



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
(MILIMANI LAW COURTS
CIVIL SUIT NO. 1705 OF 1997

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

ALI MOHAMED MWANZIA and CLEMENT MUTUMA trading as

FERRARI AUTO SPORTS.....DEFENDANT

R U L I N G

1. This Matter comes before the Court on the Chambers Summons dated 18th March and filed on 21st March 2016, which is brought by Mr Ali Mohamed Mwanzia (one half of the Defendants in partnership). It relates to a Bill of Costs filed by the Plaintiff to the Suit. It is brought under **Paragraph 11 (1) and (2) of the Advocates Remuneration Order**. It seeks the following Orders:

1. THAT the honourable court be pleased to set aside the decision of the Taxing Master made on 09/03/2016 and/or refer the Taxation to be done afresh before another Deputy Registrar and or re-tax the Party and Party Bill of Costs.

2. THAT the costs of this Application be provided for.

2. The Application is Supported by the Affidavit of ALI MOHAMED MWANZIA and is based on the following grounds and any other grounds to be adduced at the hearing hereof:-

(a) "THAT the taxation was done without the Submissions of the Applicant

(b) THAT the Applicant was denied a fair hearing and was not asked by the Court to give a response to the Bill.

(c) THAT Bill as taxed is excessive and not in line with the Law.

(d) THAT no prejudice will be caused to the Respondent

(e) THAT it will be fair and just for the reference to be allowed so that it can be heard and determined on merit for the interest of justice. "

3. The Application is drawn by Ali Mohamed Mwanzia and states at the end that ***“If any party served does not appear at the time and place above mentioned such order will be made and proceedings taken as the court may think just and expedient”***.

4. In his Supporting Affidavit (also signed on 18th March 2016) the Applicant states that he is the First Defendant in the suit. The explanation that he provides is as follows:

(a) He did not attend Court on 9th March 2016. The reason he did not do so was that he was held up in a traffic jam. He says that is the reason he was unable to attend the Taxation of the Party and Party Bill of Costs.

(b) The “Court” proceeded to tax the Bill as drawn as it was unopposed. In fact the bill was exaggerated and he was denied the opportunity to oppose the Bill.

(c) He was denied an opportunity to orally submit and show the Court that the Bill was exaggerated.

(d) He then goes on to deal with the Merits of a review and states that:

(i) ***The Advocates Remuneration (Amendment) Order 2006*** was not applicable but the Court without any ground and or reason granted and allowed the Bill as drawn.

(ii) The Instruction fee was highly exaggerated and in relation to the Getting Up fee and other Attendances charged which were not reflective to the Original Court File.

(iii) The Taxing Officer took into consideration extraneous issues of failure to file Submissions instead of taxing the Bill as filed

(iv) That on 11th March 2016 he filed his Notice of Objection to the Taxation. **Exhibit AM 1** is such a Notice duly filed and served.

(v) THAT on 16th March 2016 he received the Reasons of the Taxation from the Court. **Exhibit AM 2** is said to be those reasons. In fact, what is Exhibited is a Copy of the Proceedings.

(e) He also states that there is an Appeal pending in the Court of Appeal and

(f) That the Taxation ought to be set aside and or reviewed so that I can participate in the Taxation.

5. The Document purporting to be the “Reasons” of the Deputy Registrar comprise of the typed Proceedings for 9th March 2015, that is more than twelve months before this Application was filed. There is nothing on the face of the document to show that they are certified. At the end of those proceedings, the Taxing Officer, Deputy Registrar Hon Elizabeth Tanui is recorded as having said, *“The defendants were given a last adjournment way back on 20/11/2014. Those orders of last adjournment have not been reviewed or set aside. In as much as I sympathize with the position of Mr. Mworira, the conduct of the defendants deserves no such sympathy. Despite directions given as to the filing of submissions, no such submissions have been filed. The bill of costs dated 12/11/2009 therefore stands unopposed. It is allowed as drawn at Kshs. 185,792.40.”* The Coram records Mr. Mworira as acting for the 2nd Defendant. I assume that means Clement Mutuma.

6. The Application is opposed by the Plaintiff to the Suit. The Plaintiff has filed Grounds of Opposition. There are made on the Grounds that:

(a) *“The application is incurably defective and incompetent for failing to exhibit the reasons for the ruling delivered by the Taxing Master on 9th March 2016 (sic) in the absence of a signed, sealed and certified copy of the aforesaid ruling.”*

(b) By the Court's Order and Directions given for the Defendant to file submissions in opposition to the Bill of Costs, the Court gave the Defendants an opportunity to put in their opposition to the Bill of Costs dated 12th November 2009, in particular on; 28th September 2012, 5th November 2014, 20th November 2014. *"Therefore, the taxing master was correct in refusing to further indulge the 1st Defendant and allowing the bill as drawn for being unopposed.*

(c) *That the subject Bill of Cost is properly drawn to scale in accordance with the **Advocates (Remuneration)(Order) 1997(sic)** and graduated from scale to scale as amended from time to time.*

(d) *In view of the circumstances the application, as filed, constitutes a gross abuse of the court process and should be dismissed with costs".*

7. The Plaintiff/Respondent has also, very helpfully, filed written submissions. Under the Heading "Reference On Merits" the lists the procedural steps that have taken place and assert that the 1st Defendant has had ample opportunity to file written submissions. Paragraph 9 of the Submissions states that it was the Parties who "agreed to proceed by written submissions". It goes on to say that the Taxation was fixed for Hearing on 9th March 2015. In fact, the taxation was adjourned to 21 January 2015. For some reason it was not listed and it was up to the Plaintiff to seek a date for hearing. The Registry issued the date of 9th March 2015. The Defendant was served with a Notice on 25th January 2015. He states he intended to attend the hearing and would have done but for the traffic. It is therefore fair to assume he had Notice of the Hearing.

8. In relation to the Defendants point that he was not heard orally. It is argued that he did not attend. His excuse about the traffic is also challenged on the basis that he never made any contact at the time to say he was stuck or when and where that was. There is no explanation for the failure to comply with the directions for the filing of written submissions. The Plaintiff feels very strongly about that. The Submissions say; "In the absence of such an explanation, the court ought not to countenance the inequitable, inexcusable, blatant and contemptuous conduct of the Applicant in completely disregarding a binding order of this court. The Submissions also raise the issue of delay, being that the Application is brought 4 years after the Bill of Costs was served on the Applicant. Paragraph 13 contains a typographical error. The last hearing before Hon DR Nyambu was on 20th November 2014, not 2015 as stated.

9. Perusal of the record shows that this is a case where on the initial suit there was judgment in default. That was followed by an application to set aside that judgment. On the date of that hearing too, the Defendant failed to attend having argued that Ferrari Auto Sports was a limited company. On 12th March 2010 held that the Defendant had not put forward a suitable case for setting aside a regular judgment. The Application was dismissed with costs. The Ruling of Hon Martha Koome J (as she then was) records that the 1st Defendant failed to attend Court. He was served with the Notice of the judgment dated 9th October 2008. This is also confirmed by affidavit of service. At page 4 paragraph 9 of the Ruling, the Learned Judge says, "The 1st defendant failed to attend court, sat on his rights for over one year, fails to give any reasons why they failed to attend court and why it took them such an inordinate delay to bring this application. For those reasons I am not persuaded that the applicant deserves the exercise of this court's discretion which is exercised in the interest of justice."

10. On 25th April 2016, this Court gave directions for the filing of written submissions. The Application was listed for highlighting of submissions on 21st July 2016. On that day both Advocates confirmed that they had filed their written submissions and that the second defendant was not opposing the Application. Neither wished to highlight. The Applicant's Submissions do not appear on the Court File and a Search of the Registry has been instituted, but has been unsuccessful.

11. The issue is succinct. It is should the Court set aside the taxation for procedural irregularity because the 1st Defendant was denied a right to be heard. Secondly, whether the taxation ought to be reviewed on

the substantive ground that the DR allowed attendance fee that was grossly exaggerated. The Plaintiff's position is that it should be taxed as drawn because it was drawn to scale.

12. Starting with the right to be heard. The 1st Defendant was represented at the Hearing. He was firstly served with a Bill of Costs. There was no Objection filed in response. Nothing to show that it was being challenged – for being exaggerated. The matter was listed for the Taxation hearing and it is then that the 1st Defendant raises his objection for the first time. It is agreed the matter will proceed by way of written submissions. The Applicant failed to comply with both the agreement and the order, not once but to the extent that the DR then handling the matter found it necessary to record that she was granting a “final adjournment”. On the date appointed for Hearing of Submissions by Highlighting, the Applicant had failed to either file written submission or attend the Hearing. There was no attempt to inform the Court or opposing Counsel on that date of the difficulty in attending, if in fact it existed. As the Respondent rightly points out, there is no explanation given for the “traffic” excuse so it is too vague to be plausible.

13. Therefore, the Court cannot come to any conclusion that the Applicant's non-participation was due to nothing other than his own voluntary acts rather than a failure on the part of the Taxing Officers to grant him a fair hearing. In fact, the Court notes that the Applicant is fully apprised of the consequences of non-attendance because he has set them out on his own Application which he prepared while acting in person. Or so the Court is led to believe.

14. In relation to the substance of the Taxation, the Rules provide a clear procedure for Challenge. As the Taxation was conducted in 2015, the Applicable Rem Order would be the one of 2009. The aggrieved party has 14 days to object under **Paragraph 11 of the Remuneration Order which** 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 office 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 those items and the objector may within 14 days from the receipt of the reasons to apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection..”

Therefore, **Paragraph 11(1)** gives the party dissatisfied with the taxation at least 14 days from the decision to record their objection. That was not done. The Applicant has waited 12 months to bring the Application. The correct procedure has not been followed. The Court has not been provided with any reason why that default should be ignored to the detriment of a Judgment Creditor who has waited several years already.

15. The Plaintiff also has corresponding constitutional rights to have its matter dealt with in a timely manner.

16. The way in which the Application is presented, it is made to look like the Taxing Officer simply accepted the Bill of Costs without considering whether it complies with the Remuneration Order as to layout and setting out of items in the correct section and secondly, confirming that where there is Scale Fees set out, the correct scale is used. On the face of it the Taxing Officer did not conduct that exercise. However, due to the Applicant's own preparation of this Application, the Taxing Officer has not been given an opportunity to set out her reasoning. In the circumstances, the Court cannot be satisfied to any reasonable standard that she did not do so. The absence of best practice does not necessarily point to non-compliance.

17. In the circumstances and for the reasons set out the Application is dismissed with costs.

Order accordingly.

FARAH S. AMIN

JUDGE

DATED, SIGNED AND DELIVERED 28th DAY OF SEPTEMBER 2016.

In the presence of:

Isaiah Otieno - Court Clerk

Plaintiff: No Appearance

1st Defendant: Miss Kiwanu HB Mr Omwega