



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISC APPLICATION 36 OF 2020

MURGOR & MURGOR ADVOCATES..... APPLICANT

-VERSUS-

KENYA AIRPORTS AUTHORITY.....RESPONDENT

(Being a Reference from the ruling of the Honourable Taxing Master, Isabellah Barasa (DR) dated and delivered on 10th August 2021)

RULING

INTRODUCTION:

1. On the 15th May 2020, the Advocate/ Applicant herein, filed and/or lodged an Advocate- Client Bill of Costs against the Client/Respondent, whereby the Advocate sought to have said bill of costs taxed.
2. Other than the Advocate/client bill of costs, the advocate also filed an Affidavit sworn on the 15th May 2020, whereby the Deponent thereto, sought to underscore the nature, importance, scope and the extent of legal services that was rendered pursuant to and upon his retention.
3. It is indicated that upon service of the advocate/client bill of costs and the affidavit, which was filed alongside same, the Respondent/Client proceeded to and filed a Replying affidavit through her Corporation Secretary, namely Kathrine Kisila.
4. It is contended by the Advocate/Applicant that the Replying affidavit sworn by and/or on behalf of the Respondent/Client, was replete with half-truth, falsehoods, contradictions and non-disclosure.
5. Owing to the foregoing, the Advocate/Applicant herein proceeded to and filed an Application dated the 6th October 2020, wherein the advocate essentially sought to cross examine the deponent of the Replying affidavit sworn on the 15th July 2020.
6. Nevertheless, the deponent of the said Replying affidavit, namely Kathrine K. Kisila, passed on and/or died on the 30th October 2020, before the Application for Cross examination could be heard and disposed of.
7. Be that as it may, following the death of the deponent of the Replying affidavit, her successor, namely, Ms. Margarete Munene, swore a Replying Affidavit dated the 4th May 2021, wherein same adopted the contents of the Replying Affidavit sworn by Ms. Kathrine K. Kisila, Deceased.
8. It is worthy to note that upon the filing of the second Replying Affidavit, namely, the Affidavit by MS Margaret Munene, the Advocate herein sought to have same Cross- examined and consequently, the Application for Leave to Cross- Examine the Deponent, was listed for hearing.
9. Suffice it to note, that the Application to cross examine Ms. Margarete Munene, on the contents of the affidavit sworn by Ms. Kathrine Kisila, now deceased, was heard and disposed of vide Ruling rendered on the 10th August 2021, whereby the honourable taxing master proceeded to and dismissed the Application.
10. It is the said Ruling, which dismissed the Application to cross examine, which has now attracted the Reference vide Chamber Summons dated the 23rd August 2021.
11. Perhaps it is imperative to reproduce the Reliefs sought at the foot of the said Chamber summons. For clarity, same are reproduced as hereunder;

(i)Spent

(ii)Spent

(iii) *That the Ruling and/or decision delivered on 10th August 2021 by the Honourable Learned Taxing Master, Honourable Isabellah Barasa (DR) disallowing the Applicant's Notice of Motion dated 2nd February 2021 be set aside and/or vacated.*

(iv) *That this Honourable court be pleased to allow the Application dated 2nd February 2021 as prayed.*

(v) *That the Costs of this Application be provided for.*

12. The Chamber summons Application herein is opposed by the Client/Respondent vide Replying affidavit by one Ms. Margaret Munene, sworn on the 12th November 2021.

SUBMISSIONS

13. The subject Application/Reference came up for hearing on the 4th October 2021, whereby the court gave directions pertaining to and/or concerning the hearing and disposal of the Reference. For clarity, it was directed that the reference was to be canvassed and/or disposed of by way of written submissions, which were to be filed and exchanged, within set timelines.

14. Pursuant to the direction by the court, the advocate/Applicant filed his written submissions on the 3rd December 2021, which submissions are extensive and elaborate. Besides, the Advocate/Applicant also filed a bundle of authority/case law, which were duly highlighted.

15. It is worthy to note that the Advocate/Applicant has reiterated his position, which was taken before the Taxing Master, that is, sufficient cause and/or basis has been laid before the court to warrant an order for cross examination of the deponent of the impugned Replying Affidavit.

16. On the other hand, the Advocate/Applicant has also contended that the impugned Replying affidavit contained half-truth, falsehoods, contradiction and non-disclosure, which require to be addressed and/or clarified by way of cross examination.

17. Finally, the Advocate/Applicant has further submitted that the learned taxing master failed to properly exercise her discretion to allow for the cross examination of the Deponent of the impugn Replying affidavit. Consequently, the Advocate/Applicant, now seeks that the exercise of discretion by the taxing master be varied, set aside and/or otherwise quashed.

18. In support of the foregoing submissions, the Advocate/Applicant has cited various decisions including *GG-R v H-PS (2012) eKLR, Kenya Deposit Insurance Coporation v Hassan Hammed Abdul Afedi Zubeidi & 5 Others (2017) eKLR and Ndunde Investment Ltd v Eugene Muthoni Dadet (2020) eKLR and Law Society of Kenya v Faith Waigwa & 8 Others (2015) eKLR.*

19. On the other hand, the Client/Respondent filed her written submissions on the 8th December 2021, whereby same opposed the Reference by the Advocate/Applicant and essentially, same supported the Ruling rendered by the Taxing Master.

20. Besides, the client/Respondent has further submitted that the taxation of the Advocate/Client bill of cost is premised on the applicable Advocate Remuneration Order and that cross examination can only be ordered and/or directed in exceptional circumstances, which had not been supplied and/or availed.

21. Finally, the Client/Respondent has submitted that to the extent that the Ruling of the taxing master, is comprised of exercise of discretion, the court should be reluctant to interfere with same, unless it is shown that the taxing master failed to take into account such relevant factors, or took into account extraneous factors or better still, where the discretion is manifestly Erroneous.

22. In support of her submissions, the client/Respondent has also relied on a number of decisions including, ***G.G.R v H-PS (2012) eKLR, Ndunde Investment Ltd v Eugene Muthoni Dadet (2020) eKLR, Republic v National Land Commission & 2 Others Ex-parte Alma Farm Ltd (2020) eKLR and Kenya Deposit Insurance Corporation v Hassan Hammed Abdul Afedi Zubeidi & 5 Others (2017) eKLR.***

ISSUES FOR DETERMINATION

23. Having reviewed the Chamber Summons Application dated the 23rd August 2021, the Supporting Affidavit thereto, the Replying affidavit in opposition thereto, as well as the two set of written submissions filed by the respective parties, the following issues are germane for Determination;

a. *Whether Ms. Magrate Munene can be cross examined on the contents of the Replying Affidavit sworn by one, Katherene Kisila, on the 15th July 2020.*

b. *Whether the Advocate/Applicant has laid before the court any sufficient basis to warrant an order for cross- examination on the basis of the contents of the impugned Replying Affidavit.*

c. Whether the taxing master exercised her discretion properly and in accordance with the law and/or otherwise and whether basis has been laid to warrant interference with such discretion

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether Ms. Margaret Munene can be cross examined on the contents of the Replying Affidavit sworn by one Kathrene Kisila, on the 15th July 2020.

24. The gist of the Advocate's/Applicants Application dated the 2nd February 2021, was to cross examine the acting Corporation Secretary of the Client/Respondent, namely Ms. Margaret Munene, on the contents of the Replying affidavit sworn by Kathrene Kisila, now deceased on the 15th July 2020.

25. For the avoidance of doubt, the said position is reiterated vide paragraph 12 of the written submissions filed by and/or on behalf of the Advocate/Applicant and therefore, the import of the Application was to Cross- Examine on the basis of the Affidavit of the Deceased.

26. Premised on the foregoing position, the question that arise is whether a witness, in this case Ms. Margaret Munene, can be cross examined on the contents of a Replying affidavit, sworn by another Person/Deponent, in the manner sought by the Advocate/Applicant.

27. Before venturing to answer the aforesaid question, it is important to take note of the provisions of Order 19 rules 1 & 2 of the Civil Procedure Rules 2010, which provides as hereunder;

Power to order any point to be proved by affidavit [Order 19, rule 1.]

Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

2. Power to order attendance of deponent for cross-examination [Order 19, rule 2.]

(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.

28. It is apparent or evident that evidence may be given vide an affidavit, in appropriate cases and/or with leave of the court. However, where a Party desires to cross examine on the contents of an affidavit, such a party is at liberty to apply to court to order and/or direct the attendance for cross examination of the Deponent.

29. What comes out clearly is that the order and/or direction for attendance for cross examination must relate and/or be directed to the Deponent of the impugned affidavit. Contrarily, such an order cannot be made and/or directed to a person other than the Deponent of the impugned affidavit.

30. In view of the foregoing, I am afraid that the Application by the advocate/applicant, which seeks to cross examine one, Ms. Margaret Munene, on the contents of the Replying Affidavit sworn by Ms. Kathrine Kisila, now deceased, on the 15th July 2020, is misguided and/or misdirected.

31. In support of the foregoing position, I invoke and rely in the Decision in the case of **G G-R v H-P S [2012] eKLR**, where the Honorable court stated as hereunder;

‘The law has allowed evidence to be proved by way of Affidavits under Order 19. But under Rule 2 of the said Order, the court may order a deponent of an Affidavit to attend court to be cross examined. It would appear that where allegations of matters touching on fraud, mala fide, authenticity of the facts deponed, bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is conflict of Affidavits on record or where the evidence deponed to is conflicting in itself.

Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent of an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.

32. In any event, the position as pertains to any deposition, affidavit and/or declaration made by a person who is deceased, prior to and/or before the hearing and disposal of the proceedings, where such disposition were made is well provided for and underscored by the provisions of Section 33 of the Evidence Act, Chapter 80 Laws of Kenya.

ISSUE NUMBER 2

Whether the Advocate/Applicant has laid before the court any sufficient basis to warrant an order for cross examination on the basis of the contents of the impugned Replying affidavit.

33. It is common ground that the dispute beforehand touches on and/or concerns taxation of Advocate/Client bill of cost.

34. It is also apparent that upon the filing of Advocate/Client bill of costs, the Client/respondent filed a Replying affidavit through her Corporation Secretary, namely Ms. Kathrine Kisila, whereby the issue of Retainer is not in contest and dispute.

35. To the contrary, what appears to be in dispute, is the nature, scope and importance of the brief which was granted to the Advocate/Applicant and by extension the nature of the legal services that were rendered by the Advocate/Applicant to the client/Respondent.

36. On the other hand, it also appears that the circumstances under which the instruction were withdrawn from the Advocate/Applicant and granted to the firm of M/s Abdul Hakim & Company Advocates, is also in contest.

37. Nevertheless, it is imperative to observe that the determination of the complexity of the brief and/or instructions given to an Advocate, as well as the extent of legal research and efforts taken in the preparation of the matter, are issues which can be proved and/or established on the basis of affidavit evidence as well as looking at the Record of proceedings.

38. On the other hand, the circumstances under which a particular brief was withdrawn from a particular advocate, in this case the Applicant and granted to another advocate, including whether such withdrawal was actuated by bad faith and/or corrupt practices, do not ordinarily have a bearing on the taxation of Advocate/Client bill of cost.

39. I must also hasten to add, that the amount of Professional fees that was/is paid to the 2nd advocate, if any and in particular what was paid to M/s Abdul Hakim & Co. Advocates, will similarly be irrelevant to the taxation of Advocate/ Client bill of cost.

40. Perhaps, it is important to state that an Advocate, including the Applicant herein, is at liberty to negotiate Professional fees with a client beforehand, and thereby enter into an Agreement on such fees.

41. In support of the foregoing observation, it is important to take note and/or cognizance of **Section 45 of the Advocates Act, Chapter 16 Laws of Kenya**, which provides as hereunder;

45. Agreements with respect to remuneration

(1) Subject to [section 46](#) and whether or not an order is in force under section 44, an advocate and his client may—

(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;

(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;

(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof,

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.

42. I have gone into details in respect of the foregoing matters, merely because the intended cross examination is geared towards addressing the said issues, which the Advocate/Applicant alleges forms part of the half-truth, falsehoods, Contradictions and Non-disclosure.

43. However, it must not be lost on the court that the dispute before hand is about taxation of the Advocate- Client cost and ascertaining the Quantum of such cost.

44. It is also evident that the issue of Retainer, is not in Dispute. In fact, the Respondent/Client acknowledges that the Advocate/Applicant was duly retained and thereafter entered appearance and filed requisite pleadings on behalf of the Client/respondent.

45. Owing to the foregoing, the question that I must ask myself is what does the intended cross examination seek to achieve, particularly, as concerns the taxation, ascertainment and/or determination of the Quantum of cost, due and payable in favor of the Advocate/Applicant.

46. Put another way, is the intended Cross- examination bound to help the court to arrive at the Truth or is it in the Interest of Justice, that the intended Cross- examination be allowed.

47. In my humble view and taking into account the various observations made in the preceding paragraphs, I am not satisfied that the intended Cross- examination is being pursued with a view to help the court and by extension the taxing master to arrive at the truth belying the dispute. For clarity, the dispute herein touches exclusively on the Quantum of cost.

48. In support of the foregoing position, I can do no better than to rely on the decision in the case of **G G-R v H-P S [2012] eKLR**, where the court observed as hereunder;

The law has allowed evidence to be proved by way of Affidavits under Order 19. But under Rule 2 of the said Order, the court may order a deponent of an Affidavit to attend court to be cross examined. It would appear that where allegations of matters touching on fraud, mala fide, authenticity of the facts deponed, bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is conflict of Affidavits on record or where the evidence deponed to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent of an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.

49. Other than the foregoing decision, it is also imperative to take cognizance of the decision in the case of **Kenya Deposit Insurance Corporation v Hassan Hammed Abdul Afedi Zubeidi & 5 Others (2017) eKLR.**

From the averments in the Affidavits in support of the Applications of 25th September 2015 and 12th April 2016, and the grounds thereto, it is clear to me that, the cross examination of the deponent as prayed for herein will not resolve the key issues herein.

50. Based on the foregoing, it is my finding and holding that the intended cross examination will not assist the court in pursuit of justice and neither will same be of any use in helping the court or by extension the Deputy registrar, in resolving the key issues in Dispute herein.

51. In short, the Advocate/Applicant herein, has neither placed before the Court nor established any Sufficient cause or basis, to warrant an Order for the Cross- examination of the acting Corporation Secretary or at all.

ISSUE NUMBER 3

Whether the taxing master exercised her discretion properly and in accordance with the law and/or otherwise and whether basis has be laid to warrant interference with such discretion

52. Pursuant to paragraph 13A of the Advocates Remuneration Order, 1962, the taxing master is conferred with the power and/or mandate to summon witnesses, as it is necessary to taxation proceedings before him/her.

53. Nevertheless, the nature of the power is discretionary and therefore the taxing master is imbued with discretion, to determine whether or not any witness maybe necessary, helpful and/or imperative, to assist in the determination of any matter that is in dispute before him/her.

54. On the other hand, the provision of **Order 19 Rule 2 of the Civil Procedure Rules** also confers upon the court the discretion as to whether or not to order the attendance for cross examination of any Deponent.

55. From the foregoing provisions, it is therefore evident and/or apparent that the power conferred upon the taxing master to summon any witness and/or order a Deponent to attend for Cross- examination is discretionary in nature.

56. In the premises, when the taxing master, rendered her decision dated the 10th August 2021, same was exercising her discretion, as donated by and/or under the law.

57. Given that the power exercised by the taxing master was discretionary in nature, the Appellate court, is therefore obligated to exercise necessary caution and/or circumspection, before interfering with such Discretion.

58. At any rate, it is incumbent upon any party inviting the Appellate Court to interfere with Discretion of the Court of first instance, to show and/or establish any one or more of the following Grounds;

I. The Court of first instance failed to take into account relevant matters and/or factors in the course of the impugned decision.

II. The Court took into account extraneous and/or irrelevant factors.

III. That the Decision by the court did not take into account a relevant and applicable principle of the law, and;

IV. The exercise of Discretion is plainly and/or manifestly erroneous.

59. In support of the foregoing position, it is important to take cognizance of the decision in the case **Mbogo v Shah (1968) EA page 93 in which DE LESTANG VP, (as he then was) observed at page 94.**

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should

not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

60. In respect of the subject matter, it is appropriate to recall that the taxing master observed that in the cause of taxing an Advocate client bill of costs, the primary material would be in respect of the pleadings and documents, which were filed in the parent file, as well as the proceedings that were conducted therein.

61. On the other hand, the taxing master also found and held, that the issues upon which cross examination was being sought, including the half-truths, falsehoods, as well as the circumstances leading to the change of advocate by the Client/Respondent, would not be helpful, in the determination, assessment and/or ascertainment of the quantum of costs, if any payable to the Advocate/Applicant.

62. I have reviewed the decision by the taxing master and I must point out that in arriving at her decision, the taxing master was alive to and aware of the import of paragraph **13A of the Advocates Remuneration Order** and the provisions of **Order 19 Rule 2 of the Civil Procedure Rules 2010**.

63. Besides, the taxing master also appraised herself of the import and tenor of the circumstances where a Deponent of an affidavit, may be summoned to attend court for cross examination.

64. Despite the foregoing, the taxing master, came to the conclusion that the intended cross examination was not meant to facilitate the realization of justice and/or to facilitate the expedient and expeditious disposal of the taxation proceedings.

65. I must point out that the taxing master duly considered the relevant and applicable provisions of the law, as well as decided cases and having considered same, the taxing master proceeded to and took into account all the relevant material factors.

66. In any event, I have reviewed the submissions by the advocate/Applicant dated the **3rd December 2021**, and I have not found any irrelevant and/or extraneous factors, that was taken into account and thereby vitiated the proper discretion of the taxing master.

67. Nevertheless, it is also imperative to note that being a discretionary power, the taxing master, was free to go either way, provided that the Discretion is exercised judicially and based on reason.

68. Suffice it to observe, that the fact that this court would have arrived at a different conclusion, if same was dealing with a case of Cross examination, (*which is not the case*) does not allow this court to substitute its thinking/discretion in lieu of the one of the Taxing master.

69. In the premises, I have not found any credible and/or sufficient basis, to warrant interference with the Ruling and/or Decision of the Taxing master rendered on the **10th August 2021**.

70. Suffice it to state, that the Taxing Master, properly exercised her discretion, based on sound reason and informed by binding Decisions of various Superior Courts, which underscored the fact that prior to ordering cross examination of a Deponent, sufficient material must be placed before the Court, to show that it is in the Interest of justice, to Decree the cross- examination.

71. In a nutshell, it is my finding and holding that the Advocate/Applicant has neither met nor satisfied the requisite threshold to warrant interference with the Discretion of the Taxing Master.

FINAL DISPOSITION

72. Having dealt with and/or addressed the various issues that were itemized for determination, it is now appropriate to render the dispositive orders pertaining to and/or concerning the Chamber Summons dated **23rd August 2021**.

73. Consequently, I find and hold that the Chamber Summons under reference is Devoid of merits and same be and is hereby Dismissed.

74. Be that as it may, as the substantive issue, that is taxation of the Advocate/Client costs, is still pending, I direct that Either Party shall bear Own Costs of the Reference.

75. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Ms Kala h/b for Mr. Murgor, Senior Counsel for the Advocate/ Applicant.

N/A for the Respondent.