



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPL. NO. 10 OF 2009

KOPOT & CO. ADVOCATES.....ADVOCATE/RESPONDENT

VERSUS

HON. PETER ODOYO.....CLIENT/APPLICANT

R U L I N G

By the application dated 26-11-2010 the applicant/client prays for the following orders:

- 1. That this honourable court be pleased to review, set aside and vary the decision of the taxing master dated 20th August, 2009 and reduced into the certificate of taxation dated and issued on 9th November, 2009.**
- 2. That the court be pleased to order the advocated/respondent to show cause why he should be entitled or allowed to have the advocate-client costs of the 16 appeals Kisumu HCCA Nos. 84 –99 of 2006 as taxed herein by the taxing master in his decision of 9th November 2009 and reduced into the certificate of taxation dated and issued on 9th November 2009 and thereafter order that the advocate/respondent is not entitled to and is otherwise disentitled to any of those costs.**
- 3. That the advocate respondent be and is hereby ordered to bear the party-party costs of the 16 Appeals Kisumu HCCA 84 – 99 of 2006 and to reimburse the applicant of the entire sum totaling to Kshs. 1,360,000/=.**
- 4. Costs.**

The application is supported by the applicants affidavit sworn on the even dates together with the attendant annexures. The facts of the case are rather straight forward and clear although the issues herein seemed to have taken along time to settle. At all material times the firm of O.N. Ojwang acted for the applicant in the running suits filed at Nyando Magistrate's court. The said matters were settled and the applicant being dissatisfied filed 16 appeals at the high court through the respondent's law firm. The said appeals were struck out for the simple reason that the respondent firm had not placed itself on record in place of the earlier firm of O.N. Ojwang. The applicant was thus compelled to settle the liabilities which resulted in the sale of his parcel of land namely L.R. No. 7785/440 and L.R. 16675/60 by auction.

The respondent then proceeded to demand that the applicant settle his fees which it did by filing 16 bills of costs. The same came for consideration before the taxing master on 18-6-2009. The ruling was delivered on 20-8-2009 in which the applicant was ordered to pay Kshs. 1,546,021/=. The respondent thereafter proceeded to have the same made a decree of the court and a certificate issued thereafter.

The applicant being dissatisfied mounted an application to file this reference out of time. The application was allowed vide this court's ruling of 5-10-2010.

I have carefully perused the reference herein as well as the relevant response by the respondent and the attendant submissions by the parties. The issues to be determined are elaborately raised in the applicant's submissions. However in my humble view, the basic issues that this application hangs on is whether there was a proper service upon the applicant of both the bills and the taxation notice. If this is on the affirmative then the other issues can be determined.

The court has perused the proceedings of 18-6-2009. The respondent notified the court that it had served the applicant as well as his advocate Mr. O.N. Ojwang. The affidavit of service of Stephen Aluoch Kopot sworn on 16-6-2009 indicates that he served Ms O.N. Ojwang with a taxation notice dated 22-4-2009 vide a forwarding letter through registered post. The certificate of posting is attached and marked AK1. Apparently, there is nothing to exhibit that the bills were served.

Can the above cited service be considered sufficient? Order 5 Rule 6 of the Civil Procedure Rules presupposes that service ought to be personal. Even if the bills had not been served upon the counsel of the applicant I believe that the proper service should have been personal. In other words the bills or the taxation notice ought to have been tendered upon the firm of O.N. Ojwang & Co. In any event their physical address was well known to the respondent.

Having then found that the service was not sufficient I do not think the taxing master should have proceeded to tax the bills on 18-6-2009. She ought to have ordered a proper personal service and if the law firm of O.N. Ojwang was not available as per their physical address then she would have proceeded to order that they be served through the other available options which included posting or by advertisement.

As it is now, I would not want to venture into the demerits and merits of the bills. This should be determined by the taxing master afresh. As a matter of fact the issues raised by the applicant, namely that the respondent should be ordered to meet the bill personal are weighty for consideration at this juncture.

Consequently, I shall order:

1. **that the decision of the taxing maser dated 20-8-2009 and the certificate of costs issued on 9-11-2009 are hereby set aside.**
2. **The respondent's bill of costs are hereby referred to the taxing master for fresh taxation.**
3. **Costs of this application to the applicant.**
4. **Orders accordingly.**

Dated, signed and delivered at Kisumu this 14th day of May , 2015.

**H.K.
JUDGE**

CHEMITEI