



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 414 OF 2004

FRANCIS J.K. ICHATHA.....PLAINTIFF

-VERSUS -

HOUSING FINANCE COMPANY OF KENYA LIMITED.....DEFENDANT

RULING

1. The defendant, **HOUSING FINANCE COMPANY of KENYA**, has asked the court to set aside or to vary the orders which the court had made on 15th December 2016.
2. The court records show that on that date, the case was before Hon. G.M. Wattimah, Deputy Registrar. The reason why the matter was in court on that day was the taxation of the plaintiff's Party and Party Bill of Costs.
3. The parties had agreed to file their respective written submissions, as a means of addressing the learned Taxing Officer. The plaintiff had already filed his written submissions.
4. Meanwhile, on 3rd November, 2016, the defendant had asked for 14 more days to enable it file its submissions. However, the defendant failed to file its submissions within the 14 days, which the court had granted.
5. On 15th December 2016, the court was scheduled to verify whether or not the defendant had filed its submissions.
6. Presumably, if the defendant had filed its submissions, the Taxing Officer would have informed the parties about the date when she would deliver her Ruling on the taxation.
7. The court records show that by 15th December 2016, the defendant had not yet filed its submissions.
8. The court records also show that on 15th December 2016, the defendant's advocate failed to attend court.
9. Mr. Memusi advocate did attend court on behalf of the plaintiff. And in view of the absence from court, of the defendant's advocate, Mr. Memusi asked the court to either set a date for the Ruling on the taxation or, in the alternative, to allow the Party and Party Bill of Costs, as prayed.
10. In response to the invitation by Mr. Memusi, the learned Taxing Officer made the following order;

“I have heard the advocate for the applicant and perused the court file. I note that the respondent has not filed any submission in compliance with the orders issued on 3/11/2016. For that reason, I find that the bill of costs dated 28th September 2016 is unopposed and therefore allowed as presented, in the sum of Kshs. 684,780.00 plus Kshs. 540,931.00, totalling to Kshs. 1,225,711. It is so ordered”.

11. Ms. Karen Muthee Advocate has sworn an affidavit in support of the application. She has deponed that on the material day, she had 2 matters before the Milimani Courts. Those two matters included this case and the case of **NAOMI MUCHAI Vs JOHANNE MUCHAI, PETITION No. 49 of 2016**.

12. Whilst this case was listed before the Taxing Officer, the Petition had been listed before Muchelule J.

13. The advocate first went to attend to the petition, which was before the learned Judge.

14. However, by the time the advocate got to the chambers of the learned Taxing Officer, this matter had already been dealt with.

15. Ms. Muthee advocate has told the court that her failure to attend before the Taxing Officer, on time, was neither intentional nor deliberate.

16. I understand her to be saying that the failure should be attributed to inadvertence or an excusable mistake or error. Therefore, the defendant sought to bring its case within the purview of the decision in **SHAH Vs MBOGO & ANOTHER [1967] E.A. 116**. In that case, the Court of Appeal for East Africa set down the principles applicable when a court is called upon to set aside an *ex parte* order or judgement: this is what the court said;

“...the court’s discretion to set aside an *ex parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought, (whether by evasion or otherwise) to obstruct or delay the cause of justice”.

17. In the event that the decision which was in issue was a judgement or an order of the court, this court would determine it on the basis of its discretion as set out above.

18. In answer to the application, the plaintiff faulted the defendant for failing to move the court through the proper procedures.

19. In other words, the plaintiff’s position is that the application was incompetent, and should therefore be struck out.

20. Pursuant to Rule 11 of the Advocates Remuneration Order;

“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 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”.

21. Does this Rule relate only to decisions made by the taxing officer, in respect to the itemized Bill of Costs, during taxation?

22. A casual reading of the Rule appears to suggest a linkage between that rule and the items on the face of the Bill of Costs. I say so because it is then that the taxing officer would be in a position to give his

reasons for the decision made in respect to the items which the party was objecting to.

23. If the taxing officer were to make a decision on an application for an adjournment, I do not think that the party who felt prejudiced by that decision would have to file a reference to the High Court.

24. The reference to the High Court is filed in relation to a decision made on the taxation.

25. In this case, the decision made by the taxing officer was a decision on taxation. The taxing officer allowed the Bill of Costs in the sum of Kshs. 1,225,711/-.

26. Accordingly, when the defendant felt aggrieved by that determination, it ought to have invoked the provisions of Rule 11 of the Advocates Remuneration Order.

27. As Waweru J. stated in **DONHOLM STORES Vs EAST AFRICA PORTLAND CEMENT LIMITED [2005] eKLR;**

“Taxation of costs, whether those costs between party and party or between advocate and client, is a special jurisdiction reserved to the taxing officer by the Advocates (Remuneration) Order. The court will not be drawn into the arena of taxation except by way of a reference from a decision on taxation, made under rule 11 of the Advocates (Remuneration) Order”.

28. In this case, the defendant invoked the provisions of Sections 1A, 3(A) and 63 (e) of the Civil Procedure Act, and Order 51 Rules 8 and 15 of the Civil Procedure Rules. In effect, the defendant did not file a reference from taxation.

29. The Advocates (*Remuneration*) Order has been aptly described as a Complete Code for dealing with matters of taxation of both party and party costs, as well as advocate and client costs.

30. It is well settled that when the law provides a specific procedure and rules to address a particular kind of issue, parties are expected to utilize the said procedure and rules.

31. In **MACHIRA & CO. ADVOCATES Vs ARTHUR K. MAGUGU & ANOTHER CIVIL APPEAL No. 199 of 2002**, the Court of Appeal noted that;

“Rule 11 (of the Advocates Remuneration Order) 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”.

32. The learned Judges of Appeal reiterated that the Rules Committee had deliberately intended to avoid the procedures used when either an appeal or an application for Review was made. Instead, the Committee devised a Simple and Expeditious mode of dealing with decisions made on taxation; and that is when they came up with the procedure for filing a reference from taxation.

33. It is not simply a matter of style or technicality.

34. As the Court of Appeal alluded to, different considerations and requirements arise when a party was seeking Review, or when there was an appeal, or when there was a reference from taxation.

35. In similar vein, the defendant’s application for setting aside the decision of the learned taxing officer, is based upon different considerations from those which apply on a reference from taxation.

36. It is my considered opinion, therefore, that this court lacks jurisdiction to employ the considerations which would normally come into play in a reference from taxation, to the defendant’s application for setting aside the decision on taxation.

37. Accordingly, the application is struck out, with costs to the plaintiff.

38. However, I feel obliged to point out that when a taxing officer is called upon to carry out the taxation of a Bill of Costs, he should do so, whether or not the respondent is absent. The absence of the respondent does not, of itself, render the Bill of Costs accurate. Many parties or advocates would normally ask for Instruction Fees; Getting-Up fees and other fees, at rates which were higher than the minimum, as prescribed. It is therefore the responsibility of each taxing officer to interrogate the Bill of Costs, to try and verify if the sums claimed were either in accordance with the Remuneration Order or if any increment which had been sought was justifiable, in the circumstances.

39. Perhaps if the defendant had moved the court properly, it may have been possible to re-open the process of taxation.

40. However, as I have already determined, the application dated 13th January 2017 is struck out, with costs to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of October 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Muga for the Plaintiff

Miss Muthee for the Defendant

Mr. C. Odhiambo, Court clerk.