



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISC. CIVIL APPL. 191 OF 2011

JOHN MWANGI NDEGWAAPPLICANT

Versus

ROBERT KAGECHA NDIRANGURESPONDENT

RULING

1. By a notice of motion under order 12 rule 7 and order 22 rule 22 of the Civil Procedure Rules and section 63(c) of CPA the applicant moved the court for an order of stay of execution of the decree and certificate of cost pending the hearing and determination of the application for setting aside the proceedings/taxation of 17th November 2011.
2. The application was supported by the affidavit of Grace W. Kamuyu wherein she deponed that the respondent filed a bill of cost on 27th October 2011 and fixed the same for hearing on 17th November 2011 which bill was received by one Njoroge who did not have instructions to receive the same and did not diarize the same in the office master diary.
3. It was deponed that she did not become aware of the said bill until 22nd December 2011 when the goods of the applicant were proclaimed and that the applicant who is willing to defend the bill of cost has been locked out of the proceedings through no fault on his part and therefore the same will suffer prejudice since the goods have already been proclaimed.
4. In opposition to the said application the respondent filed a replying affidavit through Muhoho Gichimu advocates in which he deponed that he personally served the notice of taxation and the bill of cost and that the application is brought late in the day the bill having been taxed in November 2011.
5. Parties agreed that the application be determined by way of written submissions which have now been filed. On behalf of the applicant it was submitted that taxation proceeded in the absence of the applicant and his advocate and therefore the same was prejudiced by the ruling since the taxed amount had no legal basis and was excessively on the higher side.
6. It was submitted that the applicants advocate has explained the reason for none attendance and that the amount taxed in their absence is grossly excessive as the same does not correspond with the provisions of schedule vi of the Advocates (Remuneration amendment) order 2006 since the taxing officer based his instruction fee on the lower court judgment and not the subject matter which was leave to file an appeal out of time.
7. It was submitted that where taxation is done in the absence of one party then the avenue available is an application under order ix B rule 8 on the authority of PALACE DRY CLEANERS LTD & ANOTHER v KPLC NAIROBI HIGH COURT CIVIL CASE NO. 837 OF 2000.

8. On behalf of the respondent it was submitted that the applicant on 17th October 2011 filed an application for leave to appeal out of time against a judgment delivered on 2011 which application was allowed on 24th October 2011 with cost to the respondent out of which the respondent filed a bill of cost on 27th October 2011 for taxation on 17th March 2011 when the matter was heard *ex parte* and bill taxed at Ksh. 41,605.

9. It was submitted that the bill was procedurally taxed and that this honourable court cannot set aside the proceedings/taxation of 17th November 2011. It was submitted that under section 11(1)A(2) of the Advocates Act any party aggrieved by the decision of a taxing officer having obtained the reasons for the decision should file a reference.

10. From the affidavits and submissions of the parties, it is not in dispute that the taxation proceeded *ex parte* without the applicant participation. It is also not in dispute that the applicant's Advocate was served with the hearing notice for taxation. It is also not in dispute that what the applicant is seeking is setting aside the *ex parte* taxation so as to be allowed to respond to the same.

11. It is clear that once the taxing officer has taxed a bill then unless the same is set aside under section 51(2) of the Advocates Act it is then final as to the amount of cost. The said section allows the bill to be set aside by court which court means the High Court. I therefore find that the application for setting aside the *ex parte* taxation is properly before this court. This position also finds support in the decision of PALACE DRY CLEANERS LTD & ANOTHER vs KPLC LTD HIGH COURT OF KENYA AT NAIROBI CIVIL CASE NO. 737 OF 2000

12. Since the bill was taxed without the input of the applicant and whereas the advocate has owned up that the mistake was from her firm this court has wide discretion to set aside *ex parte* orders even where service was proper in the interest of justice as courts of justice should be slow to deny a party who want to be heard a forum to be heard on such terms as may be just since the main concern of the court is to do justice to the parties.

13. I would therefore allow the application herein, set aside the taxation herein on 24th November 2011 with cost to the respondent. The taxation be fixed a fresh for hearing before the taxing officer within the next 21 days from the date herein in view of the age of this matter.

Dated, signed and delivered at Nyeri this 31st day of July 2014.

J. WAKIAGA

JUDGE

Court: The ruling is read in open court in the absence of the parties and their advocates.

J. WAKIAGA

JUDGE