



IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 114 OF 2009

REPUBLIC.....APPLICANT

VERSUS

NYERI PROVINCIAL APPEALS TRIBUNAL.....RESPONDENT

AND

RUTH WANGARI WAHINYA.....INTERESTED PARTY

AND

WILSON WATENE NGANGA

CHARLED GICHUKI.....EX-PARTE

RULING

Ruth Wangari Wahinya, hereinafter referred to as “the applicant,” brought the chamber summons dated 6th day November, 2013 praying:-

- (a). that this court be pleased to extent the time within which she is to file an objection against the decision of the taxing officer of this court made on 27.9.2012;**
- (b). that the notice of objection dated 1.11.2012, and filed in this application, be deemed as properly filed;**
- c. . that this court be pleased to stay the execution of the decree for costs hereto pending the hearing and determination of this application; and/or pending the hearing and determination of her objection thereto.**

The application is premised on the grounds that on 27.9.2012 the taxing master of this court taxed the *ex-parte* applicant's bill at Kshs.208,026/=; that applicant received the certificate of costs late; that aggrieved by the taxation, the applicant filed an objection under paragraph 11(1) of the Advocates (Remuneration) Order; and that the applicant is apprehensive that unless a stay is granted, her intended objection will be rendered nugatory. Further that the application has been made without undue delay.

In the affidavit in support of the application, (entitled verifying affidavit), the applicant contends that she has neither been served with the bill of costs nor a notice of taxation regarding the Judicial review application hereto; that on 25.10.2012, she received a letter from the *ex-parte* applicant's advocate, Ndegwa Wahome & Co. Advocates, claiming Kshs.208,026/= being their taxed costs.

Contending that the Judicial review application was simple and not drawn out or delayed, the applicant has averred that the costs are overstated and do not comply with the provisions of the Advocates (Remuneration) Order.

Explaining that she has filed an objection under paragraph 11(1) of the Advocates (Remuneration) Order, the applicant has reiterated her apprehension that unless a stay of execution of the decree for costs is granted, her intended objection will be rendered nugatory.

In opposition to the application, the *ex-parte* applicant's advocate, Nancy Njoki Mureithi, swore the affidavit filed on 15.1.2014. The

advocate has, inter alia, deposed as follows:-

- i. **that the application is not only fatally defective but also an abuse of the court process;**
- ii. **that the applicant had at all times, material to the suit herein, been represented by M/S Imali Igembe & Co. Advocates;**
- iii. **that no notice of change of advocates was ever served on their firm;**
- iv. **that pursuant to a ruling delivered by Ouko J., on 20.5.2011, the *ex-parte* applicants (respondents) tabulated their costs vide a bill of costs dated 5.4.2012;**
- v. **that the respondents' bill of costs was taxed on 13.6.2013;**
- vi. **That contrary to the applicant's contention, their office duly served the Taxation Notice together with a copy of the bill of costs on the applicant's advocates on record, M/S Imali Igembe & Co. Advocates;**
- vii. **that their firm had no duty or obligation to serve the pleadings to the applicant in person since she had instructed an advocate;**
- viii. **that as the applicant did not attend court or send a representative, the court, after being satisfied that service had been effected, proceeded with the taxation;**
- ix. **That the award by the taxing officer of this court is not overstated;**
- x. **that the award represents the costs incurred by the respondents and are in accordance with the Advocates (Remuneration) Order; and**
- xi. **That the interested party's objection is unfounded, without merit and merely meant to obstruct the course of justice.**

In the submissions filed on behalf of the applicant it is reiterated that neither the applicant nor her advocates got an opportunity to see the bill that was drawn against her; that the applicant was denied an opportunity to be heard yet there was no mistake on her part or on the part of her advocates to warrant that denial; that this court has power to grant the orders sought.

It is also submitted that under Rule 11(4) of the Advocates (Remuneration) Order, the court has unfettered discretion to extent time within which to give notice taxation and to file a reference to a judge in respect of taxation. In this regard, reference is made to **M.M Kioga & Co. Advocates v. Joseph Mucharia &**

Another, Meru H.C Misc. App No.42 of 1993; First American Bank of Kenya v. Gulab P. Shah & Others (2002)1 E.A 65; and Othieno v. Ogola (2000)1 E.A 201.

Further that as a demonstration of the applicant's thirst for justice, the application was filed immediately after the applicant got to know of the taxed bill of costs herein; and that the application was filed without undue delay.

On behalf of the respondents, it is submitted that throughout the Judicial review application hereto, the applicant was represented by M/S Imali Igembe & Co. Advocates; that the respondent having not received any notice of change of advocates, sent all court processes to the applicant's advocates, on record, which processes were received without any objection or protest; that it is not true that the applicant only got to hear about the respondents' bill of costs through the letter from the respondents'; and the applicant has come to court with unclean hands.

Maintaining that the applicant had an opportunity to defend herself and failed to take up that opportunity, the respondent has argued that rather than filing an objection to the taxed bill, the applicant should have applied for variation or setting aside of the decision of the taxing master.

Terming the appointment of the applicant's subsequent advocate procedurally defective, the respondent has also submitted that no reason or explanation has been offered for the applicant's previous advocates' failure to attend court.

Further that the applicant has neither indicated the provisions of the law under which she seeks to stay the execution of the decree for costs nor shown any sufficient cause for the stay of the execution.

While acknowledging this court's discretion to grant the orders sought, the respondent has submitted that the discretion is intended to avoid hardship resulting from inadvertence or a mistake and not to assist a party who seeks to delay or obstruct the course of justice. Maintaining that no explanation has been offered for the failure of the applicant's previous advocate to attend court, the respondent has submitted that the orders sought should not be granted.

I have read and considered the pleadings and submissions filed by the parties. The issues for determination are:-

- i. **Whether the applicant was aware of the bill of costs;**
- ii. **Whether the change of advocates by the respondent was procedural;**
- iii. **Whether the court should exercise the discretion in favour of the applicant; and**
- iv. **What is the order as to costs.**

Whether the applicant was aware of the bill of costs; It is not in dispute that the applicant was represented by a firm of advocates, M/s Imali Igembe & Co. Advocates, in the Judicial review application. The respondents have argued that they had no duty to serve the applicant personally with pleadings when she had instructed an advocate to act for her. I agree.

The respondents have also contended that they were never served with any notice of change of advocates and that the subsequent change of advocates by the applicant was unprocedural.

Even though the issue of service of notice of change of advocates is raised in the respondents replying affidavit, the applicant failed to address it in the supplementary affidavit sworn by her advocate and instead chose to address the issue of filing of the draft notice of objection to the taxation. **Order 9** of the **Civil Procedure Rules** provides as follows:-

“1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf...

3. (1) Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person,....

5. **A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of change of advocate is filed in the court in which such cause or matter is proceeding is served in accordance with rule 6, the former advocate shall, subject to rule 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.** (emphasis supplied).

There being no evidence that a notice of change had been filed by the applicant at the time the taxation hereto occurred, I agree with the respondents submission that they had no duty whatsoever to personally serve the applicant.

There is ample evidence that the applicant's previous advocate was served with the taxation notice (See annexure NNM1).

By dint of the provisions of Order 9 rule 3(1) (*supra*) the process served on the applicant's advocates, then on record, was as effectual as if served personally on her. In that regard, the applicant cannot be heard to say that she was not served with the notice of taxation.

Whether the change of advocate was procedural; **Order 9 Rule 9** of the **Civil Procedure Rules** makes it mandatory for change of advocate or intention to act in person after judgment has been passed, it can only be made pursuant to an order of the court. This matter had been finalized, judgment having been delivered on 20/5/2011. **Order 9 Rule 9** of the **Civil Procedure Rules** reads:-

“9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –

- a. **upon an application with notice to all the parties; or**
- b. **upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

For the above stated reason, I find that this appliciton to be incompetent.

Should the court exercise its discretion in favour of the applicant;

As pointed out hereinabove, this court has discretion to grant the orders herein sought. See **Oluoch & Company v. Digital Imaging Systems Limited**. However, like any other exercise of discretion, that discretion should be exercised judicially. I agree with the respondents' submission that the discretion is not meant to assist a party who seeks to delay or obstruct the course of justice. In the instant application, the applicant has not offered any explanation as to why her previous advocate failed to attend court to defend the respondents' bill of costs.

Having considered the circumstances of this case, and having found the application to be incompetent, I am not persuaded that the applicant has made a case for exercise of the court's discretion in her favour.

The upshot of the foregoing is that apart from the application being incompetent, it has no merit and is dismissed with costs to the respondents.

Dated and Delivered this 30th day of May, 2014.

RPV WENDOH

JUDGE

PRESENT:

Ms Mureithi holding brief for Mr. Said for the applicant

N/A for the respondent

N/A for the Interested Party

N/A for the Ex-parte

Kennedy – Court Assistant