REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 418 OF 2017

ALFRED OCHIENG OPIYO T/A

OCHIENG OPIYO & CO. ADVOCATES.....APPLICANT

- VERSUS -

EXPORT HYDRO PUMP & SERVICES (AFRICA) LIMITED.....RESPONDENT

RULING

1. By the consent of the parties, this court shall deliver one ruling which relates to Misc. Civil Application nos. **423/2017, 425/2017,415/2017,416/2017,419/2017,418/2017**,and **417/2017.**

2. This court by this ruling is considering two applications. The two applications have been filed in all the files stated in the previous paragraph. The facts in all those files are similar and hence why the parties consented to one ruling being delivered for all those matters.

3. The first in time is the ***Notice of Motion*** filed by ***Alfred Ochieng Opiyo T/a Ochieng Opiyo & Co. Advocates*** *(herein after refered to as the advocate)* dated ***9th February, 2018.*** By that application the advocate seeks entry of Judgment of the taxed cost, by the taxing master of this Court, of the Advocate/Client bill of costs. Those costs were taxed on ***5th December, 2017*** and a ruling was delivered by the taxing master on ***30th January, 2018***.

4. The second application is by a chamber summon dated ***26th April, 2018.*** It is filed by ***Export Hydro Pump & Services Africa Limited*** *(hereinafter referred to as the client)*. By that application, the client seeks orders that this court be pleased to set aside the taxing master's decision and the certificate of taxation; leave to be granted to the client to defend the Advocate/Client bill of costs and the bill of costs be taxed afresh; that in the alternative, the client be granted extension of time to file a reference to the taxation.

CLIENT'S APPLICATION

5. The client's application is supported by various grounds. Which were advanced by a supporting affidavit sworn by the learned counsel for the client.

6. The client by that supporting affidavit, stated that the client requested from the advocate by a letter dated ***12th September, 2017***, an itemised bill of costs. The advocate by his letter dated ***21st September, 2017***, sent the Advocate/Client bill of costs as requested.

7. It was the contention of the client that notwithstanding the request for itemized bill of costs, the advocate proceeded to tax his bill of costs. The client by it's supporting affidavit, stated that such a taxation was in bad faith and was an attempt to steal a match. In the clients view the taxed costs are exagerrated and unfair.

8. The advocate responded to the client's application through the affidavit of ***Alfred Ochieng***. By that affidavit the advocate confirmed that the Advocate/Client bill of costs was filed in court on ***17th October, 2017***. The bill of costs and notice of taxation was served upon the client on the ***19th October, 2017***. That the firm representing the client only filed a notice of appointment but failed to attend taxation.

9. The affidavit of the advocate stated that the client's application was incompetent because it offends paragraph 11 (4) of the Advocate (Remuneration) Order. In the advocate's view, in his deposition, only a diligent party should be granted leave to file a reference out of time.

10. By its further affidavit, again sworn by its advocate, the client stated that the first time it became aware of this matters, was when it's advocate was served with the advocate's application to enter judgment of the taxed costs.

ANALYSIS AND DETERMINATION OF CLIENT'S APPLICATION

11. When the client filed it's application, the Advocate/ Client bill of costs had been taxed on ***5 December, 2017*** and a certificate of taxation was issued by the taxing master dated ***8th February, 2018***. In view of that background, how should the client have challenged that taxation? That answer, is found in the Advocate Remuneration Order. Paragraph 2 of that order provides in part:

> ***"this order shall apply to the Remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof....."***

12. It is not disputed that the advocate with the bill of costs previously acted for the client herein. It is on the basis of that, that the advocate raised the Advocate/Client bill of costs, whose taxation the client contests by it's application under consideration.

13. Having established that there was that relationship between the advocate and client, and having noted that by the time the client filed its application the bill of costs had been taxed, there is but one way that the client should have challenged that taxation. That challenge should have been mounted on paragraph 11 of the Advocates (Remuneration) Order. That paragraph provides a detailed process of objection to taxation as seen below:

> *"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 subsection (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)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. Paragraph 12 of that order, permits a reference by consent of the parties. In this matter, there is no such consent and the client was therefore bound to follow the process set out in paragraph 11. It is as provided under that paragraph 11 that a party aggrieved by the taxation should access the High Court or the Court of Appeal as the case may be.

15. The supreme court in a case pertinent to what is before court had an occassion to consider the importance of adherance to the laid down procedure in approaching a court of law. This was in an appeal of an election petition that is the case of ***Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016]eKLR*** where the court stated thus:

> *"This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.*
>
> *Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the constitution, which proclaims that,* ***"...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities".*** *This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts."*

16. The importance of following procedure of pargraph 11 of the order, was underscored by ***Justice R. E Aburili*** in the case ***Vishisht Talwar v Anthony Thuo Kanai T/a A. Thuo Kanai Advocates [2014] eKLR*** where the learned judge stated:

> *"The learned judge referring to a decision in the* ***Court of Appeal in Machira & Co. Advocates – vs- Arthur K. Magugu & Another CA 199/2002[2012]eKLR*** *stated that:*
>
> ***"Rule 11 thereof provides for ventilation of grievances from such decisions through 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. Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate's bill of costs through references under Rule 11 to a Judge in chambers."***

The learned Judge found fault with a reference of taxed costs that was filed as an appeal rather than a reference and proceeded to state further:

> ***"I have no doubt in my mind that the above cited decisions set out good law regarding the procedure to be adopted in challenging taxed bill of costs whether it is between party and party or advocate and client."***

17. The client failed to request for reasons to the decision of the taxing master within 14 days as provided under paragraph 11, to enable it file it's reference objecting to the taxed costs.

18. It is however noted that the client has by it's application sought leave to file a reference out of time. The main ground upon which the client seeks that leave is that the advocate failed to serve notice of taxation, that the taxed costs were exagerrated, unfair and that the taxation amounted to miscarriage of justice.

19. On the issue of service it is important to state that there is on record an affidavit of service sworn by ***Dan Achando***. By that affidavit the process server stated that he on ***15th November, 2017*** effected service of the bill of costs and the notice of taxation upon the client and specifically served them on an administrative assistant by the name of ***Vivian Otambo***.

20. There was no affidavit evidence, either by the client or by the said ***Vivian Otambo*** stating that such service was not effected. It is important to state that service on the client, through ***Vivian Otambo*** was effected on ***15th November, 2017***. The notice of appointment of ***CM Advocates LLP in Miscellaneous Application No. 423 of 2017***, was filed in court on ***21st March, 2018***. That filing was way after the taxation and after the issuance of the certificate of taxation. There was therefore no obligation on the part of the advocate to serve the bill of costs and notice of taxation on CM Advocates LLP because by the date of taxation that firm was not on record.

21. The client failed to challenge service upon itself of the bill of costs and notice of taxation. It was not enough for the client's advocate, who was not on record, to depone that the client was not served.

22. There is an affidavit on record showing service on the client. With that affidavit, there is a presumption of service of the client. See the case of ***Justus Mungumbu Omiti v Walter Enock Nyambati Osebe & 2 Other [2010] eKLR*** where the court stated:

> ***"There is a qualified presumption in favour of the process server recognized in MB Automibile v Kampala Bus Service [1966] EA 480 at p 484 as having been the view taken by the Indian courts in construing similar legislation. On Chitaley and Annaji Rao: The Code of Civil Procedure Vol. II p 1670, the learned commentators say:***
>
> *"3. Presumption as to service – There is a presumption of service as stated in the process server's report, and the burden lies on the party questining it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."*
>
> In this case the client has not denied service.

23. The client further argued that the taxed costs were exagerrated and unfair but failed to elaborate why the client says so. It was not enough to make a bare statement, the client was obligated to support that statement with submissions which this court can base an order for setting aside taxation. Having failed to do so, that argument is discounted and disregarded.

24. The argument raised that the advocate jointly with another firm of advocates held a deposit in a joint account, which it was alleged they had not given an account of, was not proved. That argument is also rejected.

25. It follows that the application of the client, not only is it incompetent, but the same is not supported by grounds which would justify the setting aside of taxation.

26. Before concluding on my consideration of the client's application, it is important to consider the advocate's objection to the client's application on the ground that it should not have been filed by way of chamber summons but rather should have been filed by way of notice of motion.

27. In the first instance, the rule does not state whether an application should be under chamber summons or notice of motion. It follows that the client cannot be faulted for having filed a chamber summons. But more importantly, an application cannot be defeated by such failure because the only difference between the two formats is that a chamber summons is intended to be heard in chambers whilst notice of motion is intended to be heard in open court. The courts, however, presently hear all applications in open court whether they be by chamber summons or notice of motion. This change of attitude of hearing applications was captured by ***M. J. Anyara Emukule, J in the case Susan K. Baur v Shashikant Shamji Shah & Another [2011]eKLR*** where the learned judge stated:

> ***"The difference between a Summons in Chambers and a Notice of Motion is today very much blurred. In the olden days, summons in chambers was heard in chambers unless the court adjourned it for good reason to be heard in open court. Similarly, Motions were heard in open court unless the court as stated in Order L, rule 1 directed that it be heard in chambers. Today, both Chamber Summons and Motions may and are heard in chambers, and in open court. So that christening an application a Chamber Summons or a Notice of Motion when the rules provide otherwise does not go to the root or basis of the claim, and is merely a matter of form not substance. It does not render the application fatally defective."***

28. I wholly agree with that holding. The advocates objection in that regard is rejected.

THE ADVOCATE'S APPLICATION

29. The advocate seeks entry of judgment for taxed costs as provided under ***Section 51 (2) of the Advocates Act Cap 16***. That section provides as follows:

> ***"(2)The certificate of taxing officer by whom any bill has been taxed shall unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."***

30. The client stated in submissions before court that retainer was not disputed in this matter. That being so, and because the court has declined to set aside the taxed costs, there is no reason why judgment should not be entered as prayed by the advocate.

31. In conclusion therefore, the following are the orders of the court:

*a. The application dated **26th April 2018** is dismissed with costs to the advocate.*

*b. The application dated **9th February 2018** is granted as follows:*

*i. Judgment is hereby entered in favour of **Alfred Ochieng Opiyo t/a Ochieng Opiyo & Co. Advocate** as against **Export Hydro Pump & Services Africa Ltd** for **ksh 237,945.75***

*ii. The advocate is **awarded costs** of the **Notice of Motion** dated **9th February 2018.***

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of June, 2018.

MARY N. KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

……for the Plaintiff

……for the Defendant