



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 355 OF 2002

SIFUNA & CO. ADVOCATES.....PLAINTIFF

VERSUS

1. AKHTAR SHAHID BUTT

2. MODERN COAST BUILDING CONTRACTORS.....DEFENDANT

R U L I N G

1. The plaintiff, as a judgment debtor, by the court ruling dated 14/8/2012, **M.K. Ibrahim J**, as he then was, by which the suit was dismissed, has brought the Notice of Motion dated 12/8/2016 and sought from the court a prayer that the ruling on taxation dated 17/11/2015 be set aside and for a declaration that paragraph 14 of the Advocates (Remuneration) Order was not complied with.

2. The grounds set forth for that application is that the Notice of taxation was not served upon the Applicant because the firm stopped operating and the offices in Mombasa closed after the counsel (applicant) was elected as the speaker of Trans-Nzoia County Assembly. In the Affidavit in support, sworn by **HON. DAVID KINISU SIFUNA** those facts are reiterated with an addition that after being so elected he has at all times come to Mombasa wherever necessary, from TRANS NZOIA, and met his advocate colleagues who all know his changed status and inability to continue practicing in Mombasa. He then adds that upon election his office and his post office Box Number were all closed.

3. The Application was opposed by the Defendant/decree holder by the Affidavit of **MR. MOHAMED FAKI KHATIB** who asserted being a stranger to the fact that the judgment -debtor was elected the speaker as aforesaid, that the firm was wound up and the fact that the judgment-debtor has been coming to Mombasa meeting his colleagues who were then aware of his changed status.

4. Beyond the denial, the advocate pointed out that the suit when filed disclosed the postal address of the judgment debtor for purposes of service and that service of the bill and Notice of taxation were all effected upon the same address by registered post because the Applicant did not notify the court and the respondent of the alleged change in address nor was the notice sent by post been returned.

He proceeded and asserted that, paragraph 14 of the Advocate (Remuneration) Order was duly complied with and finally that the Applicant stands to suffer no harm because he has refused to refund legal fees over paid to him as ordered by the Court of Appeal. The decree holder therefore prayed that the Application be dismissed for lacking merits.

Submissions offered

5. Pursuant to the directions of the court dated 8/3/2017, the judgment - debtor/applicant filed submissions dated 26/4/2017 on the same day while the decree-holder/Respondent had filed their submissions dated 16/3/2018 on the same day.

6. In his submissions, which were highlighted by Mr. Obara in open court, the counsel largely and wholly relied on the grounds of the application as reiterated in the Affidavit of support stressing that the best mode of service, personal service, ought to have been effected and that service by registered post only resorted to if the subject of service cannot be traced. On that basis they asserted that paragraph 14 of the Advocate (Remuneration) order had not been complied with.

7. For the Respondent/decreed holder Mrs. Wambani filed submissions as aforesaid and highlighted same. The thrust of those submissions were that civil procedure act and the rules provide that documents may be sent by registered post to the address provided to court and when delivery is disputed a certificate of postage or other evidence of delivery need be provided. To the counsel, there was evidence of service by the Affidavit of Service sworn by Mr Mohammed Faki Khatib on the 3rd August 2015 which annexed a certificate of posting. It was additionally contended, while relying on the decision of **FINA BANK LTD VS JOHN MURIITHI KABERENGE [2013] eKLR** that the person challenging delivery of a registered mail has the liberty to obtain a letter from the post master general to confirm non-delivery of such a postal mail.

8. The Respondent then delved into the principles applicable to setting aside default proceedings and cited to court the decision **Labh Singh Harman vs A.G. & Another [2016] eKLR, and SHAH VS MBOGO [1966] E.A. 116** quoted with approval in **Ecobank Kenya Ltd A & A Cereals Ltd [2013] eKLR** to the effect that setting aside is a discretionary matter and used to further the purposes of justice and not intended to reward delay by a party out to delay and obstruct course of justice.

10. Further submissions was made to the effect that the service was effected upon the advocate applicant using the postal address provided in the pleadings because no notice of change of address had ever been filed and that there was no evidence that the said registered letter was ever returned as much as there was any evidence that the postal address had been closed.

10. Reliance was placed on the decision in **Fina Bank Ltd vs John Muriithi Keberenge [2013] eKLR** to the effect that where delivery is disputed it is important for the person so asserting to get a letter from the post master general to that effect.

11. On stay the counsel submitted that it is not that often that a court stays execution for costs. She cited to court the decision in **Labh Singh Harman Singh vs A.G and Another** for the proposition of the law that there must be demonstrated substantial loss before stay can ensue.

12. Lastly counsel submitted that the conduct of the Advocate/Applicant is clearly intended to delay just and expectation disposal of the dispute and cited the decisions in **Shah vs Mbogo [1966] EA 116 and Ecobank Kenya Ltd vs A & A Cereals Ltd [2013]eKLR**.

13. Based on those submissions, the only issue for determination is whether a legal basis has been laid for this court to interfere with the decision of the taxing officer and the certificate of costs thereby issued.

Analysis and determination

14. To this court the law at Rule 11 of the Advocates (Remuneration) Order is that he who is aggrieved by a decision of the taxing officer has only one recourse- file a reference^[1]. It has also been said that the advocates act and the Rules made there under is a complete code on matter of taxation and ascertainment of costs incurred and therefore there is no room for the invitation of the Civil Procedure Act. That is the law enunciated in **Machira vs Arthur K. Magugu, [2012] eKLR**, where the Court of Appeal said:

“With regard to advocates bills of costs, we agree with Ringera J in Machira vs Magugu (1) that the Advocates Remuneration Order is a complete code which doesn’t provide for appeals from the taxing masters decisions. Rule II thereof provide for ventilation of grievances for such decisions through references to a judge in chambers”.

15. As crafted the Application seeks orders of setting aside and re-taxation. I am of the humble opinion that the Applicant has not properly approached the court and that the application is incapable of grant. I would be purporting to sit on reference without regard to the law applicable. That I hold is wholly untenable.

16. In any event even if I was to consider the application without the due regards to the rules on reference, the application itself was filed on 15/8/2016 when the taxation is accepted to have been conducted on the 17/11/2015. It was, to me, filed inordinately out of time and was to that extent time barred.

17. Both counsel submitted on the provisions of rule 14, Advocate (Remuneration) Order, without minding to expound on its purport and it is therefore only right that it be set out here for records to be straight. That provision says:-

Default of advocate to attend taxation after notice

Any advocate who after the due notice without reasonable excuse fail to appear on the date and at the time fixed for taxation or on any date and time to which such taxation is adjourned, or who shall in any way delay or impede the taxation, or put any other party to any unnecessary or improper expense relative to such taxation shall, on the order of the taxing officer, forfeit the fees to which he would otherwise be entitled for drawing his bill of costs and attending the taxation, and shall in addition be personally liable to pay for any unnecessary or improper expense to which he has put any party; and the taxing officer may proceed with such taxation ex parte.

18. I fail to see the assistance of this provision to the parties particularly the advocate applicant. It has no bearing on his assertion that he was to be served otherwise than upon the address he had provided for service. I however do find that he was properly served and there is therefore no reason to interfere with the proceedings so taken.

19. For the foregoing reasons, the application is fatally defective, misconceived bad in law and incapable of grant. It is dismissed with costs to be paid to the chief by the Advocate.

20. Noting that this is a matter regarding taxation and in order that the parties be not exposed to yet another round of taxations, I do assess such costs in the sum of Kshs.8,000/= all inclusive.

Dated and delivered at **Mombasa** this **29th** day of **August 2018**.

P.J.O. OTIENO

JUDGE

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