



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW**

**MISCELLANEOUS APPLICATION NO. 182 OF 2016**

**IN THE MATTER OF THE SOCIETIES ACT CAP 108 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA**

**AND**

**IN THE MATTER OF APPLICATION BY WAY OF JUDICIAL REVIEW PROCEEDINGS  
FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI AGAINST THE  
REGISTRAR OF SOCIETIES APPOINTED UNDER CAP 108, LAWS OF KENYA**

**AND**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**ANN NJERI WAIHUMBU.....1<sup>ST</sup> INTERESTED PARTY**

**SUSAN NDUTA NDUNGU .....2<sup>ND</sup> INTERESTED PARTY**

**MARTIN GACHERU.....3<sup>RD</sup> INTERESTED PARTY**

**DANIEL ABEA.....4<sup>TH</sup> INTERESTED PARTY**

**SUSAN NDUTA KIMANI.....5<sup>TH</sup> INTERESTED PARTY**

**THE HON. ATTORNEY GENERAL.....6<sup>TH</sup> INTERESTED PARTY**

**EX-PARTE/APPLICANTS**

**JOSEPH NDEMI WANJIRI .....1<sup>ST</sup> EX-PARTE APPLICANT**

**LUKA GITHINJI NDEGWA.....2<sup>ND</sup> EX-PARTE APPLICANT**

**GODFREY CHEGE MUIGAI.....3<sup>RD</sup> EX-PARTE APPLICANT**

**JACKSON MUSYOKA JUMA.....4<sup>TH</sup> EX-PARTE APPLICANT**

**(BEING THE OFFICIALS OF KAWANGWARE**

**MARKET DEVELOPMENT SOCIETY)**

**RULING**

1. On 10<sup>th</sup> July 2017, Honourable S. Mwayuli Deputy Registrar delivered a ruling and reasons for taxation in a bill of costs dated 6<sup>th</sup> March 2017 filed by the firm of Julius Nyakiangana & Company Advocates for the 1<sup>st</sup>-5<sup>th</sup> interested parties.
2. In the said ruling, the Honourable Deputy Registrar/ taxing officer taxed the bill of costs which had been drawn at kshs 558,005 thereby to kshs 258,005 taxing off kshs 300,000/-.
3. The record shows that the respondent/applicant did not appear for the taxation despite its advocates being served with notice of taxation. The applicants herein who were respondents/exparte applicants in the main motion were represented by the firm of P.W Macharia Associates Advocates.
4. After the certificate of taxation was issued, the interested parties' advocates filed notice of motion dated 1<sup>st</sup> September 2017 seeking for judgment on the certificate of taxed costs as stipulated in Section 5(2) of the Advocates Act. That application is still pending hearing and determination. The certificate of taxation is dated 15<sup>th</sup> August, 2017.
5. As soon as the exparte applicants were served with the application for judgment, they filed an application dated 23<sup>rd</sup> October 2017 under certificate of urgency seeking for stay of execution of the certificate of taxation dated 15<sup>th</sup> August 2017.
6. However, on my perusal of that application, I declined to certify it as urgent because the purpose of stay was not disclosed.
7. Subsequently, the exparte applicants filed a notice of change of advocates on 3<sup>rd</sup> November and a notice of withdrawal of the application dated 23<sup>rd</sup> October 2017 before effecting service on the interested parties which notice was endorsed by the court this morning effectively withdrawing that application. The applicants then filed a fresh application dated 13<sup>th</sup> November 2017 seeking to set aside the certificate of taxation dated 15<sup>th</sup> August 2017 and the order issued on 10<sup>th</sup> July 2017 taxing the interested parties' bill of costs to shs 258,005.
8. The applicants also seek for an order compelling the interested parties to tax their bill of costs in accordance with rules of procedure and natural justice by involving the exparte applicants by way of interparties taxation of the bill of costs. They further seek for stay of execution of the certificate of taxation dated 15<sup>th</sup> August 2017 and or the hearing of the interested parties' notice of motion dated 1<sup>st</sup> September 2017 pending the hearing and determination of this application; and costs.
9. The application is based on the grounds on the face of the notice of motion and supported by the

affidavit sworn by Joseph Ndemi Wanjiru on 13<sup>th</sup> November 2017 deposing, among others that the taxation was done ex parte because he had disagreed with his advocate P.W Macharia who did not attend court for the taxation and that neither did the said advocates notify him of the taxation date. That he was served with the certificate of taxation directly on 24<sup>th</sup> August 2017 but had no money to consult another advocate.

110. On 12<sup>th</sup> October 2017 the applicant learned from the perusal of the court file that there was an application seeking judgment in terms of the impugned certificate of taxation, which was set for hearing on 30<sup>th</sup> October 2017.

11. That unless the orders herein are granted, the applicants will be unfairly forced to pay shs 258,005/- without due process being followed to their detriment.

12. The application was opposed by the interested parties who filed a replying affidavit on 17<sup>th</sup> November 2017 sworn by Mr Julius Nyakiangana advocate deposing among others that the application is an abuse of court process, is premature for non-compliance with the Advocates Remuneration Order and in view of the pending application dated 23<sup>rd</sup> October 2017.

13. That the applicants were served with the bill of costs on 10<sup>th</sup> March 2017 which was set down for 5<sup>th</sup> April 2017, again served on the applicant's advocates on 29<sup>th</sup> March 2017 as shown by the affidavit of service annexed.

14. That on 5<sup>th</sup> April 2017 there was no appearance by the applicants and the court was on leave hence the matter was slated for mention on 6<sup>th</sup> June 2017 to fix a ruling date which mention notice was served on the advocates for the applicants on 11<sup>th</sup> April 2017 as shown by annexed affidavit of service.

15. That on 6<sup>th</sup> June 2017 a ruling date was given for 10<sup>th</sup> July 2017 at 2.30 p.m. and a ruling date was served on the applicant's counsels on 12<sup>th</sup> June 2017 as shown by annexed affidavit of service.

16. That on 10<sup>th</sup> July 2017 when the ruling was delivered there was still no appearance by the applicants. That the interested parties' advocate further served the certificate of costs on the ex parte applicants personally on 24<sup>th</sup> August 2017 as shown by annexed affidavit of service and that the advocates for the applicants had even requested to settle the costs as taxed by installments as shown by letter annexure JN-5 from L.N. Macharia & Company Advocates dated 3<sup>rd</sup> November 2017.

17. The application was argued this morning by Mr Jakech counsel for the applicants with Mr Nyakiangana advocate representing the interested parties.

18. The applicant's counsel reiterated the grounds and supporting affidavit of his client while maintaining that since his clients did not participate in the taxation, they should be accorded an opportunity to have the taxation done interparties as the taxation proceeded when they had disagreed with the advocates PW Macharia who did not notify their clients of the date of taxation.

19. Further, that the bill as taxed is too high and if executed, the clients will suffer.

20. In opposition, Mr Nyakiangana, relying on his sworn replying affidavit submitted that the application was an abuse of court process because there is an acknowledgment that there was an advocate on record for the applicants who was duly served to appear for taxation and that the applicants were also served with certificate of taxation personally. In addition, it was contended by Mr Nyakiangana that the issue of the applicants disagreeing with their advocates on record is immaterial since they were served and no other advocate was on record for them at that time hence there was no confusion on legal representation.

21. Further, that the applicants could only challenge the taxation through the procedure set out in paragraph 11 of the Advocates Remuneration Order by filing a notice of objection to the taxation and if they did not know of the taxation, they could seek for enlargement of time to file objections and file a reference for the court's consideration, not asking this court to stay and set aside the taxation as is the case here. Counsel urged this court to dismiss the application with costs but that the advocate for the applicant should personally pay those costs for misadvising their clients in this matter.

22. In a rejoinder, Mr Jakech counsel for the applicants submitted that although it is admitted that his clients and their former advocates were served with certificate of taxation and bill of costs, the two had disagreed and that in any case, Section 95 of the Civil Procedure Act allows this court to stay certificate of taxation whereas Section 85 of the Act allows the application of the Civil Procedure Act to Miscellaneous Applications as this one.

23. It was submitted that the procedure for filing of a reference assumes that there is only a certificate of taxation yet in this case, there was and is already, an application for judgment. Reliance was placed on Miscellaneous Application 83/15 at Machakos (not supplied to court) where the court (Muriithi) held that a stay of execution of the bill of costs can issue by the court.

24. Counsel for the applicant submitted that although the circumstances in this case and the High Court Miscellaneous Application 83/2015 are different, the principles were the same.

25. In a rejoinder to the authority cited, Mr Nyakiangana replied that the Miscellaneous 83/2015 was in his client's favour and that in the matter, there was a pending reference where the applicants were seeking enlargement of time to file a reference out of time unlike in this case.

26. Further, that the court in the said case dismissed the application for non compliance with the established procedure for filing of references under paragraph 11 of the Advocates Remuneration Order.

27. It was contended that as there is no judgment entered in terms of the issued certificate of taxation, there is no risk of execution of the certificate of taxation.

### **DETERMINATION**

28. I have carefully considered the exparte applicant's notice of motion dated 13<sup>th</sup> November 2017, the grounds in support, the supporting affidavit and annexures. I have also considered the replying affidavit filed by counsel for the interested parties and the respective counsel's submissions and case law relied on this morning.

29. The only issue for determination is whether the application by the applicant has any merit or at all.

30. It is worth noting that the established procedure for challenging taxation of bills of costs is set out in paragraph 11 of the Advocates Remuneration Order and provides that:

***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;***

***2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on these items and the objector may within fourteen days from the receipt of the reasons apply to a judge in chambers which shall be served on all the parties concerned, setting out the grounds of his objection;***

***3) Any person aggrieved by the decision of the Judge upon any objection referred to such judge under Sub paragraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

***4) The High Court shall have power in its discretion by order enlarge the time fixed by Sub paragraph (1) or Sub paragraph (2) of the taking of any step, application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”***

31. In **Machira &Company Advocates vs Arthur K. Magugu & Another CA 199/2002 [2012] e KLR** the Court of Appeal made it clear that Rule 11 of the Advocates Remuneration Order provides for ventilation of grievances from such decisions of the taxing officer through a reference and that such decisions cannot be challenged by way of review, appeal or even setting aside.

32. In this case, it is not in dispute that the bill of costs was taxed after the advocates for the applicants had been served severally but had not appeared.

33. The applicants claim that they had disagreed with their then advocate on record, PW Macharia who never notified them of the date of taxation until when they were served with the certificate of taxation and learnt of the application for judgment on perusal of the court file.

34. That may be so. However, there is no way the court(taxing officer)could have known that the applicants and their advocates had fallen out. She had to undertake her judicial duties without inquiring to establish the reasons for the non attendance of the applicant’s counsel as long as she was satisfied that the advocates for the adverse parties were served with notice for, and that is what is expected of any court, including this court.

35. Where the applicants realize that they were excluded from participating in the taxation and a certificate of taxation has been drawn and sealed, with an application for judgment already on record, I agree that they can apply for stay of further proceedings including entry of judgment.

36. However, that stay must be a stay pending some other action. In these cases of taxation, the stay can only be sought and granted on account that there is a pending application seeking for enlargement of time under Paragraph 11 Rule (4) of the Advocates Remuneration Order to file an objection to the taxation and or an intended Reference.

37. There is no demonstration of an intention to file such application which should have been filed instead of the application seeking to set aside the taxation and certificate of taxation. Courts, over time have held that:

***“ Taxation of costs whether those costs be 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 except by way of a reference from a decision on taxation made under Rule 11 of the Advocates Remuneration Order.”***

38. And as was held in **Donhold Rahisi Stores case Nairobi HCC 18/2004**. The present application is not such reference. The court would only be inclined to stay recovery of the taxed costs pending the determination of a reference stipulated under Paragraph 11 of the Advocates Remuneration Order, and not pending the setting aside of the certificate of taxation and the order of taxation.

39. The applicant’s counsel now on record had the opportunity, on being instructed to take over the conduct of the matter from PW Macharia Advocates, to study the file and the applicable law and procedure for challenging taxation proceedings, whether the taxation was conducted *exparte* or *interpartes*.

40. The law allows the filing of a reference *exparte* or *interpartes* that is why there is provision for

notice of objection to taxation of specific items of the taxed bill and where the Ruling for taxation has reasons for such taxation, the objector need not seek reasons for taxation. He or she can proceed, upon giving notice within 14 days of the decision, proceed to file a reference in chambers for consideration inter partes. Where such time has lapsed, then Paragraph 11(4) gives such party wishing to apply latitude to seek enlargement of time.

41. None of the above was done by the applicants through their advocates. They cannot cling to Article 159(2) of the Constitution as the cure for procedural technicalities because the matter is not before the court as a reference challenging the specific value items of the bill of costs as taxed, for the court's discretion to be exercised in accordance with the principles established over time.( see **HCC 100/2013 Ufundi Co-operative Savings and Credit Society Ltd vs Njeri Onyango & Company Advocates** .

42. Challenging a taxation is not the same as challenging an ex parte judgment or other order made in a matter where review can be sought. The manner of challenging the taxation is stipulated in the Advocates Remuneration Order under the Advocates Act Cap 16 Laws of Kenya. That procedure cannot be ignored and brought into ambit of Civil Procedure Act and Rules. In **Speaker of the National Assembly vs Karume [2008] 1KLR 425** the Court of Appeal made it clear that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed.

43. The above decision echoes **Pasmore vs Oswald Twistle Urban District Council [1988] A.C 887** where it was held that where an obligation is created by statute, the person seeking the remedy is deprived of any other means of enforcement.

44. The above decisions have been followed subsequently by the Court of Appeal in **Samson Chembe Vuko V Nelson Kilumo & 2 Others[2016] e KLR and Mutanga Tea Factory Company Ltd vs Shikara Ltd & another [2015] e KLR** on the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes.

45. For the above reasons, I find that the application dated 13<sup>th</sup> November 2017 is devoid of any substance and is improperly before this court. The same is dismissed.

46. Counsel for the interested parties urged for costs against the advocates for the applicant for misadvising their clients.

47. I would have done so. However, costs are in the discretion of the court and moreso in proceedings of Judicial Review like these where the interested parties have been awarded costs payable by the applicants.

48. The advocates for the parties ought to know the law but in this case; the court had to intervene by rejecting the initial application, for the applicant's advocates to file some semblance of an application on behalf of their clients. In this case, they fumbled and lost. It is sufficient to tell the advocates to, in future, to read their law and advise their client's properly.

49. In the premises, I order that each party shall bear their own costs of the application which is hereby dismissed.

**Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of November 2017.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Jakech for ex parte applicant

Miss Ogonjo H/B Nyakiangana

CA: George