



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**MISCELLANEOUS CIVIL APPLICATION NO 631 OF 2016**

**IN THE MATTER OF THE ADVOCATE'S ACT**

**AND**

**IN THE MATTER OF THE ADVOCATE- CLIENT BILL OF COSTS**

**AND IN THE MATTER OF REFERENCE FROM THE RULING OF THE TAXING OFFICER OF THE HIGH COURT AT MOMBASA**

**BETWEEN**

**COUNTY GOVERNMENT OF KILIFI.....APPLICANT**

**AND**

**ROBINSON ONYANGO MALOMBO t/a**

**O.M. ROBINSON ADVOCATES.....RESPONDENT**

**RULING**

1. Before me is an application by way of Notice of Motion dated 16<sup>th</sup> February, 2018 filed by the County Government of Kilifi which was a Respondent in the main application for taxation dated 21<sup>st</sup> November, 2016. In this application, the Applicant has sought for the following orders:

- (a) THAT the Applicant be granted leave to file out of time an objection to the taxing officer and a taxation Reference to this Honourable court against the ruling of the Honourable court's Taxing officer delivered on 11<sup>th</sup> December, 2017.*
- (b) THAT the leave granted in prayer (1) above do operate as a stage of execution of the Ruling of the Taxing officer aforesaid and any other consequential proceedings.*
- (c) THAT, the objection to the taxing officer and application for reference annexed hereto be deemed as duly filed and served upon payment of the requisite fees.*
- (d) THAT costs of this Application be in the cause.*

2. The same is premised on eleven (11) grounds and the sworn affidavits of JOHN BWIRE, advocate for the Applicant, the annexures thereto and other grounds to be adduced at the hearing hereof. The main grounds are that:

- (a) Delay was occasioned by lack of notice of delivery of judgment to the Applicant's Advocates*
- (b) THAT, they have come to court tirelessly after a delay of 27 days only.*
- (c) The objection is based on the ground that the subject matter is Kshs 6,522,000/= whereas the taxing master relied on Ksh 3,044,292.00 and awarded the Respondent Ksh 3,016,661.20 which in the estimation of the Applicant is manifestly excessive.*
- (d) Thereference has already been filed simultaneously with this application.*

3. The same is opposed by the respondent who has filed two affidavits sworn on the same day and the salient depositions are that;

**(a) The notice was posted on the public notice board at the law courts that the ruling was scheduled to be delivered on 11<sup>th</sup> December, 2017;**

**(b) That the taxing master applied the correct scale in the Advocate's remuneration order;**

**(c) That, the applicant has not made or shown willingness to furnish security;**

4. The parties filed written submissions as directed on 6<sup>th</sup> March, 2018 and when they appeared in court for purposes of highlighting the same, they opted to rely on their said submissions and list of authorities entirely as presented.

5. I have read through the affidavits and the supporting documents filed by the parties herein and find that two issues come up for determination, being;

(a) whether the leave sought, if granted will resolve the dispute between the parties; and

(b) whether the ends of justice will be met by the grant of the said leave that has been sought and whether security should be granted.

6. The real dispute herein is whether the Taxing master considered the correct value of the subject matter. This riddle can be best resolved by the parties adducing evidence in court on a substantive application which I note has already been filed in court. Hence at this stage, this court can only say as much.

7. I have read through the documents and what has come out is a dispute on the fact, and which is also admitted by the Respondent, that the Taxing master used the correct scale. This is a dispute for the main application, and each party has its strong points which they desire to advance so there can be a resolution.

8. As for the prayer for stay of execution and furnishing of security, it has now become trite law that, County Governments are in the same privilege as the National government when it comes to legal processes. This holding has been a result of protracted arguments which have now been settled by the High court in numerous cases such as;

(i) MOMBASA COUNTY GOVERNMENT VRS PAULINE WANJIKU KAGENI (2017) e KLR

(ii) CLUB LTD VRS THE GOVERNOR, KAJIADO COUNTY

Where the courts held that County Governments are Governments in the meaning assigned to National Government.

Article 6 (1) of the Constitution 2010, provides as follows;

***“ The territory of Kenya is divided into the counties specified in the first schedule. And Article 6 (2) states that”***

***“ The governments at the National and County levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and co-operation.***

Article 176 (1) of the Constitution that establishes County Governments simply provides as follows;-

***“There shall be a County Government for each county, consisting of a County Assembly and a county Executive”***

There is no attempt to draw a distinction that gives a different meaning to a devolved unit to give a different meaning to that assigned to a National Government.

9. This brings into question whether, therefore, a County Government is protected from the requirements of Order 42 Rules 6 and 7 of the Civil procedure Rules thereof. Order 42 rule 8 of the Civil Procedure Rules provides as follows;

***“ No such security as is National in rules 6 and 7 shall be required of from the Government undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity”.***

The upshot of the discussion is that the requirement for the deposit of security does not apply to County Government.

10. The upshot of the discussion is that the application dated 16<sup>th</sup> February, 2018 be and is hereby allowed in terms of prayer No. (1) (2) and (3) of the same.

I also direct that the substantive application already filed be fixed for hearing and disposal within 60 days, failure to comply, the same will stand dismissed with costs.

**Ruling delivered, signed and dated this 25<sup>th</sup> day of October, 2018.**

**LADY JUSTICE D. O. CHEPKWONY**

**25.10.2018**