decided cases that *“an appellate court will only interfere with the decision of the Taxing Master, where it is proven that his/her discretion was exercised injudiciously or that he/she misdirected himself/herself on the law”*. I am also aware that the file in respect of **Hc Misc Civil Application 54 of 2014** is said to be missing and therefore I will be rather limited in making any decision touching the said taxation. Be that as it may, I have not seen any request for written reasons by the deputy registrar for a decision as required under Paragraph 11 or an application for reference or an application for extension of time within which to file a reference that is provided for within the same order.

13. Paragraph 11 of the Advocates’ Remuneration Order provides as follows:

“11. Objection to decision on taxation and appeal to Court of Appeal.

(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 subparagraph (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), may with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(5) 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."

14. In light of the absence of the file in **Hc Misc Civil Application 54 of 2014**, I am unable to tell whether indeed such steps were made and I have come to the only conclusion that my decision on the 2nd issue would have to await the outcome of compliance with the directions in respect of Prayer 2. In this regard I will stay the decision in respect of prayer 4 until the file is availed and in the meantime, interim orders are extended in terms of prayer 3. The matter shall be mentioned in two weeks' time to enable an update on the progress. Each party to bear their own costs.

It is so ordered.

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

D. K. Kemei

Judge