



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION NO 255 OF 2012

MUSEMBI NDOLO & COMPANY ADVOCATES..... RESPONDENT

VERSUS

CANNON ASSURANCE KENYA LTD.....APPLICANT

JUDGMENT

By a Notice of Motion dated 24th April 2017 filed on 25th April 2017, brought under the provisions of Sections 1A,1B and 3A of the Civil Procedure Act and Rules 72 and 76 of the Advocates (Remuneration) Order, 2009 and all the enabling Provisions of the law, the applicant seeks orders that:

- 1. This Honourable Court be pleased to hear this matter under urgency and ex-parte in the first instance***
- 2. This Honourable Court do grant interim stay of execution of orders issued on 16.3.17 pending the hearing of this application***
- 3. This Honourable Court be pleased to set aside the proceedings of 16.3.17 and its subsequent orders by which the applicant's bill of costs dated 5.3.12 and filed on 7.12.12 was erroneously taxed as prayed***
- 4. This Honourable Court be pleased to grant the respondent unconditional leave to defend and/o reply to the applicant's bill of costs dated 5.3.12***
- 5. That costs of this application be provided for.***

The application is predicated on the grounds among others that:-

- a. The Bill of Costs was erroneously taxed as drawn by an advocate holding brief for the firm of Otieno, Yogo, Ojuro & Co. Advocates
- b. The bill as drawn offends the provisions of Rule 13 of the Advocates (Remuneration) Order 2009

The application is further supported by the affidavit of Eric O. Ojuro Advocate for the applicant sworn on 24th April 2017. Mr Ojuro deposes that when the matter came before the Taxing Master on 16.3.17, one Diana Nyamogo, a student in the firm of Otieno, Yogo, Ojuro & Co. Advocates instructed one Mr. Owino, advocate, to hold brief for Mr. Yogo advocate, for purposes of adjourning the matter but the bill was taxed as drawn in unclear circumstances. He further deposes that the order of 16.3.17 is very prejudicial to the applicant as there are other matters between the parties and the advocate is well aware that the issue of retainer has not been determined. It has also been deposed that it is in the interest of

justice and fair play that this application be allowed and parties be allowed to raise issues for determination before taxation. In his replying affidavit sworn on 13.6.17, Mr. Ojuro deposes that the High Court dismissed a reference filed by the respondent herein and that the respondent's appeal in **Civil Appeal No. 24 of 2017** as shown by the Memorandum of Appeal marked **EOO-1** which relates to similar issues as raised by the respondent herein is still pending in the Court of Appeal. Diana Nyamogo in her supplementary affidavit sworn on 13.6.17 deposes that on 16.3.17; she was sent to court to get counsel to hold brief for Mr. Yogo advocate in **Misc. 232/16; 237/16; 235/16 and 236/16 Otieno, Yogo, Ojuro & Co. Advocates versus UAP Provisional Insurance. Co. Ltd** which were to be taxed as drawn. She further deposes that she had been instructed to have the Bill of Costs in this matter adjourned but that due to a mistake on her part, she instructed a Mr. Owino to have the bills taxed as drawn.

The application is opposed on the grounds set out in the grounds of opposition filed on 12.5.17 and a replying affidavit sworn by the Musembi Ndolo, Advocate, on 12.5.17. He avers that the allegations by Mr. Ojuro that Mr. Owino did not have instructions was farfetched since Mr. Owino, advocate informed the taxing master that he had instructions from the firm of Otieno, Yogo, Ojuro & Co. Advocates to tax the bill as drawn. He further deposes that the notice of motion herein is an abuse of the court process since an objection to and/or decision against the Taxing Officer is undertaken under Rule 11 of the Advocates Remuneration Order and not by filing an application under Sections 1A, 1B and 3A of the Civil Procedure Act and Rules 72 and 76 of the Advocates (Remuneration) Order, 2009. He additionally deposes that the Advocate-Client Bill of Costs having been taxed by consent is final and not challengeable either on appeal or reference but can only be varied or set aside or discharged for reasons which would enable the court to set aside an agreement.

In the written submission, the client/applicant faulted the advocate/respondent for not informing the Taxing Master that the client had filed a preliminary objection to the Bill of Costs in question. It was further submitted that the issue of retainer remains unresolved. To this end; the applicant relied on **Evans Thiga Gaturu Advocate Vs Kenya Commercial Bank Ltd HCC No. 343 Of 2011 Nairobi** and **Omulele & Tollo Advocates v Magnum Properties Limited [2016] eKLR** where the respective courts held that whether or not there exists a retainer should be determined before taxation and **Njogu & Company Advocates v National Bank of Kenya Limited [2016] eKLR** where the court held that the advocate cannot seek to steal a march on the client and secure a benefit by invoking the illegality of the retainer agreement. Counsel also relied on Article 159 of the Constitution which mandates the court to do justice.

The advocate relied on **Kamunyori & Company Advocates v Cannon Assurance (K) Limited [2006] eKLR** where it was held that decision by a Taxation Master is challengeable by way of a reference and **Flora N. Wasike v Destimo Wamboko[1988] eKLR** where the Court of Appeal, held that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation.

I have carefully considered the application in the light of the affidavits and submissions on record. Prayers 1 and 2 have already been spent. In my understanding, this court is now called upon to determine two issues. First, I have to determine whether or not the statutory provisions cited by the client are available to them and secondly, if I should determine that issue, in favour of the client, I would then need to determine if the client had made out a case to warrant the setting aside of the certificate of taxation.

Counsel for the client submitted that this court's duty is to do substantive justice to the parties without as espoused in Article 159 of the Constitution and Sections 1A, 1B and 3A of the civil Procedure Act. He further submitted that there shall be no prejudice to the respondent if the bill of costs is taxed afresh since there is a question about retainer that remains unresolved.

The respondent/advocate contends that an order or ruling arising from taxation cannot be reviewed and that a party who is aggrieved can only file a reference to the High Court.

I have considered the case of **Kamunyori & Company Advocates v Cannon Assurance (K) Limited [2006] eKLR** that emphasized a point raised by the Hon. Ringera J. (as he then was) in the case of **Machira & Co. Advocates V Arthur K. Magugu & Another** when he said:

“Secondly, as I understand the practice relating to taxation of bills of costs, 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.”

Section 1A of the Civil Procedure Act provides as follows:

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

Section 1B of the Civil Procedure Act provides as follows:

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

Section 3A provides as follows:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Clearly, the sections recognize the special jurisdiction or power, as well as the special form or procedure that may be prescribed by or under any other laws which are in force.

Section 72 and 76 of the of the Advocates (Remuneration) Order, 2009 deal with Notice of taxation to be given by taxing officer and *ex-parte* proceedings and extension or limitation of time or adjournment before the Taxing Master. There is evidence that the client’s advocate had been duly served with the notice of taxation. The taxation did not proceed *ex-parte* since the client was represented. No application for adjournment was made before the Taxing Master and Section 72 and 76 of the of the Advocates (Remuneration) Order, 2009 are therefore not applicable to this application.

In the light of the foregoing; Sections 1A, 1B and 3A of the Civil Procedure Act and Rules 72 and 76 of the Advocates (Remuneration) Order, 2009 fall short of empowering the court to set aside a certificate of taxation. The client has thus failed to properly move the court. In the result, the Notice of Motion dated 24th April 2017 and filed on 25th April 2017 is incompetent. Accordingly, it is struck out, with costs to the advocates.

In arriving at this decision, I have consciously not delved into the substance of the matters raised with regard to whether or not there was a valid consent to tax the bill as drawn since they may arise if and when the client decides to challenge the decision of the Taxing Master.

DATED AND DELIVERED THIS 24th DAY Of August 2017

T.W.CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Applicant/Client - Mr. Ojuro

Advocate/Respondent - N/A