



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC. CIVIL APPLICATION NO. 274 OF 2010
IN THE MATTER OF THE ADVOCATES ACT
AND IN THE MATTER OF TAXATION OF ADVOCATE CLIENT COSTS

BETWEEN:

S. O. OWINO & ADVOCATES..... PLAINTIFF

VERSUS

AQUILA DEVELOPMENT CO. LTD.....DEFENDANT

RULING

1. This matter comes before the Court on an application to set aside the taxation of the Taxing Officer dated, signed and delivered on 23rd June 2010 in open Court in the absence of the Parties. On 2nd July 2010 Messers S.O. Owino & Associates (*“the Applicant”*) wrote to the Taxing Officer stating:

“We object to your decision to strike out our bill of costs and hereby give you notice to the same pursuant to paragraph 11 of the Advocates (Remuneration) Order. In the circumstances pursuant to paragraph 11 (2) kindly let us have the reasons for your said decision”.

2. The Applicant was informed by letter dated 19th July 2010 that the reasons were ready for collection and the fee for a certified copy was Kshs.120/- and for an uncertified copy it was Kshs.60/-. That letter was received by the Applicant, they say, on 2nd August 2010 and the appropriate fee was paid and certified copy obtained later.

3. This Application is brought by Chamber Summons on 17th August 2010. It is brought under **Order 11 of the Advocates (Remuneration) Order**. That Order is a schedule to the **Advocates Act (Cap 16 of the Laws of Kenya)** under **Section 48. Paragraph 11 (Rev 2010)** provides:

“(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 the reasons for his decision of those items and the objector may within fourteen days from the receipt of the reasons apply to the Judge by chamber summons which shall be served on all the parties concerned, setting out the grounds of his objection....”.

4. There is no record of receipt of the letter of 2nd July 2010 notwithstanding that it is date stamped as received by the Registry on that day. The only record of the date on which the certified copies were available is the carbon copy of the form informing the Applicant that copies would be available on payment of the fee. That form is dated 19th July 2010 and records that it is in response to the letter of 2nd July 2010. The Application was filed on 17th August 2010 and that is recorded. The Applicant was given various hearing dates ranging from 3rd November 2010 up to 4th April 2011 when it came before Hon. M.G. Mugo J. On that day Mr. Owino was not well. It was agreed to stand the matter over generally by consent. The rationale behind that is not recorded. The file was then lost and recovered and the matter came before this Court on 10th November 2014. Mr. Njoroge for the Respondent was not able to proceed because, he said, he had misplaced the file because he thought the matter had ended. He needed time to retrieve the file. The matter was listed again on 1st December, 2014 when Mr. Owino was not ready and the matter was re-listed for 27th April 2015 when it was finally heard.

5. Mr. Owino argues that it is, simply, a straightforward application to set aside the decision of the Taxing Officer 23rd June 2010 and for the matter to be remitted before a different taxing officer. The Application is by Chamber Summons filed on 17th August 2010, the Supporting Affidavit of Stephen Owino was sworn on 17th August 2010 and the Further Affidavit sworn on 9th February 2011 and filed on 14th February 2011.

6. The Application seeks the following Orders.

“1. That the decision of the taxing officer dated and delivered on 23rd June 2010 to strike out the Applicant’s Bill of Costs dated 15th March 2010 be and is hereby set aside and/or vacated.

2. That the Bill of Costs dated 15th March 2010 be remitted back for taxation before a different taxing officer.

3. That the costs of this application be awarded the Applicant.

The Grounds the Application relies upon are that:

“a) The Court in Misc Civil Application No.51 of 2009 did not determine item No. 2 in the Bill of costs filed therein.

*b) The fees payable for service received under item No. 2 was not concluded in the taxation of the bill of costs in **Misc. Civil Application No. 51 of 2009** as such the filing of the bill of costs herein is not an abuse of the Court process.*

7. The Application is supported by the Affidavit of Stephen Owino, Advocate which sets out the background and in particular that the Letter dated 19th July 2010 from the Deputy Registrar was not acted upon until 2nd August 2010. **Exhibit SO 2** is a copy of that letter and it shows that it was received by the Registry on 2nd August 2010 which suggests that it could not have been transmitted onwards before that date. The original Notice of Objection and request for the decision is dated 2nd July 2010 and appears at **Exhibit SO 1**. Mr. Owino states clearly that he paid for a certified copy on 2nd August 2010, as demonstrated by the Receipt at **Exhibit SO 3**, but did not receive the certified copy until 10th August 2010 and filed his Chamber Summons on 17th August 2010. Paragraph 10 of the Affidavit goes to the substance of the Application and states that the taxation was dealt with on paper, in that the Parties filed Written Submissions and there was no highlighting. That is borne out by the Record. At paragraph 10 it is said that “the taxing officer erred in relying on the bill of costs filed in the said **Misc App. No. 51 of 2009** instead of the ruling delivered in the said matter.” In fact the taxing officer considered only the Bill of Costs and the argument from only one side, on that issue.

8. The Respondent opposes the Application on two grounds, procedural and substantive and relies on the

Replying Affidavit sworn on 2nd November 2010. The argument on procedure is that the Application was filed out of time, the pertinent provision being paragraph **11(2) of the Remuneration Order**. It is argued that the Applicant is out of time and should seek an extension because the Application was not filed within 14 days of receipt of the reasons. It is argued that was not done.

9. Dealing next with the argument that the Application does not comply with **Paragraph 11 of the Remuneration Order**. **Paragraph 11(1)** gives the party dissatisfied with the taxation 14 days from the decision to record their objection. The Ruling was delivered on 23rd June 2010. The Notice of Objection in the form of a letter was sent and received on 2nd July 2010 that is within 14 days. The Taxing Officer is then to make the reasons available. The earliest date that could possibly have been done was 2nd August 2010. Even if time starts to run from receipt of the letter, the first day would be 3rd August and 17th August is within 14 days time period. Therefore, the Respondent's argument that timescales have not been complied with, is without merit.

10. On the substantive grounds, it is said that the Bill of Costs for the sums now claimed was struck out in its entirety. It was said the Applicant is being selective in reading the Ruling. In summary it is said that the Applicant filed a Bill of Costs in **Misc. App. 51 of 2009** claiming the same fees at Item 1 here, as item 2 there. It was struck out. That item 2 is now the current bill. The thrust of the argument is that the Applicant is attempting to claim, and be paid the same fees twice. To support it is said Kshs.75,000/- has already been paid. That is the argument that was accepted by Deputy Registrar Kandet's Ruling of 26th June 2010 striking out the Bill. When asked if he had provided the DR with a copy of the Ruling from **Misc App. 51 of 2009**, he said he had not. The Respondent relies on **Paragraph 21** of the Remuneration Order to support the argument that a fee should only be paid once. **Paragraph 21** provides:

“In the calculation of scale charges the basis of charge shall, unless otherwise provided in the Schedules, and irrespective of the number of titles involved or documents required to be prepared or approved, be the sum set forth in the deed or document as the price or consideration is set forth, the value of the subject matter affected by the deed, which shall be deemed...”

11. It is conceded by the parties and it is clear from the Ruling of 23rd June 2010 that the Taxing Officer did not consider the Ruling in **Misc. App. 51 of 2009** in coming to its decision. It seems he relied purely on the submissions made by the paying party without giving the Advocate an opportunity to respond to the allegation that the matter was res judicata. **Section 7 of the Civil Procedure Act (Cap 21)** provides. *“No court shall try any suit or issues in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”* (emphasis added).

12. It is clear from the above that in deciding whether the Bill of Costs was res judicata, the taxing officer would need to firstly satisfy himself that the issue was raised. He did so because a copy of the Bill in **Misc App. No. 51 of 2009** was provided to him. Secondly, he would have to satisfy himself that it was being raised for a second time and thirdly, that it had been heard and finally decided upon. It is worthy of mention that the taxing officer in that matter was Mr. S.A. Okato Deputy Registrar. In the circumstances personal knowledge can be discounted.

13. The Ruling of 2nd February 2010 bears out what Mr. Owino says both in his Affidavit as well as oral argument. What is said there is telling both of the actions of the taxing officer here, as well as the Respondent. It says; *“I agree with submissions by the Respondent's Counsel that the Applicant should have filed separate bills for particularly items 2 and 3. This is so because instruction fees is an independent and static item chargable (sic) only once and is not affected or determined by the stage the suit has reached. (see judicial Hints on Civil Procedure Vol. 1 at page 143)”*. Surprisingly, in his Written Submissions dated 11th May 2010, Counsel for the Respondent argued the exact opposite, that is, that there was one transaction and so the items should be billed separately. There is an obvious inconsistency there.

14. Therefore, both the submissions and the Ruling that the item had been billed, taxed and paid earlier were factually incorrect. The fact that the Taxing Officer omitted and/or failed and/or neglected to consider the earlier Ruling for the exact and correct outcome amounts to a fundamental misdirection.

15. In the circumstances, the Application is allowed as prayed. The Ruling of Deputy Registrar Kandet of 23rd June 2010 is set aside. The Bill of Costs dated 15th March 2010 and filed on 16th March 2010 is remitted to a different taxing officer to be taxed a new.

16. The Respondent to pay the Applicant's costs here and below.

Dated 20th May 2016.

Orders accordingly,

Order accordingly,

FARAH S.M. AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2016.

In Presence of:

Otieno – Court Clerk

No Appearance for Applicant

Alex(clerk) for Respondent