



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CAUSE NO. 40 OF 2015

IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

GEORGE MIYARE T/A ATONGA MIYARE & ASSOCIATES

ADVOCATESADVOCATE/APPLICANT

VERSUS

EVANS GOR SEMELANG'OCLIENT/RESPONDENT

RULING ON REVIEW

1. On 8th November, 2017 this court delivered two decisions – one ruling and a judgment. The judgment was in respect of an application by the advocate seeking for judgment and decree on a certificate of taxation dated 17th January, 2017 with interest at 18% p.a from date of taxation until payment in full. On the other hand, the court also delivered a ruling striking out the client's application dated 20th January, 2017 seeking to set aside and or vary the ruling and reasons for taxation by the taxing officer dated 22nd December, 2016. The two applications were heard together.

2. The record shows that the advocate/Respondent put in motion the process of execution of the decree for recovery of his costs and warrants of attachment and sale of movable property belonging to the client/Applicant were issued by the Deputy Registrar. However, on 14th December, 2017 over one month after the decision of this court striking out the client's application for setting aside the ruling/certificate of taxation issued in favour of the advocates, the client filed a notice of motion dated 11th December, 2017 seeking to have the orders of this court made on 8th November, 2017 set aside on account that they were erroneous on account of a mistake of fact that the applicant had filed the Notice of Motion dated 20th January, 2017 out of time. The application also sought to stay execution against the client; and that this court do grant any other such further orders as it shall deem fit and just for the preservation of justice; and costs of the application to be provided for.

3. The client's application is predicated on 9 grounds but which turns out to be one main ground to wit, that the court erroneously held that the application for setting aside the ruling and reasons for taxation were erroneous because the time within which the same court have been filed stopped running as

stipulated in Order 50 of the Civil Procedure Rules, for reasons that from 22nd December, 2016 to 13th January, 2017 was excluded from computation of time for doing anything, and that as the ruling for taxation was made on 22nd December, 2016 the filing of the application on 23rd January, 2017 was within time as stipulated in Order 50 (4) of the Civil Procedure Rules.

4. The application is supported by the affidavit of Lawrence O. Nyangito Advocate sworn on a date which is undisclosed but filed in court on 14th December, 2017 elaborating on the grounds for review and emphasizing that the court made an error/mistake when it held that the application for setting aside the ruling and reasons for taxation was filed out of time.

5. The advocate filed a replying affidavit sworn by George Miyare on 22nd January, 2018 contending that the Mr. Lawrence Nyangito who swore a supporting affidavit lacks authority to do so on behalf of his client; that no objection was filed to the taxation as mandated by law within time or at all hence the court was correct in finding that the chamber summons dated 20th January, 2017 was fatally incompetent; that the client deliberately overlooked the established procedure under the relevant statute for challenging the decision of both the taxing master and the Judge in cases of reference and instead imported the Civil Procedure Act and Rules which is a totally different legal regime; that the Notice of Motion dated 11th December, 2017 is a disguised application for leave to appeal to the Court of Appeal and or for enlargement of time within which to appeal the impugned decision of this court hence it is misconceived and lacks merit; that it is a deliberate delay of the client to deny the advocate his costs for services rendered; that the application is an abuse of court process; that the computation of time by the court was correct as the applicable law is paragraph 11 of the Advocates Remuneration Order 2014; that there is no sufficient reason for setting aside the decision of this court and that the application herein offends public policy on finality of litigation and an abuse of court process.

6. The client then filed a further replying affidavit sworn by his Counsel Mr. Nyangito advocate on 6th March, 2018 contending that the advocate's assertion are incorrect, that the challenge to the advocate swearing an affidavit on behalf of his client is settled by this court in **Regina Waithera Mwangi Gitau vs. Boniface Nthenge [2015]eKLR**; that Order 50 of the Civil Procedure Rules is clear that time for doing anything including filing of documents or any application stops running between 22nd December, 2013 January, hence the application by the client was filed in time after the delivery of the ruling and reasons for taxation; that this court therefore may have by mistake overlooked the provisions of Order 50 of the Civil Procedure Rules and proceeded to dismiss the client's application dated 20th January, 2017 which mistake can be corrected by this court in the interest of justice.

7. The parties' advocates argued the application for review orally on 7th March, 2018 with Mr. Nyangito advocate arguing the prayers for review on behalf of the client/applicant and reiterating the grounds and depositions in his affidavit in support and the further 'replying'(sic) affidavit while urging the court to allow his application dated 11th December, 2017. Counsel maintained that the reference was filed in time because time stopped running between 22nd December, 2016 and 13th January, 2017.

8. In opposition, Miss Owino argued on behalf of the advocate/Respondent reiterating the deposition in contention by the affidavit of George Miyare and maintained that the Civil Procedure Act and Rules do not apply to the matters herein for taxation but that the Advocates Act as stipulated in paragraph 11 of the Advocates Remuneration Order is the applicable law. It was also submitted that this court's decision of 8th November, 2017 considered the issues extensively at paragraph 15 – 19 before entering judgment hence this court was *fuctus officio*.

9. Reliance was placed on **Hezekiel Dira T/a H. Oira Advocate Vs. KCB [2015] ekLR** on the inapplicability of the Civil Procedure Act in matters of taxation. Counsel also relied on paragraph 11 of the Advocates Remuneration Order on the procedure for challenging decisions of the court in References and urged the court to dismiss the client's application with costs.

10. In a brief rejoinder, Mr. Nyangito maintained that the Hezekiel Oira case cited by Miss Oviwo was

irrelevant as it deals with issues of whether or not there was retainer between an advocate in a public office and his employer where the advocate had left public service and claimed for advocate/ client fees.

11. Mr. Nyangito also maintained that Order 50 of the CPR governs all Civil proceedings and also applies to matters of taxation. Further, that Order 45 of the Civil Procedure Rules allows both an appeal and review. He maintained that his client filed objection to taxation in time hence the court should allow the application for review.

DETERMINATION

12. I have carefully considered the client/applicant's Notice of Motion dated 8th November, 2017, the grounds, the supporting and further affidavit thereof; and the Replying affidavit filed by the advocate/Respondent in opposition thereto.

13. I have given equal consideration to the parties' advocates' oral submissions for and against the motion for review of the ruling of this court delivered on 8th November, 2017.

14. The impugned ruling determined what the client/applicant considered to be a Reference challenging the taxing master's ruling and reasons for taxation given on 22nd December, 2016 in an advocate/client bill of costs.

15. This court at paragraph 8 of the said decision first explained the applicable law in matters of taxation between client and advocate on costs and held that the applicable law was the Advocate's Remuneration Order and more specifically, paragraph 11 thereof which sets out the procedure for filing of References, starting with an objection to the decision of the taxing officer within 14 days of the decision by giving notice in writing to the taxing officer, of the items of taxation to which he objects and upon getting the reasons or if the reasons are in the ruling on taxation, then the objector may, within 14 days apply to a Judge by chamber summons, a reference setting out the Reference or challenge. In other words, the applicant must first file an objection stipulating what items he objects to before filing a chamber summons.

16. In this case, the court was categorical at paragraph 14 of the decision that between 22nd December, 2016 and 23rd January, 2017 when the chamber summons for challenging the taxation was filed, there was no objection filed with regard to any specific items that the Respondent/client wished to challenge in the subsequent reference by way of chamber summons. And that such objection ought to have been filed within 14 days after the decision by the taxing officer, by giving notice to the taxing officer of the items of taxation to which the client objects.

17. The court at paragraph 16 was also clear that in this case, the applicant simply filed an application challenging the taxation made on 22nd December, 2016 and urging the court to vary/set aside the said taxation.

18. At paragraph 17, the court further made it clear that the applicant was obliged to file an objection to the specific items of taxation that he had issues with, within 14 days of the decision.

19. At paragraph 18, the court even claimed further that an enlargement of time could be sought where the 14 days had lapsed before filing of objection.

20. Paragraph 19 of the decision sought to be reviewed stipulates that no such objection or application for enlargement of time was even sought hence the Reference as filed was fatally incompetent as it was not filed on the basis of any objected to items and was filed outside the stipulated time frame hence it was struck out at paragraph 20.

21. From the above excerpts of the impugned decision, it is clear that this court did consider the issue of filing of objection to taxation to be an important factor in filing of References. On the other hand,

whereas the court did not consider the issue of time stopping from 21st December to 13th January as stipulated in Order 50 Rule (4) of the CPR, nonetheless, in my view, that was not a relevant factor for my consideration for the reasons that No objection to taxation was filed whether within the 14 days from 22nd December, 2016 or thereafter. What was filed was a Reference without any objection being first lodged to the specific items objected to. It is for that reason that this court found and I would still find that the application as a Reference was incompetent because it was not preceded by an objection to any items of the taxation ruling by the taxing master.

22. The applicant simply filed a Reference without following the procedure laid out in paragraph 11 of the Advocates Remuneration Order.

23. Now on the question of time stopping to run, Order 50 of the Civil Procedure Rules is on ‘TIME’ Under Rule (4) thereof, it is stipulated that:

“except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: provided that this rule shall not apply to any application in respect of a temporary injunction.”

24. The applicant’s Counsel Mr. Nyangito avers that the above provision is of universal application to all matters before the court because matters of taxation are civil in nature hence the Civil Procedure Act and Rules are applicable and that therefore the court overlooked Order 50 Rule (4) of the CPR when it found that the Reference was filed out of time stipulated in paragraph 11 of the Civil Procedure Rules. The Respondent advocate submitted that the procedure and law applicable in matters of advocate/client taxation is the Advocates Remuneration Order under the Advocate’s Act, not the Civil Procedure Rules.

25. The question is whether the Civil Procedure Rules in which time does not run applies to matters of taxation between client and advocate which are governed by paragraph 11 of the Advocates Remuneration Order.

26. Section 3 of the Civil Procedure Act stipulates that;

“In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special form or procedure prescribed by or under any other law for the time being in force.”

27. Although Mr. Nyangito dismissed the relevance of the **Hezekiel Oira case** to this case, it is clear that he was oblivious of the principles espoused in that case. The court was clear that the applicant cannot invoke the Civil Procedure Act and Rules made thereunder to circumvent the procedure provided under the Advocates Act and Remuneration Order in regard to review of the decision of the taxing officer in 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 their capacity as the Deputy Registrar of this court.

28. The court also made it clear that the Advocates Act is the legal regime governing taxation of costs whether party and party or Advocate/client and that the Advocates Act is a complete statute in itself on matters of taxation of costs and as such, a party cannot invoke the provisions of the Civil Procedure Act or Rules made thereunder for purposes of challenging any decision of the taxing officer. The court was fortified by the Court of Appeal in **Machira & Co. Advocates vs. Arthur K. Magugu [2012] eKLR** where the Court of Appeal referring to the High Court decision between the same parties as was held by Hon. Justice Ringera (as he then was) stated, *inter alia*:

“----with regard to the advocates bill of costs, we agree with the decision of Judge Ringera in Machira vs. Magugu (1) that the Advocates Remuneration Order is a complete code which

does not provide for appeals from the taxing officer's decision. Rule 11 thereof provides for ventilation of grievances from such decisions though 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 ---"

29. Section 3 of the Civil Procedure Act as cited above is also clear that where there is a special procedure provided by any other written law, then that special procedure would be applicable and therefore the Civil Procedure Act and Rules cannot be said to be of universal application to all matters which appear to be civil in nature as asserted by Mr. Nyangito.

30. In **Kimani Wanyoike vs. ECK CA 213/95** the Court of Appeal was clear that

"where there is a law prescribed by either a constitution or an Act of Parliament governing a procedure for the redress of any particular grievance, that procedure should be strictly followed."

31. The same position was stated by the Court of Appeal in *speaker of the National Assembly vs. Kamme* [2008] Klr 425.

21. Similarly, in **Mutanga Tea & Coffee Company Ltd Vs Shikara Limited & Another** [2015] e KLR the Court of Appeal reiterated the foregoing as follows:

".....This court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes (Speaker of the National Assembly V Karume)(supra), was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by the Constitution. In granting the order, the court made the often -quoted statement that:

"[W] here there is a clear procedure for the redness of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.(see also Kones v Republic & Another exparte Kimani Wa Nyoike & 4 Others [2008] e KLR (ER) 296).

"It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court. (Emphasis added).

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159)(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. (Emphasis added).

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner....

.....We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very raison d'être of the mechanisms provided under the two Acts....."(emphasis added).

32. On Mr. Nyangito's reliance on the overriding objectives of the law, the case of **Karuturu Networks Ltd & Another vs. Daily Figgis Advocates CA 293/2009** is relevant. In that case, the Court of Appeal made it clear that:

"The application of the overriding objections 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 vide the court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the first expedition, proportionate and affordable resolution of appeals."

33. It follows that the question of whether Order 50 Rule 4 of the Civil Procedure Rules is applicable to these proceedings is a foregone conclusion. It does not apply. Paragraph 11 of the Advocate Remuneration Order is so elaborate on the time frames for filing of objection to taxation, the Reference and even provides for enlargement of time that there is no gap capable of being filed by Order 50 Rule 4 of the Civil Procedure Rules.

34. Furthermore, the import of Section 3 of the Civil Procedure Rules is to acknowledge laws like the Advocates Act and Remuneration Order in matters of taxation of costs such that parties would be bound by the applicable law to the circumstances of their case and not to import Order 50 Rule 4 which is not a rule of general application to all matters before the court, irrespective of whether such matters were of civil nature or not.

35. In my humble view, therefore, there was no mistake, error or overlooking by this court of the provisions of Order 50 Rule 4 of the Civil Procedure Rules in making of the decision of 8th November, 2017 which is sought to be reviewed. The court was conscious of the provisions of Section 3 of the CPA and Order 50 Rule (4) of the CPR but did not have to allude to them because they were not in issue at that time. What was in issue was paragraph 11 of the Advocates Remuneration Order which sets out the procedure for challenging decisions on taxation.

36. In addition, the decision which is impugned also entered judgment for the advocate in terms of the certificate of costs. The applicant client has not sought to vacate that judgment. It would serve no useful purpose to purport to review a ruling which review would not have the effect of vacating the judgment entered into against the client applicant herein.

37. On the question of Mr. Nyangito swearing an affidavit on behalf of his client, I find no fault in that as matters of review are matters which an advocate has personal knowledge of as they are matters of law.

38. For all the above reasons, I find the motion by the client/applicant not merited. It is a misapprehension of the law.

39. The same is hereby dismissed with costs to the advocate/Respondent.

Dated, Signed and Delivered in open court at Nairobi this 9th day of March, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Miss Wanjiku for Applicant

Miss Mutuku for the Respondent

CA: Mohamed Kombo