



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC CAUSE NO 512 OF 2012

IN THE MATTER OF THE ADVOCATES ACT

BETWEEN

MASIKA & KOROSS ADVOCATES.....APPLICANT

VERSUS

NJAMA LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The Respondent's Notice of Motion application dated 6th June 2014 and filed on 12th November 2014 was brought pursuant to the provisions of Sections 1A, 1B, 3A, (sic) 63 (e) of the Civil Procedure Act and the inherent powers of the court. It sought the following orders:-
 1. **THAT the Taxation proceedings before the Hon. R. Nyakundi (Mr) Deputy Registrar on 5th December 2013, the Certificate of Costs issued pursuant thereto and all consequential orders be set aside.**
 2. **THAT the Bill of Costs be fixed for inter partes hearing.**
 3. **THAT this Court does grant any further remedies as it deems fit.**
 4. **THAT the costs of this Application be provided for.**

THE RESPONDENT'S CASE

2. The application herein was supported by the Affidavit of Francis Njakwe Maina that was sworn on 6th June 2014. The Respondent's Written Submissions were dated and filed on 18th December 2014.
3. It contended that the taxation of the Applicant's Bill of Costs proceeded without its knowledge as the Applicant did not issue it with a Notice of Taxation. It also stated that there was no Affidavit of Service on the court record evidencing service of the said Notice by way of registered post and that it only learnt that the said taxation took place after it was served with a Certificate of Costs dated 5th December 2013.
4. It averred that the Applicant sent it the said Notice vide a letter dated 10th January 2014 despite

M/S Mwangi & Guandaru Advocates having filed a Notice of Appointment dated 26th July 2013 on 29th July 2013 indicating that all correspondence in the matter was to be sent to them. It was therefore its argument that the Applicant's advocates failure to comply with the said Notice of Appointment could only be regarded as having been in bad faith in a bid to have it being condemned unheard in the taxation proceedings.

5. It therefore urged the court to allow its application so that the Applicant's Bill of Costs could be heard on merit.

THE APPLICANT'S CASE

6. In opposition to the said application, on 27th November 2014, Isaac Nyahanga Owuor, an advocate, swore a Replying affidavit on behalf of the Applicant herein. The same was filed on 28th November 2014. The Applicant's written submissions were dated and filed on 18th December 2014.
7. The Applicant stated that it initially obtained a Notice of Taxation on 28th August 2012 which had a hearing date of 27th September 2012. However, the matter was not listed. Thereafter the court file went missing. When the said file was traced, it served the Respondent with a Notice of Taxation for 14th February 2013 on 17th January 2013. The Affidavit of Service was filed on 13th February 2013 evidencing service of the Hearing Notice upon the Respondent.
8. On 14th February 2013, the Deputy Registrar directed it to file its documentation which it did on 27th February 2013. The matter was, however, not listed for mention before the Deputy Registrar on 28th February 2013 as had been expected. The matter was taken out of the cause list on several other subsequent days as the said Deputy Registrar was not sitting.
9. The Respondent's advocates filed a Notice of Appointment of Advocates. They appeared in court on 17th September 2013 where at they were directed to file their documentation but did not do so. On 25th November 2013, the Deputy Registrar reserved his ruling for 2nd December 2013. The Ruling was, however, delivered on 3rd December 2013.
10. It thus urged the court to dismiss the Respondent's application with costs to it as the same was not merited.

LEGAL ANALYSIS

11. Before the court could delve into the analysis of the parties' respective submissions, it found it prudent to point out that the integrity of the court file herein was in question. The Notice of Appointment of Advocates by M/S Mwangi & Guandaru Advocates and the Affidavit of Service that was filed on 13th February 2013 was not on the court record. Neither were the proceedings that took place before the Deputy Registrar. The court therefore had to rely on copies of documents that had been annexed by the parties in their respective Affidavits in an attempt to reconstruct what had transpired herein.
12. It was as correct as the Respondent pointed out that there was no copy of the Affidavit of Service evidencing service of the Notice of Taxation that was scheduled for 5th November 2013. This appears to have been the last court attendance. The court could only make this assumption as there was no record to show whether or not the matter proceed on the said date. In fact, save for the Affidavit of Service that was filed on 13th February 2013, there did not appear to be any Affidavit of Service commensurate with the numerous times the Applicant took mention dates.
13. For the reason that the court record appeared incomplete and the fact that the Respondent did not file its documentation as had been ordered by the Deputy Registrar on 17th September 2013, the court was very hesitant to find that the Respondent was not aware of the date the taxation was scheduled for hearing. Indeed, the court's position was informed by the fact that Exhibits marked "INO 6" and "INO 8" annexed to the Applicant's Replying Affidavit showed that M/S Mwangi & Guandaru Advocates had acknowledged receipt of the Notices of Taxation for 17th September 2013 and 5th November 2013 and various documents that had been attached to the Applicant's application, facts the said advocates did not deny.

14. The court noted the cases that were relied upon by the Respondent to the effect that the court could determine a question of whether or not a party had been given an opportunity to be heard- **See Andrew Achoki Mogaka vs Samson Nyambati Nyamweya & Another [2007] eKLR, Khan & Katiku Advocates vs Shabbir Motor Spares Ltd [2004] eKLR, Rosemary Halubwa Shakala & Another vs Edward K. Shakala [2011] eKLR** that were decided by Ochieng J, Azangalala, Mary Kasango and Emukule JJ respectively.
15. The above notwithstanding, the court was of the firm view that it did not have jurisdiction to determine whether or not the proceedings before the Deputy Registrar had been conducted properly. Indeed, the cases relied upon by the Respondent were merely persuasive as the cases were decided by courts of equal and concurrent jurisdiction as this one.
16. This court took the view that the provisions of the Civil Procedure Rules, 2010 are not applicable to matters touching on taxation by the taxing master. Indeed this very court did hold in the case of **Lubullelah & Associates vs N.K Brothers Limited [2015] eKLR** as follows:-

“...The Advocates Remuneration Order is a complete code that would render certain provisions of the Civil Procedure Act and Civil Procedure Rules, inapplicable. Appreciably, Order 52 of the Civil Procedure Rules only applications under Section 26 (2) and (6), Section 28(2), Section 45, Section 45 (2), (4) and (5), Section 50 (1), Section 52, Section 62 (1), Section 73 (1) all of the Advocates Act Cap 16 (Laws of Kenya) are governed by the Civil Procedure Rules.”

17. The court’s position was informed by the provisions of Paragraph 76 of the Advocates Remuneration Order that empower the Deputy Registrar to proceed *ex parte* in default of appearance of either or both of the parties. It is expected that a taxing master who proceeds *ex parte*, must have satisfied himself that an opposing party has had adequate notice of the taxation. If he subsequently finds that there was no proper service, he would also have power to set aside his order and give such an opposing party opportunity to be heard.
18. Indeed, the court does not see any provision of the law that would prevent a taxing officer from allowing an application for setting aside his order as a result of non-attendance by one party if he is satisfied that such party had no notice of such taxation. This is a basic rule of natural justice. That notwithstanding, Paragraph 13A of the Advocates Remuneration Order empowers a taxing master to exercise his discretion with a view to determining any dispute before him.
19. Paragraph 13 A of the said Advocates Remuneration Order provides as follows: -**“For the purpose of any proceeding before him, the taxing officer shall have power and authority to summons and examine witnesses, to administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him** (emphasis court).”
20. It would therefore not be necessary for a party to file an application at the High Court purporting to ask it to oversee or review the actions by a taxing master as doing so would amount to the court sitting on appeal on the decisions of a taxing master without having all the information such a taxing master took into account before proceedings *ex parte*.
21. It is the view of this court that if a taxing master refused to give an opportunity to such a party seeking to set aside his order for proceeding *ex parte*, such party can then file a reference under Paragraph 11 of the Advocates Remuneration Order challenging the decision of a taxing master.
22. In this regard, the court was persuaded by the holdings in the cases of **Muriu, Mungai & Co Advocates vs New Kenya Co-op Creameries [2012] eKLR** in which Mabeya J held that the jurisdiction of the court could only be invoked through a reference to the court. In the said case, Mabeya J had cited the case of **HCCC 719 of 2009 Lubullelah & Associates vs Nasser Ahmed t/a Airtime Business Solutions** where Koome J (as she then was stated as follows:-

“...Courts in Kenya are hierarchical, the jurisdiction of taxation of costs is vested upon the taxing master who should evaluate the matters placed before him/her and should do so independently. The jurisdiction that is vested in the High Court on the other hand is to deal with a reference emanating from the decision of the taxing master (emphasis court). “

23. In the case of **Cecil G. Miller t/a Miller & Co Advocates vs Parin Shariff & 2 Others [2012] eKLR**, Odunga J declined to intervene in an application that had not been brought pursuant to the

- provisions of Paragraph 11 of the said Advocates Remuneration Order and held that the same ought to have been heard by the taxing master under the provisions of Paragraph 13A of the said Order, a position this court strongly believes ought to have been taken by the Respondent herein.
24. This court wishes to re-emphasise that the court's jurisdiction herein could therefore only have been invoked if the Respondent had filed a reference under Paragraph 11 of the said Advocates Remuneration Order. Provisions of Article 159 (2) of the Constitution of Kenya, 2010 are not a panacea to cure any defect where parties have failed to follow the laid down procedures. Allowing Article 159 (2) (d) to cure any procedural technicality would be a recipe for chaos as the procedural law would be completely disregarded, which was not the intention of the Legislators.
25. For the reason that the court found and held that the provisions of the Civil Procedure Rules were inapplicable herein, it found that it had no jurisdiction to grant the orders sought in the application herein. Granting the orders sought in the present application would have the effect of this court reviewing the decision of the Deputy Registrar to proceed *ex parte* and/or sitting on appeal against such a decision, a jurisdiction that this court lacked. It would also have the effect of giving the Respondent a second bite at the cherry when it failed to attend court on a date its advocates had been served with a Notice to do so. Indeed, without jurisdiction, the court's hands were tied and could do nothing for the Respondent.

DISPOSITION

26. Accordingly, the upshot of this court's ruling was that the Respondent's Notice of Motion application dated 6th June 2014 and filed 12th June 2014 was fatally defective and incompetent in the first instance as the court lacked jurisdiction to hear and determine the same. The same is hereby dismissed with costs to the Applicant.
27. It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of April 2015

J. KAMAU

JUDGE