



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS APPLICATION NO. 29'B' OF 2016

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

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES.....APPLICANT

AND

THE NATIONAL LANDS COMMISSION.....RESPONDENT

RULING

This matter comes up before the court now for 2 applications. First the application dated 3rd November, 2016 seeking the entry of Judgement for Kshs. 220,735,840.88/- as taxed. And second, is the application dated 24th November, 2016 by the Respondent seeking to set aside the taxed costs and also extension of time for Respondents to file a response within 14 days.

When the parties appeared in court on 5th April, 2017, it was the agreement of the parties that they canvass the 2 applications by way of written submissions and that the court do make a ruling based on the said submissions. Accordingly, both sides have filed their submissions. I have carefully considered the 2 sets of submissions, and the attached exhibits and authorities relied on by the parties. I shall deal first with the application dated 3rd November, 2016.

This is the application which seeks that this court do enter Judgement for the applicant against the Respondent for Kshs. 220,735,840.88 as appears on the certificate of taxation of costs dated 20th September, 2016, with interest from the date of filing of the application to the date of payment in full. The application also seeks leave for the applicant to execute the Judgement against the Respondent.

On this application, the undisputed facts include the following:-

- i. That the bill of costs was taxed on 20th September, 2016 and the same has todate not been set aside or stayed.
- ii. That during the taxation, the Respondent was represented by learned counsel on several occasions. Of particular importance were the orders by consent made on 24th May, 2016, that the Respondent do file their submissions within 14 days.
- iii. That on 26th July, 2016, after failing to file the said submissions, the Respondents were again by consent of the Applicant, given 2 more weeks to do so. A date of ruling on the bill of costs was

then fixed for 6th September, 2016. Apparently, no submissions were ever filed by the Respondent and the ruling was accordingly delivered on 20th September, 2016. In effect therefore the taxing master, and indeed with concurrence of the applicant, accorded the Respondent sufficient and ample opportunity to make their presentations and submissions to the bill of costs as filed. They failed to make any. And this was a period that ran from 24th May, 2016 upto 20th September, 2016.

The court was referred to Section 51(2) of the Advocates Act, on general provisions as to taxation. The same provides: -

“the certificate of a 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.”

Counsel for the applicant has further referred this court to a number of authorities regarding this matter i.e.

a. Lubullellah & Associates, Advocates -vs- N.K. Brothers Limited (2014)eKLR, that where the certificate of costs has not been set aside and or altered, then the court has no option but to enter the judgment under Section 51(2) of the Advocates Act, as above. And that the Application ought not be barred from enjoying the fruits of its hard work (page 4 of 5).

b. Ahmednassir Abdikadir & Company Advocates -vs- National Bank of Kenya Limited (2006)eKLR, on the fact that the court would only consider whether there is a certificate of taxation or a dispute on retainer.

In our instant case, there is obviously a certificate of taxation. There was however no dispute on retainer brought to the attention of the taxing master (page 5 of 6).

c. A.M. Kimani & Company Advocates -vs- Kenindia Assurance Company Limited (2006 eKLR that where the certificate of taxation has not been set aside or altered, and where there is no order of stay, the certificate is final as to the amount of costs.

The same finding was made in Daly & Eiggis Advocates -vs- Hanelex Limited (2013) eKLR, and Evans Thiga Gaturu, Advocate -vs- Kenya Commercial Bank Limited (2012) eKLR.

As stated above, despite the Respondent being accorded the opportunity it failed to raise the same before the taxing master. The situation herein is therefore similar to the ones in the above cited cases this court was referred to. The courts consistently held in those cases that in the absence of any order of stay, setting aside or alterations by the court of a certificate of costs, or unless there is shown a dispute on retainer, then it would be proper for the court to enter judgment in accordance with Section 51(2) of the Advocates Act. This court has no reason to deviate from this established position.

The 2nd application dated 24th November, 2016 seeks principally 2 prayers, first an order of stay of the orders of the taxing master dated 20th September, 2016 and also leave to enlarge time to file a reference against the decision of the taxing master. The application is brought under Regulation (Section) 11(2) of the Advocates Remuneration Order, which provides;

“The taxing officer shall forthwith record and forward to the objector reasons for his decision on those items and the objector may within 14 days from the receipt of the reasons apply to a Judge by chamber summons, which shall be served on all parties concerned, setting out the grounds of his objection.

In my view, this rule (11(2)) cannot be read in isolation or to the exclusion of the other related rules, especially Rule 11(1). I hold this way because Rule 11(2) considers the process of objection midway through the process. The whole process starts at Rule 11(1);

“Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.”

A reading of these 2 rules show that the process of objection must run and be commenced in a sequence, that is to say;

- i. A ruling of a taxing master must have been delivered.
- ii. The intended objector to give notice in writing within 14 days of the date of the ruling, specifically giving or indicating the items objected to.
- iii. The taxing officer to immediately or forthwith record and forward to the objector the reasons for his decision on those items.
- iv. Then within 14 days, the objector may apply to the Judge, setting out the grounds of his objection.

The question is therefore whether these 2 rules have been complied with and therefore whether there is a valid application before the court. The documents filed by the applicant, and not objected to by the Respondent, show that the ruling of the taxing master was delivered on 20th September, 2016. The certificate of costs was issued the same date on 20th September, 2016. It was however not until 8th December, 2016 that the Respondent (applicant in the application dated 24th November, 2016) filed their application. There is nothing on record to show if the applicant (National Land Commission) ever wrote to the taxing master within 14 days seeking reasons for the determination on the items objected to. Similarly, there is nothing on record to show if the taxing master ever furnished the applicant with any such reasons for the determination on the items objected to. In effect therefore, there has been no attempt on the part of the applicant (National Land Commission) to commence the objections (if at all) as required by Rule 11(1) of the Advocates Remuneration Order. The applicant has instead chosen to pursue the objection midway through the process (Rule 11(2)).

The significance of Rule 11(1) cannot be over-emphasized. This is because it is the reasons to be furnished by the taxing master that would be expected to form the grounds of objection to be placed before the Judge. In the absence of such reasons being given by the taxing master, there is in my view, absolutely no basis for an application being made under Rule 11(2). I am therefore in total agreement with the determination in Soundd Entertainment Limited -vs- Anthony Barungu & Company Advocates (2014)eKLR, that;

“In this case, the applicant did not file an objection within 14 days to the taxing officer. The taxing officer has not given or written any reasons..... Indeed, no items objected to by the applicant as an objector have been identified. As a result, there is not decision which the applicant can challenge before the Judge by a chamber summons” (page 3/3).

As to the 2nd substantive prayer on the application i.e prayer for stay of execution of the decision of the taxing master until the reference is determined, with respect, this is intertwined with whether there is a valid reference or objection on record in the first place. Having failed to meet the requirements of Rule 11(i) and (ii), I am not convinced that there is any valid reference or objection before the court. Ordering for stay of the orders of the taxing master, would therefore be an exercise in futility.

The chronology of this matter clearly shows a disinterested Respondent in the whole taxation process. The Respondent (the National Land Commission) was represented in court before the taxing master by

Advocates. Despite being given at least 2 opportunities to file their submissions, none was filed. Despite being served with the certificate of costs, the Respondent (Nation Land Commission) failed to comply with the rules on objection, only choosing to come up about 4 months later (in December, 2016) with its own application. I do not agree that one counsel is to blame for this indolence. To me, this shows only one fact, that the Respondent did not intend to participate in the proceedings before the taxing master from the onset. And that this application dated 24th November, 2016 is only meant to delay this matter and deny the applicant the enjoyment of the fruits of his labour. Is this therefore a party to whose benefit time can be enlarged? I am not persuaded to believe so.

An issue was raised on whether there is an objection regarding retainer. However, as already opined above, no such objection was ever raised before the taxing mater. I have however noted that both sides are agreed that there was indeed such an arrangement between the parties. I have further noted that this contractual arrangement still subsists with the Advocate still being on record for the Respondent even in the pending appeal at the Court of Appeal. This therefore, cannot be a good ground as an objection to taxation, since such retainer payments (if payable as per the signed agreement) may be set off from the taxed costs.

As to the issue of whether the Bill of Costs had been taxed in Miscellaneous Application No. 29 of 2016 or 29(B) of 2016, I have perused the pleadings herein on the relevant taxation file. All the pleadings are in respect of No. 29 of 2016. However, to me, the important issue is whether this apparent confusion in the numbering of the case made it impossible for the Respondent (National Land Commission) to discern with accuracy the relevant file. I do not think so since all this confusion only came up with the ruling of the taxing master, long after the Respondent had been accorded the opportunity. This error is however regretted.

It is for these reasons that I am not convinced that the Respondent's application dated 24th November, 2016 and filed on 8th December, 2016 has any merits. I dismiss it wholly with costs to the Applicant firm. I otherwise allow the application of the Advocates dated 3rd November, 2016 in terms of prayer 1 and 2. I also award costs of this application to the applicant firm. Orders accordingly.

DATED, SIGNED and DELIVERED at ELDORET, this 21st day of June, 2017.

D.O. OGEMBO

JUDGE

Ruling read out in open court in presence of: -

Mr. Mathai hold brief for Prof. Ojienda, the applicant.

There is no representation by Masaka Advocate for the National Land Commission

D.O. OGEMBO

JUDGE