

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC NO. 7 OF 2017

FRANSICAH PETER.....APPLICANT/RESPONDENT

VERSUS

MULINGA MBALUKA & CO. ADVOCATES..RESPONDENT/APPLICANT

RULING

Before me is a Notice of Motion dated 3rd April 2017 filed by Fransicah Peter against Mulinga Mbaluka trading as Mulinga Mbaluka and Company advocates.

The main prayer in the application is that this court be pleased to stop the bill of costs coming for taxation on 4th May 2017 until the complaints lodged by the applicant on 22nd March 2017 to the Advocates Complaints Commission Nairobi is heard and determined.

The respondent filed a replying affidavit sworn on 20th April 2017 in opposition to the application, the main contention being that under section 48 and 49 of the Advocates Act, he is entitled to file his bill of costs for taxation where there was disagreement between him and his clients. He also stated that under section 60(7) of the Advocates Act, the Advocates Complaints commission or Disiplinary Tribunal was required to adjourned the hearing of any complaint and await any taxation of the advocate clients was, where a bill of costs had already been lodged in court.

The respondent also filed written submissions through counsel.

On the hearing date of the application, which was 26th April 2017, Mr. Onono appeared for the respondent and relied on the written submissions filed.

The applicant Fransicah Peter stated that she wanted the court to stop the taxation until her complaint with the Advocate Complaints Commission was dealt with.

I have considered the application and the arguments on both sides. Prior to the hearing of the application, this court granted intern stay orders against the taxation.

It is not in dispute that a taxation application has been filed. It is not in dispute that this application was filed after the taxation application was filed. The issue is whether the taxation should proceed before determination of the complainant lodged by the applicant in the Advocate Complaints Commission.

From the facts placed before me, the issue which the applicant raised before the Advocates Complaints Commission relates to the conduct of the lawyer, the respondent, in accounting for moneys had and received. Ultimately in my view, the denomination of that issue will also affect the substance of the taxation as it will clarify certain contested issues on amount that can be paid to the lawyer. It is a preliminary issue which, in my view ,should be considered and determined before taxation.

Mr. Mbaluka has relied on section 60(7) of the Advocates Act (cap.16) to state that the taxation should proceed irrespective of a pending existing related complaint with the Advocates Complaints commission. In my view if this happens, it would deny the applicant Fransicah Peter an opportunity for fair hearing as envisaged under article 50(1) of the Constitution which provides as follows:-

“ Every person has the right to have any dispute that can be resolved by the application of law

decided in a fair and public hearing before a court or , if appropriate, another independent and impartial tribunal or body.”

In my view it will not be fair to ignore the pending preliminary complaints related the same matter on application of moneys had and received and proceed to finalized the taxation. Such action would render the complaints of the applicant nugatory.

I thus allow the application of Fransicah Peter dated 3rd April 2017 and order that the bill of cost coming for taxation hearing be and is hereby stopped until her complaint lodged on 22nd March 2017 to the Advocates Complaints Commission Nairobi is heard and determined. The costs of this application will be in the cause.

Dated and delivered at Garissa this 24th of May 2017.

George Dulu

Presiding Judge