



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLENOUS CIVIL CAUSE NUMBER 553 OF 2014

DOUGLAS ODHIAMBO APEL & ANOTHER.....PLAINTIFFS/APPLICANTS

VERSUS

TELCOM KENYA LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

The Defendant/Respondent filed the Chamber Summons dated the 25th November, 2015 which is expressed to be brought under paragraph 11(2) of the Advocates (Remuneration Order).

In the said application the following orders are sought: -

1. That the court be pleased to set aside in its entirety the decision of the Taxing Master made on the 1st day of September 2015.
2. That the court do order that the party and party Bill of Costs dated 28th July, 2014 be referred back for taxation by a different Taxing Officer with appropriate directions or the court do make such orders as are just and fair in the circumstances.
3. That costs of the reference be awarded to the applicant.

The same is grounded on the grounds set out on the body of the same and its supported by the affidavit of Caroline Ndindi annexed thereto.

The summary of the Defendant's/Respondent's case is as hereunder.

On the 28th day of July, 2014, the Plaintiff filed a party and party Bill of Costs which the taxing officer did tax and delivered a ruling on 1st September, 2015.

The Defendant's Advocate did a letter dated 4th September, 2015 as required by paragraph 11 of the Advocates Remuneration Order seeking reasons for taxation of all the items on the Bill of Costs.

That on the 20th day of November, 2015, the Defendant received from the post office the Deputy Registrar's Letter dated 10th November, 2015 stating that the reasons for taxation are as per the ruling dated the 1st September, 2015. On the 23rd November, 2015, the Defendant's Advocate paid and obtained copy of the said ruling.

The Defendant believes that the taxing officer erred in failing to consider her submissions which are on record and for failing to apply the applicable Advocates Remuneration order in taxing the bill. In addition she listed the following other reasons why the taxing officer erred: -

- i. The taxing officer erred by taxing the party and party bill without the parent file i.e. HCCC No. 2547 of 1998.
- ii. That the taxing officer erred in allowing items on the bill without evidence and in particular items 11, 12, 21, 23, 25, 27, 44, 47, 54, 55, 57, 69, 82, 87, 89, 91, 93, 94, 95, 99, 100, 106, 111, 112, 114, 115, 117 and 121.
- iii. That the taxing officer awarded Ksh.900/- for attendance on 11th April, 2015 whereas the Plaintiff's Advocate's did not appear in court.
- iv. The taxing officer awarded Ksh.150/- for attendance on 11th June, 2001 for hearing the Plaintiff's application for leave to amend the plaint.
- v. The taxing officer failed to consider the Respondent's submissions in taxing items Nos. 10-35, 36, 42, 60, 65, 37-41, 43-59, 61-64, 66 to 124 and 127 in taxing are drawn to scale.

The Application is opposed and in doing so, the Plaintiff filed a replying affidavit on the 11th day of December, 2015 sworn by Nyamondi Ochieng- Nyamogo Advocate, wherein he depones that even though purported to be brought **“under paragraph 11(2) of the Advocates (Remuneration) Order”** both the Chamber Summons dated the 25th November, 2015 and the supporting Affidavit, in their entirety, are incurably defective, pathetically incompetent, frivolous and as such this honourable court is without jurisdiction to entertain the same as a reference.

He further depones that paragraph 7 of the supporting affidavit (**which sets out the reason why the taxing officer erred**) is a mere hotchpotch of desperate allegations without an iota of evidence or even a demonstration of what exactly is being complained about.

The application proceeded by way of oral submissions. On her part counsel for the Defendant reiterated the contents of the supporting affidavit and in addition submitted that the taxing officer did not give her reasons for taxation as is evident from her ruling. She further averred that the applicable scale is schedule 7 of the Remuneration Order but the taxing master ignored their submissions on that issue. That had submissions been considered, the taxing officer would have arrived at a different conclusion.

On his part, counsel for the Plaintiff submitted that the Application before the court is not a reference as understood under the Advocate's remuneration order. That the Defendant in her request for reasons for taxation never sought to know from the taxing master whether she made reference to the parent file. He further stated that the taxing officer opens her ruling by giving an explanation as why she proceeded the way she did and even made reference to Article 159 of the Constitution.

That the taxing master is being faulted for allowing some award for attendance without evidence but in his submission no evidence has been brought before the court to the effect that the taxing officer did not look at the parent file to arrive at her decision.

On the Defendant's contention that the taxing officer did not take into account her submissions, the learned counsel for the Plaintiff averred that there is no provision in the Remuneration Order that requires a taxing officer to take into account any party's submissions but she is supposed to tax the bill according to the law. He relied on Section 76 of the Remuneration Order.

It was further submitted that the items complained off by the Defendant have been explained by the Taxing master in that she explains that they are drawn to scale. She particularly refers to items 10-127. On the submission by the defendant that the taxing officer failed to indicate the Remuneration Order that she used, his response was that a Bill of Costs would normally state under what law it is brought and therefore the defendant cannot say they were not aware under which Remuneration Order, the Bill of Costs was taxed. He also took issue with the Defendant for her failure to annex the Bill of Costs to her affidavit and argued that such failure would cause injustice to the Plaintiff as he would not be able to respond to the application and the court also would not be in a position to know what is exactly before it.

I have carefully considered all the materials before me and the submissions made by the learned counsels for the parties herein.

I will start by considering the objection taken by Mr. Ramogo that the application is defective on the ground that the Bill of Costs which is the subject matter of the Application has not been annexed to the affidavit. I have looked at the record and I note that the Bill of Costs is part of the record before the court and it was therefore not necessary for it to be annexed to the affidavit. The application herein has been brought in High Court Misc. Cause No. 553 of 2014 in which the Bill of Costs was filed. In that regard, the objection by the counsel for the Applicant is not tenable.

The application herein seeks to set aside the decision by the taxing master on the grounds inter alia that the taxing master acted contrary to the provisions of the Advocates Remuneration Order, the Taxing Officer taxed the party & party costs without the parent file, the taxing officer erred in allowing items on the Bill without evidence, that she allowed items that ought not to have been allowed and that the taxing officer did not take into account submissions by the Applicant.

The learned counsel for the Respondent has taken issue with the applicant's application for the reason that the same is not a reference and that the application is not provided for under the Remuneration order. The same is brought under paragraph 11 (2) of the Advocates (Remuneration) Order.

The Applicant is challenging the decision by the taxing officer. A decision by the taxing officer can only be challenged by way of a reference. In this regard, the Hon. Justice Waweru had this to say in the Case of **Donholm Stores (suing as a firm) Vs East Africa Portland Cement Limited (2005) eKLR.**

“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 Advocate (Remuneration) Order. The court will not be drawn into arena of taxation except by way of a reference from a decision on taxation, made under rule 11 of the Advocates’ (Remuneration) order.

In this regard, I am also persuaded by the decision of Hon. Justice Angote in Malindi Miscellaneous Civil Application No. 16 of 2013 where he observed : -

“In the absence of a competent Reference before the court, I find and hold that I do not have the requisite jurisdiction to entertain an application for review or setting aside the certificate of costs or the taxing officer’s decision of 5th June, 2014”.

In the premises aforesaid, I agree with the counsel for the Respondent that the Application is not properly before the court and for that reason the application dated 25th November, 2015 is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 31st day of March, 2016.

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L NJUGUNA

JUDGE

In the presence of

.....***for the applicant***

..... ***for the respondent***