



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC MISC APP. NO. 51 OF 2011**

**LEONARD KATUNGA MBUVI T/A KATUNGA MBUVI & CO.  
 ADVOCATES.....APPLICANT/ADVOCATE**

**=VERSUS=**

**1. ACCREDO AG**

**2. HANS JUERGEN LANGER**

**3. ZAHRA**

**LANGER.....RESPONDENTS/CLIENTS**

**R U L I N G**

**Introduction:**

1. What is before me is the Notice of Motion dated 30<sup>th</sup> October 2014 filed by the Clients/Applicants. In the Application, the Clients are seeking for the following orders:

- (a) **THAT the honourable court be pleased to review, discharge and/set aside the decision delivered on 22<sup>nd</sup> day of September 2014 and the resultant decree issued on 26<sup>th</sup> September 2014.**
- (b) **THAT the honourable court be pleased to enlarge time and review, discharge and/or set aside the ruling of the taxing master and the certificate of costs issued in this matter.**
- (c) **THAT the honourable court be pleased to tax the instruction fees afresh and determine all questions and settle all terms relating to the instruction fees payable in Misc. Application Number 51 of 2011.**
- (d) **THAT the honourable court be pleased to issue any other and such further orders as it may deem fit to grant.**
- (e) **THAT costs of this application be provided for.**

**The Clients'/Applicants' case:**

2. The 2<sup>nd</sup> Client/Applicant deponed in his affidavit that this court entered a final Judgment on 22<sup>nd</sup>

September 2014 for an amount of Kshs.2,914,654; that this court delivered a Ruling in Misc Application number 17 of 2013-Kenyaniri & Associates Vs Salama Beach Hotel on 26<sup>th</sup> September, 2014 and that the decision in this suit and Misc. Application number 15 of 2013 both emanated from taxation of bills of costs filed by the two advocates who acted for the Defendants in HCCC No. 106 of 2010.

3. The 2<sup>nd</sup> Client/Applicant has deponed that this court having found that it was unconscionable for two firms of advocates to claim the full instruction fees on the Defence and counter-claim in HCCC No. 106 of 2010 from the same client, it is a new and important matter which was not available to him.

#### **The Advocate's/Respondent's case:**

4. In response to the Application, the Respondent filed his Grounds of Opposition in which he averred that this court lacks jurisdiction over the certificate of costs and the decree; that the court is *functus officio* in matters of setting aside and review and that the Application is an abuse of the doctrine of finality.

#### **Submissions:**

5. The Applicants' advocate submitted that the Deputy Registrar issued a Certificate of Costs in this matter on 4<sup>th</sup> September 2012 and a final Judgment was entered into for Kshs.2,914,654 by the Court on 22<sup>nd</sup> September 2014.

6. Counsel submitted that on 26<sup>th</sup> September 2014, this court delivered a Ruling in a different matter in which the court decreed that the Respondent herein should not have been awarded the full instruction fees on the Defence and counter-claim in HCCC No. 106 of 2010, the same having been struck out by the court.

7. According to counsel, the decision of this court is a new and important matter of evidence.

8. On the other hand, the Respondent's/Advocate's counsel submitted that the Remuneration Order is a complete code and hence there is no room for invocation of the Civil Procedure Rules; that any complaint arising from taxation of any item is to be ventilated by way of reference and that the time for objecting to the taxation has strict time lines.

9. The Respondent's counsel submitted that the reasons for the taxation of the Client/Advocate Bill of Costs was delivered on 23<sup>rd</sup> July 2012 and a period of more than two years has since lapsed.

10. Counsel submitted that the High Court only interferes with the decision of the taxing master when there is an error and that there is no error apparent to warrant this court to interfere with the duly issued Certificate of Costs

#### **Analysis:**

11. It is not in dispute that on 23<sup>rd</sup> July 2012, the taxing officer taxed the advocate-client bill of costs dated 22<sup>nd</sup> November 2011 at Kshs.2,914,564. The Ruling by the taxing officer was delivered in the presence of the advocates for both parties.

12. The record shows that indeed, the Applicants/clients filed a Reference appealing against the said taxation. However, the clients' advocate withdrew the said reference on 23<sup>rd</sup> October 2012.

13. The Respondent then obtained a Certificate of Costs and a Judgment from this court.

14. The Clients/Applicants have filed the current Application for review and setting aside the decision of this court dated 22<sup>nd</sup> September 2014 in which it entered Judgment based on the Certificate of Costs in favour of the Advocate/Respondent. The Clients/Applicants are seeking for an order that this court sets

aside the Ruling of the taxing officer and then tax instruction fees afresh.

15. The Application is premised on the ground that in Malindi Misc. Application Number 16 of 2013, Kenyariri & Associates Vs Salama Beach Hotel, I delivered a Ruling in which I stated that the Respondent herein was not entitled to full instruction fees.

16. The issue that I am supposed to determine is whether this court can review and set aside the decision of the taxing officer and the subsequent decisions that she has made, then re tax a bill of cost which was taxed almost four years ago on the basis of a Ruling that I made in Misc. Application Number 16 of 2013.

17. The only avenue, as correctly submitted by the Respondent, available for a party to challenge the decision of a taxing officer is by filing of a Reference to this Court pursuant to the provisions of Rule 11 of the Advocates Remuneration Order.

18. Although the High Court or this court can enlarge time within which to file a Reference, the Application before me is not for enlargement of such time.

19. As I have already stated the Applicants herein filed a Reference in this matter but withdrew it.

20. The only reason why the Applicants now want to argue what they perceive to be a Reference out of time is because I stated in a different matter that the Applicants herein cannot pay instruction fees twice to two advocates in the same matter.

21. That, in my view, cannot be a good reason for setting aside the Certificate of Costs and the entry of Judgment so as to allow the party to argue his Reference out of time or for review of the Ruling of the taxing officer.

22. Having submitted to the decision of the taxing officer by failing to file a Reference, the Applicants cannot at this stage, using my decision in a different matter, seek to re-open the taxation after more than three years. In any event, the issue as to whether the client could pay two advocates instruction fees should have been within the knowledge of the advocate who was acting for the clients all along.

23. In view of the fact that the only reason that the Applicants want this court to set aside the Ruling of the Taxing Officer and the subsequent orders of this court is my Ruling of 26<sup>th</sup> September 2014 in Misc Application Number 16 of 2013, I find and hold that no good reason has been given for me to exercise my discretion in favour of the Applicants.

24. The Applicants' counsel cannot wait until the court makes its pronouncements on matters of law in a different suit for him to use that pronouncement to unsettle a previous Ruling, in which no appeal or reference was filed. In fact, if such a practice was to be allowed, then there would be no end to litigation. It is for that reason that Order 45 of the Civil Procedure Rules, which is not applicable in this case, does not provide that a Ruling or Judgment can be reviewed upon discovery of a favourable Judgment or Ruling in a different matter.

25. Consequently, I dismiss the Applicants'/Clients' Application dated 30<sup>th</sup> October 2014 with costs.

Dated and delivered in Malindi this 20<sup>th</sup> day of **March**, 2015.

**O. A. Angote**

**Judge**