



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
MISC. APPLICATION NO. 294 OF 2017

GICHUKI KING'ARA & COMPANY ADVOCATES.....APPLICANT

VERSUS

KSC INTERNANTIONAL LIMIED.....RESPONDENT

RULING

[1] The Notice of Motion dated **29 November 2017** was filed herein by the Client/Respondent pursuant to **Article 165(3)(a) of the Constitution of Kenya, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, and Order 50 Rule 1 of the Civil Procedure Rules, 2010**, for orders that:

[a] The Honourable Deputy Registrar, **Mr. Aswani Opande**, be disqualified and/or recused from hearing and/or dealing in any way with this matter;

[b] The Respondents' Notice of Motion application dated **9 November 2017** be heard and determined before and in priority to the taxation of the Advocate/Applicant's Bills of Costs herein dated **10 July 2017**;

[c] The costs of and occasioned by this application be borne and paid by the Advocate/Applicant.

[2] The application was premised on the grounds that the Deputy Registrar has conducted himself in a manner which shows that he is biased in favour of the Advocate/Applicant and that he is therefore not partial in this matter. It was averred that the Deputy Registrar delivered a Ruling on **20 November 2017** in which he completely ignored the binding legal authorities which had been submitted to him by the Respondents' Advocates and effectively directed that the disputed issues of the Applicant's retainer and its entitlement to tax any bills of costs against the Respondents need not be determined before the taxation. It was thus contended that the Deputy Registrar acted unlawfully and in excess of his powers by directing the cancellation of the hearing date taken by the Respondent for its said application dated **9 November 2017**, and the reinstatement of a taxation date taken irregularly and improperly by the Applicant.

[3] It was further the contention of the Respondent that the aforementioned actions of the Deputy Registrar appear to be calculated to force the taxation of the Applicant's Bills of Costs herein to be concluded in haste prior to the determination of the Respondent' said application dated **9 November 2017**; and therefore that the Respondent is justifiably apprehensive that the Deputy Registrar is not impartial in this matter, hence the need for recusal. These averments were expounded on in the Supporting Affidavit sworn by **Ripthuman Singh Ubhi** and are supported by the documents annexed to

the said affidavit.

[4] The application was opposed by the Applicant and an affidavit filed to that effect sworn on **30 November 2017** by **Mr. Peter Gichuki King'ara, Advocate**. It was the averment of **Mr. Kingara** that the Respondent having terminated his retainer vide the two letters dated **15 June 2017** and **4 July 2017**, it would be ridiculous for it to now state that it had not instructed the Applicants; and that it was on that basis that the Deputy Registrar found that the Applicant was duly instructed and that the Respondent's remedy would be to await the conclusion of the taxation and file a Reference.

[5] On the issue of recusal of the Deputy Registrar, the Applicant averred that no valid ground had been laid for it; and that it is up to the Deputy Registrar to determine whether he should or should not recuse himself. It was further averred that the Deputy Registrar acted judicially and fairly in the matter; and that the issue of whether the Respondent's application should come before taxation is now *res judicata*.

[6] The application was argued on **6 December 2017** by **Mr. Sarvia** for the Client/Respondents and **Ms. Kimere** for the Advocate/Applicant. As rightly pointed out by **Ms. Kimere**, this is not a reference, but is an application that has been brought pursuant to the inherent jurisdiction of the Court. Accordingly, the Court is properly seized thereof.

[7] I have given careful consideration to the application, the grounds upon which it has been brought, the affidavits filed herein in respect thereof as well as the submissions by Learned Counsel. The backdrop of the matter is that the Applicant was retained by the Respondent to act for it in **High Court Civil Case No 446 of 2015: KSC International Limited (Under Receivership) & Others vs. Bank of Africa (K) Limited & Others**. The Applicant attached to its Replying Affidavit two letters dated **15 June 2017** and **4 July 2017** by which the Respondent terminated the retainer. The letter of **15 June 2017** in particular reads as follows in part:

"It has come to our attention that you are now actively campaigning as an MP in the upcoming elections, contrary to what you have severally told us. In light of the same, we feel that you will not be in a position to serve our interests with the time and dedication required and we with immediate effect terminate your services. We request you to arrange to handover all documents with regards to our matters. We have appointed the firm of M/s Desai, Sarvia & Pallan Advocates to take over the matter, who will accordingly file a change of advocate notice as well as arrange to collect all documents."

[8] The second letter merely reiterated the contents of the first letter aforementioned. Thus, the Applicant prepared its Bills of Costs and sought the taxation thereof, as he was entitled to do by dint of **Section 51** of the **Advocates Act, Chapter 16** of the **Laws of Kenya**. In response to the Bill of Costs, the Respondent filed a Notice of Preliminary Objection but later changed its mind and opted to canvass its case by way of a formal application for striking out of the Bill of Costs. That is the Notice of Motion dated **9 November 2017** which was filed herein on **10 November 2017**. Accordingly, when the matter came up before the Deputy Registrar for directions on **15 November 2017**, **Mr. Sarvia** for the Respondents urged that the said application, which raises, inter alia, the issue of the Applicant's retainer, be prioritized and disposed of before taxation. The Deputy Registrar took arguments thereon and thereafter rendered his considered Ruling on **20 November 2017**.

[9] The Deputy Registrar in his Ruling, while making it clear that he was not going into the merits of the Respondent's application, was of the view that there was no dispute as to the retainer. For that reason, he declined to stall the taxation. It cannot be gainsaid that the Deputy Registrar enjoys wide latitude in his capacity as a Taxing Master; and unless it is demonstrated that he committed an error of principle, the Court would be slow in upsetting his decision as a Taxing Officer. In this instance I find no misdirection on the part of the Deputy Registrar, for he made it clear that he was not going to concern himself with the merits of the Notice of Motion dated **9 November 2017**. Indeed, in his Ruling of **20 November, 2017**, he was explicit that the Respondents were **"...at liberty to fix a date for the application dated 9/11/17 to arrest this taxation if they so wish..."** Accordingly, the argument that the issue of whether the Respondents' application should come before taxation is now *res judicata*, is untenable, granted that the

same is yet to be heard and determined on the merits.

[10] In the premises, I have no hesitation in holding, as I hereby do, that the filing of the instant application was wholly unwarranted. For that reason, I find it unnecessary to pay attention to the authorities that were cited by Counsel for the Respondents noting that they touch on issues that fall within the purview of the application dated **9 November 2017**, which is yet to be argued.

[11] As to the request for recusal, in Black's Law Dictionary, Ninth Edition, recusal is defined as:

"Removal of oneself as a judge or policy-maker in a particular matter, esp. because of conflict of interest."

Accordingly, there is merit in the argument by the Applicant's Counsel that the same is a matter that falls within the jurisdiction of the Deputy Registrar. Indeed, in the Judicial Service Code of Conduct and Ethics, Legal Notice No. 132 of 2016 at paragraph 13(6), which is applicable to Judicial Officers such as Deputy Registrars, it is recognized that:

"A judicial officer shall disqualify himself or herself in any proceedings in which her impartiality might reasonably be question..." (emphasis supplied)

It is manifest therefore that it was not anticipated that a Judge would make the recusal decision on behalf of the Judicial Officer concerned.

[12] The foregoing being my view of the matter, it is my finding that the Respondents' application dated **29 November 2017** is misconceived and is hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER, 2017

OLGA SEWE

JUDGE