



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
MISCELLANEOUS CAUSE NO. 533 OF 2016

KTK ADVOCATES.....ADVOCATE/RESPONDENT

-VERSUS-

CPF FINANCIAL SERVICES LIMITED.....CLIENT/APPLICANT

RULING

[1] The firm of **KTK Advocates** (hereinafter "**the Advocate**") filed the Advocate/Client Bill of Costs dated **23 November 2016** herein for taxation in connection with services rendered to the Client, **CPF Financial Services Ltd.** The Advocate contended that the Bill is respect of the instructions it had been given by the Respondent to recover outstanding contributions to the tune of **Kshs. 2,748,082,560/=** from **Nairobi City Water & Sewerage Co. Ltd** on its behalf. In response to the Bill of Costs, the Client filed a Notice of Preliminary Objection on **13 January 2017** denying the retainer and asking that the Bill of Costs be struck out. The Preliminary Objection was taken before the Deputy Registrar in her capacity as the Taxing Officer, and a decision rendered by her on **22 December 2017**. The Taxing Officer was of the view that the Preliminary Objection had failed to meet the threshold laid down in **Mukisa Biscuit Manufacturing Company Ltd vs. West End Distributors Co. Ltd.**, as it did not raise points of law; but was based on disputed facts.

[2] The Client, being aggrieved by that decision, filed the Notice of Motion dated **9 February 2018**, seeking the following orders:

[a] That the Taxing Master's decision delivered on **22 December 2017** in which she dismissed the Client's Preliminary Objection be vacated and/or set aside;

[b] That upon setting aside of the said decision the Preliminary Objection by the Client be upheld and the Advocate's Bill of Costs be struck out with costs;

[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 misdirected herself in both law and fact in arriving at the decision she took by failing to appreciate that the Preliminary Objection raised purely issues of law and that the same met the threshold in **the Mukisa Biscuit Case**. It was further averred that the Taxing Master misdirected herself, both in law and in fact, in failing to give a reasoned decision based on the law and the facts placed before her; in failing to adhere to the doctrine of *stare decisis*, despite the fact that authorities by superior courts on similar issues had been placed before her in support of the Preliminary Objection; and in failing to appreciate that the issues raised before her could only be canvassed before the taxation and not during the taxation. Accordingly, it was the Client's prayer that the orders sought in the Notice of Motion dated **9 February 2018** be granted.

[4] While the said application was pending hearing and determination, the Advocates' Bill of Costs came up before the Taxing Master, who was poised to proceed with the taxation, having disposed of the Preliminary Objection. Thus the record of her proceedings on **14 February 2018** shows that she issued an order thus:

"I have not seen the notice of motion on the file. Taxation on 27.2.2018. Taxation Notice to issue."

[5] Similarly, on **27 February 2018**, Counsel for the Client brought it to the attention of the Taxing Master that a Reference had in fact been filed, and asked to be allowed to have the same placed before a Judge for determination before taxation could proceed. That request was opposed by **Ms. Makori** for the Advocate, whose argument was that there was no provision in law for stay of taxation; and that a Reference

could only lie after taxation. The Taxing Master agreed with Counsel for the Advocate and issued an order in the following terms:

"Having heard both advocates and noting that the purported reference is not on the court file and that reference is usually done after the bill has been taxed. I direct that the party to proceed with taxation of the bill."

[6] Accordingly, directions were given for the filing of written submissions in connection with the taxation and a mention set for **19 March 2018** to confirm compliance. It was in the light of the foregoing that the Client filed the Notice of Motion dated **7 March 2018**, which is the subject of this Ruling. The said Notice of Motion was filed under **Section 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 50** of the **Civil Procedure Rules**, for Orders that:

[a] Spent

[b] There be a stay of proceedings in regard to the taxation of the Advocate's Bill of Costs dated **23 November 2016** pending the hearing and final determination of the application dated **9 February 2018**;

[c] Spent

[d] That the costs of the application do abide the outcome of the said reference.

[7] The application was supported by the affidavit annexed thereto, sworn by **Vivianne Wachanga**, Advocate, sworn on **7 March 2018**. She reiterated the contention of the Client that, there being a pending Notice of Motion dated **9 February 2018** on the file, the same ought to be heard and determined by a Judge before taxation can proceed. She further averred that despite the fact that the existence of the said Notice of Motion has been brought to the attention of the Taxing Master, she proceeded to give directions for the taxation to proceed; thereby exhibiting not only a biased attitude, but also disdain for the doctrine of *stare decisis*. **Ms. Wachanga** further averred that unless the prayers sought are granted, there would be a serious breach of the law and a miscarriage of justice from the standpoint of the Client.

[8] Learned Counsel, **Mr. Njenga**, urged the Client's case and reiterated the grounds set out on the face of the Notice of Motion dated **7 March 2018** and the averments in the Supporting Affidavit annexed thereto. He argued that a valid Reference has been filed which could not be simply wished away by the Taxing Officer. It was the contention of **Mr. Njenga** that the Taxing Officer was obliged to have the Reference disposed of by a Judge before proceeding with taxation. He relied on **D. Njogu & Co. Advocates vs. National Bank of Kenya Ltd [2016] eKLR** as well as the authorities that he had relied on in urging the preliminary objection before the Taxing Officer. He therefore prayed for an order of stay of taxation pending the hearing and determination of the Client's Reference.

[9] The Advocate resisted the application by way of the Preliminary Objection filed herein on **12 March 2018**, contending that the Court has no jurisdiction to hear the application dated **7 March 2018**; and that the same is for striking out. On behalf of the Advocate, it was the submission of **Mr. Kipkorir** that there is no Reference, properly so called, before the Court. He pointed out that the Notice of Motion dated **9 February 2018** was filed two months after the Ruling of the Deputy Registrar; and that the procedure set out in **Rule 11** of the **Advocates (Remuneration) Order** was never followed; and therefore what is purported to be a Reference is not a Reference for purposes of **Rule 11**. Counsel relied on **Supreme Court Reference No. 1 of 2013** for the proposition that rules of procedure must be strictly complied with; and that the Constitution did not do away with the rules of procedure.

[10] It was further the submission of **Mr. Kipkorir** that the jurisdiction to entertain a Reference only arises after taxation and not before. He cited the cases of **Lumumba Mumma Kaluma vs. Sachin Shaha [2013] eKLR** and **Ochieng Onyango Kibet & Ohaga vs. Adopt A Light Limited [2007] eKLR**. He urged the Court to dismiss the application to enable the parties go back to the Deputy Registrar for taxation; and pointed out that the Bill of Costs has been pending taxation for two years now, to the prejudice of the Advocate.

[11] Having given consideration to the arguments advanced herein and the authorities relied on by Learned Counsel for the Advocate, it is apparent that they have nothing to do with the instant application for stay of taxation. In **Limumba Mumma Kaluma vs. Sachin Shaha** (supra), 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. The Preliminary Objection was dismissed on the ground that that was not a matter that could be disposed of by way of preliminary objection. And 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. Clearly, and as pointed out by Counsel for the Client, the Advocates arguments appear to be levelled against the so called Reference as opposed to the Client's application for stay of proceedings/taxation.

[12] It is now settled that the only recourse available for a party who feels aggrieved by a decision of the Taxing Officer is by way of Reference to a Judge pursuant to **Paragraph 11** of the Advocates Remuneration Order, which is a complete code in itself. As was aptly stated by **Ringera, J.** (as he then was) in **the Matter of Winding Up of Leisure Lodges Limited, Winding Up Cause No. 28 of 1996, this is the recourse available whether it be on the quantum awarded on the bill as a whole or any items thereof or on the validity of the bill as a whole or any specific items**

[13] Similarly, in **Machira and Co. Advocates vs 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."

[14] The Ruling of the Deputy Registrar that gave rise to the Notice of Motion dated **9 February 2018** was in respect of a Preliminary

Objection on a point of law as to the validity of the Bill of Costs; and therefore having filed "an appeal" by way of that Notice of Motion, it would only be fair and just that the taxation be stayed pending the hearing and determination thereof. In my view, it would be pre-emptive, at this stage, to argue that the Reference is a non-starter, granted that it is yet to be formally canvassed before the Court. Similarly, the Taxing Officer fell into grave error by simply ignoring the application and purporting to proceed with the taxation on the basis that no taxation had taken place from which a Reference could arise.

[15] I would thus agree with the expressions of **Azangalala, J.** (as he then was) in **The Board of Trustees, National Hospital Insurance Fund v. Kipkorir, Titoo & Kiara Advocates, HCCC No. 154 of 2004** that taxation proceedings can, in appropriate cases and for sufficient cause, be stayed. Here is an excerpt of what the Learned Judge had to say:

“The merits or ...demerits of the plaintiff’s allegations cannot be determined in this application. That will be left for the Judge who will try the action. I am however certain that the said allegations cannot be determined by the Deputy Registrar during taxation of the defendant’s bill of costs. Which way then should my discretion be exercised? Should I let the taxation...proceed where the very basis of the bill of costs is being challenged or should I stay the taxation to await an adjudication over the complaints by the plaintiff? In my view the interests of justice lean in favour of granting a stay of taxation. The reason is that taxation determines the quantum payable. It does not address the issue of whether or not any fees has been earned. Taxation can therefore wait. The main adverse consequence is that the defendant will be delayed in realizing the fruits of its labour.”

[16] In the same vein, I would find persuasive the words of **Ojwang, J.** (as he then was) in **Kenya Pipeline Company Limited vs. Nyamongo Advocates [2016] eKLR**, that:

"...taxation of costs comes at the conclusion of a normal process of hearing, conducted by virtue of the Civil Procedure Act (Cap. 21) and the Civil Procedure Rules. There may, therefore, be taxation-of-costs matters which are so enmeshed in the motions of the trial process itself, that it would not be out of order to raise issues about them within the framework of normal civil procedure; and in any case, any meet directions on the hearing of suits and applications may be made by the Court, by virtue of the broad discretions created by the Constitution of Kenya and the Civil Procedure Act (Cap. 21).

[17] Accordingly, I would grant the Client the opportunity to ventilate its so called Reference or appeal by way of its Notice of Motion dated 9 February 2018; and would thus allow the application dated 7 **March 2018** and issue Orders as hereunder:

[a] That there be a stay of proceedings in regard to the taxation of the Advocate's Bill of Costs dated **23 November 2016** pending the hearing and final determination of the application dated **9 February 2018**;

[b] That the costs of the application do abide the outcome of the said reference.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH 2018

OLGA SEWE

JUDGE