



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 232 OF 2005

HIMATLAL MORARJI MANEK.....PLAINTIFF

VERSUS

RATILAL GOVA SUMARIA.....DEFENDANT

RULING

[1] The Chamber Summons dated **2 July 2015**, which is the subject of this Ruling, was filed on behalf of the Plaintiff, **Himatlal Morarji Manek** by the law firm of **M/s Shah & Parekh Advocates**, for orders that:

[a] That the taxation of the Defendant's Bill of Costs which was done on **19 June 2015** be set aside;

[b] That the amount in the Defendant's Bill of Costs of **Kshs. 397,556.00** be substituted with **Kshs. 250,839.00** on account of an arithmetic error made by the Deputy Registrar, **Hon. Sandra Ogot**, in the computation of the taxed Bill of Costs; or in the alternative, the Bill be sent back to the Deputy Registrar for correction of the error aforementioned.

[c] That the costs of the application be provided for.

[2] The application was filed pursuant to **Rule 11** of the **Advocates (Remuneration) Order** and was predicated on the ground that there is an error apparent in the Taxing Officer's Ruling on Taxation dated **19 June 2015**, in that the amount taxed off amounted to **Kshs. 280,415** and not **Kshs. 133,698.00** as indicated therein; and therefore that the Bill of Costs ought to have been taxed at **Kshs. 250,839.00** and not **Kshs. 397,556.00**, as was done by the Deputy Registrar. In support of the application, the Plaintiff relied on the affidavit of **Advocate Hasmukhrai Manilal Parekh**, annexed thereto.

[3] In his affidavit, Mr. Parekh deposed that, while perusing the Ruling on Taxation, he noticed that, on Item 1, the Defendant had claimed **Kshs. 450,000.00** as Instructions Fee; and that the Taxing Officer allowed a sum of **Kshs. 200,000.00** and accordingly taxed off **Kshs. 250,000.00** in respect of that item, yet the total amount taxed off the Bill of Costs by the Deputy Registrar was shown in the Ruling to be **Kshs.133,698.00** only. This anomaly prompted him to check all the items of the Bill of Costs which were taxed off and came up with a figure of **Kshs. 280,415** as the taxed off amount. He therefore averred that the Defendant is entitled to only **Kshs. 250,839.00** and not **Kshs. 397,556.00** as awarded by the Deputy Registrar. Annexed to the the affidavit of **Mr. Parekh** affidavit are copies of the Bill of Costs itself and the impugned Ruling on Taxation aforementioned.

[4] The application was opposed by the Defendant, to which end, the firm of **T.O. K'Opere & Co. Advocates**, filed Grounds of Opposition herein dated **1 September 2016** in which the following points were set out:

[a] That the Chamber Summons was never served upon the Defendant's Advocates until **17 August 2016**, more than one year after the purported filing; and is therefore suspect and should be investigated for its authenticity and validity.

[b] That the Chamber Summons does not comply with **Rule 11 of the Advocates (Remuneration) Order** as it does not specify the items purported to be challenged; and that if the Plaintiff was concerned with and seeks the correction of an arithmetic error apparent on the face of the record, then the same should have been done under **Section 99 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, and not **Rule 11 of the Advocates (Remuneration) Order**, as has been sought herein.

[c] That the purported affidavit attached to the Chamber Summons attributed to **Hasmukhrai Manilal Parekh** is fatally defective and should be struck out from the record; and that the application would then be devoid of foundational basis.

[d] That the application is a gross abuse of the Court process and should be struck out and/or dismissed with costs to the Defendant for being frivolous, vexatious, misconceived and incompetent.

[5] In response to the aforesated Grounds of Opposition, the Plaintiff filed a Further Affidavit on **19 October 2016**, principally to bring to the Court's attention a series of correspondence exchanged between the Advocates on record as well as copies of the official receipt dated **2 July 2015** to confirm the filing of the Chamber Summons and the various steps taken by the Plaintiff in furtherance of both the Taxation and the Reference. It was further averred that the court file was not available on **2 July 2015** and for some time thereafter, and that it was for this reason that the Plaintiff was unable to take a hearing date for the application for service on the Defendant.

[6] The Plaintiff reiterated its posturing that there is an error in the computation of the taxed costs and averred that this error was brought to the attention of both the Advocate for the Defendant and the Deputy Registrar vide the letters dated **25 June 2015**, marked **Annexure HMP5** and **HMP6**; and even requested the Deputy Registrar to review the matter on own motion to correct the said error, but that there was no response thereto. Accordingly, the Plaintiff issued a Notice of Objection to the Taxation on **2 July 2015** as per **Annexure HMP2**. Thus, the Plaintiff is not targeting any particular items in the Defendant's Bill of Costs; rather, he is seeking a correction of the computational error that he says is evident in the Ruling on Taxation.

[7] **Paragraph 11 of the Advocates (Remuneration) Order**, pursuant to which the application has been filed, provides that:

"(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 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."

[8] It is noteworthy that the Notice of Objection to the Taxation was filed on **2 July 2015**, which was the same date that the Chamber Application was filed. It is indubitable therefore that the Reference was filed within the 14 day window stipulated in **Paragraph 11** of the **Advocates Remuneration Order**. As to the late service of the application, an explanation was given by the Plaintiff in the Further Affidavit of **Mr.**

Parekh, which has not been faulted, namely, that the court file was missing for much of that time.

[9] Accordingly, the issues for my consideration, having considered the impugned Ruling, the affidavits filed and the annexures thereto, as well as the written submissions filed herein, can be summarized as follows:

[a] Whether the application amounts to a gross abuse of the court process as to warrant its being struck out for the reason that the Supporting Affidavit is undated; and if not,

[b] Whether the Reference is competent from the standpoint of Paragraph 11 of the Advocates (Remuneration) Order; and if so, whether the orders sought are warranted.

[10] The Defendant challenged the validity of the Supporting Affidavit sworn by **Mr. Parekh** on the ground that it is undated, and therefore fatally defective. Counsel for the Plaintiff countered this argument by submitting that **Paragraph 11(2) of the Advocates (Remuneration) Order** does not prescribe that a Chamber Summons thereunder be accompanied or supported by an affidavit. It was urged that even without the Supporting Affidavit, the Court can still consider and determine the application on the basis of the grounds set out on the face thereof, since the two annexures to the impugned affidavit are documents which are otherwise on the record.

[11] It is a requirement of **Section 5 of the Oaths & Statutory Declarations Act, Chapter 15 of the Laws of Kenya**, that:

"Every commissioner for oaths before whom any oath or affidavit is taken or made under the Act shall state truly in the jurat or attestation at what place and date the oath is taken or made."

And it is manifest that the Supporting Affidavit is undated; hence, the question to pose is whether this omission is fatal to the reference. Since the provision is mandatory, I would endorse the position taken in **Charles Muturi Mwangi vs. Invesco Assurance Co. Ltd [2014] eKLR** thus:

"The omission to indicate the date of swearing of the affidavit attached to the application before the court renders the same defective...The defect on the affidavit is not a mere technicality that can be addressed under Article 159 of the Constitution. The undated affidavit violates a statutory mandatory provision and thus the striking out..."

[12] The Supreme Court underscored the importance of compliance with procedural stipulations in the following words, expressed in **Supreme Court Petition No. 3 of 2013: Raila Odinga & 5 Others vs IEBC & Others**:

"...Our attention has repeatedly been drawn to the provisions of Article 159(2)(d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities...The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law..."

[13] I would accordingly take the view that the Supporting Affidavit is fatally defective for being undated, and is accordingly struck off. Nevertheless, it needs to be considered whether the application is incompetent without the Supporting Affidavit. In this regard, I would agree with the submissions of the Plaintiff's Counsel that since the Bill of Costs and the Ruling on Taxation are part of the court record, the Reference is not necessarily bereft of foundation. It is instructive that **Paragraph 11 of the Advocates (Remuneration) Order** does not explicitly provide that a Chamber Summons thereunder be accompanied by an affidavit. The Plaintiff having set out the grounds of his Objection in the Notice of Objection as well as the body of the Chamber Summons, would, in all fairness be entitled to a determination on the merits. Besides, he did file a Further Affidavit in support of the application on **19**

October 2016, which is not only more detailed but is also compliant in all respects. In the premises, it cannot be said that the application is an abuse of the process of the Court.

[14] On Whether the Reference is competent from the standpoint of **Paragraph 11 of the Advocates (Remuneration) Order**, it was the contention of the Defence Counsel that since the gist of the Plaintiff's Objection and Reference is that there is an arithmetical error in the Ruling on Taxation, the said error ought to have been dealt with under **Section 99** of the **Civil Procedure Act**. That provision reads:

"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

[15] The Plaintiff's Further Affidavit does show that he invoked the Deputy Registrar's jurisdiction under the Slip Rule aforesaid vide his letter dated **25 June 2015**. That letter states as follows in part:

"...Your Honour can review the matter on your own motion as this is an arithmetic calculation error. If you think that a formal application is necessary then we can do so. Please let us hear from you urgently..."

[16] According to the Plaintiff, there was no response to that letter, and as such, he was constrained to file a formal application. He added that there was no other way of approach in the circumstances other than through a Reference, whose procedure is circumscribed by **Paragraph 11** of the **Advocates (Remuneration) Order**. His Counsel relied on the case of **Machira & Co. Advocates vs. Magugu [2002] 2 EA 528** in support of this posturing.

[17] There is no gainsaying that the taxation regime is a special and complete code in itself whose purpose was well explicated by **Ringera, J** as he then was in **the Machira Case** (supra) thus:

"...the Advocates Remuneration Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. It does not provide for an appeal from any sort of decision by the taxing officer and indeed order XLII of the Civil Procedure Rules is clear that appeals lie either as of right or with leave from orders made under the Civil Procedure Rules. No mention is made of orders made under the Advocates Remuneration Order. And it is a basic principle of procedural law that appeals to the High Court lie only where a right of appeal has been conferred by statute. Secondly, ... any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates Remuneration Order..."

[18] The foregoing viewpoint was, on appeal, upheld by the Court of Appeal in **Machira & Co. Advocates vs. Arthur K. Magugu & Another [2012] eKLR** thus:

"With regard to advocates' bills of costs, we agree with the decision of Ringera, J (as he then was) in Machira vs Magugu [2002] 2 EA 428 that the Advocates Remuneration Order is a complete code which does not provide for appeals from taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decision 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 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 a simple and expeditious mode of dealing with decisions on advocates' bills of costs through references under Rule 11 to a judge in Chambers..."

Accordingly, I have no hesitation in holding that the application is competently before the Court and that

the error sought to be corrected is one that directly arises out of the taxation exercise and therefore falls within the strictures of **Paragraph 11 of the Advocates (Remuneration) Order**.

[19] As to whether the orders sought are warranted, the Plaintiff set out quite succinctly in the letters dated **19 and 25 June 2015**, the Notice of Objection dated **2 July 2015** attached to the Further Affidavit of **19 October 2016** his reasons for concluding that the Deputy Registrar erred in working out the amount due to the Defendant in respect of the Bill of Costs dated **20 January 2014**. The explanation is simply this: Since the total amount of the Bill was **Kshs. 531,254.00** and a sum of **Kshs. 280,415.00** was taxed off, **Kshs. 250,000.00** thereof being taxed off Item 1 alone, then the result was **Kshs. 250,839.00** and not **Kshs. 397,556.00** that was awarded by the Deputy Registrar. This proposition is irrefutable and it is noted that Counsel for the Defendant did not challenge it. It is, as far as I was able to ascertain, in accordance with the Ruling of the Deputy Registrar. To my mind, that misdirection amounts to an error of principle for the purposes of review under **Section 11 of the Advocates (Remuneration) Order** as it has the effect of awarding the Defendant more in terms of costs than was deserved. In this regard, I find instructive the following expressions of the Court of Appeal in the case of **Kamunyori & Co. Advocates vs. Development Bank of Kenya Limited [2015] eKLR**:

"Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value of the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error on principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred...As long ago as 1961, the predecessor of this Court emphasized in Arthur v. Nyeri Electricity [1961] EA 492 that 'where there has been an error in principle, the Court will interfere, but questions solely of quantum are regarded a matters with which the taxing officers are particularly fitted to deal and the Court will intervene only in exceptional cases.' That is still good law..." (Emphasis supplied)

[20] Accordingly, it is my resultant finding the Plaintiff's Reference is meritorious and would allow the same with costs. As this is a straightforward matter of correction of a computational error, I find it pointless referring it to the Deputy Registrar for correction. Hence I would set aside the amount of costs of **Kshs. 397,556.00** awarded by the Deputy Registrar as per the Ruling on Taxation dated **19 June 2015** and substitute therefor the sum of **Kshs. 250,839.00** as prayed by the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2017

OLGA SEWE

JUDGE