



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 448 OF 2010

NJAGI WANJERU & CO ADVOCATES..... APPLICANT

VERSUS

B. MOMANYI T/A MOMANYI & ASSOCIATES ADVOCATES.....RESPONDENT

RULING

By a written notification dated 8th April 2014 and filed in court on 14th April 2014, counsel for the applicant/advocate filed a Notice of Preliminary Objection seeking to strike out with costs to the applicant the objection/“reference” dated 18th February 2014 filed by the respondent on the following grounds:

- i. The purported objection/“reference” is materially incompetent by virtue of paragraph 11 (2) of the Advocate Remuneration Order providing for lodgment by way of a Chamber Summons and an abuse of the court process and is indeed an inexcusable display of ignorance of the law by the respondent and his able advocate.
- ii. The purported objection/“reference” is mischievously calculated to delay the determination of this matter and the related **HC Misc Civil Application Nos 449 – 452 of 2010**.
- iii. It is in the interest of justice that the respondent is prevented from further abusing the court process.

M/s Ongoto & Co Advocates represent the applicant whereas the respondent is represented by the firm of Mariara & Co Advocates.

The genesis of this matter is that it is alleged that the respondent firm of B. Momanyi Advocates/Associates were retained by the City Council of Nairobi to represent the latter in several matters. The said law firm then with the permission of the then acting director of Legal Affairs at the City Council of Nairobi instructed the applicant firm of Njagi Wanjeru & Co Advocates to act as lead counsel and generally handle some matters on behalf of B. Momanyi & Associates Advocates, as a Mr Momanyi Advocate of the latter firm was unwell for sometime. It is further alleged that the two law firms mutually agreed that B. Momanyi & Associates Advocates would pay a fee to Njagi Wanjeru & Co Advocates as their costs upon B. Momanyi & Associates Advocates collecting their legal fees from the City Council of Nairobi.

The above arrangement did not work as a result of which the firm of Njagi Wanjeru & Co Advocates after handling the said matters as assigned demanded for payment of their dues in vain. They consequently

filed a summarized bill of costs respecting the matters in question namely, **HCC No. 24 of 2007; HCC 589/08; HCC MISC 37/2009; and HC Civil Appeal 124/2009** and retained the firm of Ongoto & Co Advocates to claim on their behalf the said costs.

There is no admission on the part of the firm of B. Momanyi & Associates Advocates that they ever instructed the firm of Njagi Wanjeru & Co Advocates to hold their brief in any of the alleged cases wherein the City Council of Nairobi was their client. They are emphatic that as they were not litigants in any of the stated matters, there is no way they could have retained the firm of Njagi Wanjeru & Co Advocates to represent them and therefore, there is no client/advocate relationship hence, the purported bill of costs as presented are incompetent.

The issue before me is not to determine the merits or demerits of the disputed bills of costs but to determine whether the “reference” filed by M/s Mariara & Co Advocates for the respondent/applicant on 19th February 2014 is tenable in law, as that is the subject and substance of the Preliminary Objection herein.

The applicant argues that the purported “reference” filed on 19th February 2014 are mere letters addressed to the Deputy Registrar of the High Court which offends the clear provisions on paragraph 11 (2) of the Advocates Remuneration Order, that such references should be lodged by way of Chamber Summons to a judge. Mr Mariara Advocate on the other hand contended that the Advocates Act does not provide that when a party is dissatisfied with the taxing master’s order, then they file a Chamber Summons. According to him, one is only required to write a letter to the Deputy Registrar to refer the matter to the Judge to determine the issues in question and that is exactly what they did in this case. He urged the court to find that the “references” filed in Court on 19th February 2014 are properly before the Court and implored the Court to dismiss the Preliminary Objection with costs.

The applicable law in this matter is paragraph 11 of the Advocates Remuneration Order which provides:

- 1) Should any party object to the decision of the taxing officer he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- 2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons **apply to a judge by Chamber Summons**, which shall be served on all parties concerned, setting out the grounds of his objection.

From the above provisions of paragraph 11 (2) of the Advocates Remuneration Order, it is clear that the respondent herein did not follow the established procedure as outlined therein, despite being granted leave on 5th February 2014 by Hon. Lady Justice Rose Ougo to file the references out of the stipulated period. In their submissions before Court in opposition to the Preliminary Objection, they insisted that a letter to the Deputy Registrar is sufficient as there is no specific procedure provided under the law for filing of such references.

With utmost respect to the learned counsel, the provisions of the Advocates Act (Advocates Remuneration Order) as cited above are clear that a reference has to be filed by way of Chamber Summons and the Judge is thereby empowered to either refer the matter back to the taxing officer or to vary the decision of the taxing officer, and it is by virtue of this special procedure provided for filing of references to a Judge in Chambers that an appeal on taxation of costs may be taken forward to the Court of Appeal.

I am enjoined on this point to accept the observation by **Ojwang J** (as he then was) in **Kenya Pipeline Co. Ltd – Vs – Nyamungo & Nyamungo Advocates [2006] eKLR** that:

“a legislative framework so comprehensive and so practical-oriented, could not have been established in vain, it ought to be regarded as the normal path where a party is aggrieved on bill-of-costs matters.”

In the matter of the Speaker of the National Assembly – Vs – Kamune [2008] 1 KLR EP 425, it was held that:

“where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should have been strictly followed.”

There are indeed very important questions of law being raised in the purported reference filed by the applicant/respondent advocate which “reference” I find to be a nullity as a letter addressed to the Deputy Registrar requiring the matter to be placed before a Judge is no reference at all. And especially when the said “reference” is filed by a seasoned advocate of the High Court in defence of their own cause.

The record herein reflects that there has been heated acrimony between the two disputing advocates as shown by correspondence and affidavits of all sorts some of which I can only describe as scandalous towards each other, and which practice I find unhealthy and uncalled for. The issues herein have been outstanding since 2010 and it is only fair and just that parties resolve their disputes expeditiously and in an economical manner to avoid hardship to either of them. I would have discarded the Preliminary Objection if I had found that it had no foundation or based on a mere technicality. However, the Court of Appeal in a number of decisions has held that Articles 159 (2) (d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act were not intended to aid parties who deliberately seek to flout the established principles of law that are meant to aid the Court in the dispensation of justice and are not a panacea for incompetency; and more particularly so when the party seeking to hide under the said provisions is a seasoned advocate and an officer of the Court.

See CA 154/2013 Karanja, Ouko & Kiage JJA in Kakuta Maimai Hamisi – Vs – Peris Pesi Tobiko & 2 Others. The Court further observed that:

“Article 159 is not a panacea nay a general white wash, that cures and mends all ills, misdeeds and defaults of litigation.”

In this case therefore, the applicant cannot hide or pitch tent or take umbrage in the said provisions. Similarly, in CA 290 Mumo Matemu – Vs – Trusted Society of Human Rights Alliance & 5 Others, the Court of Appeal held that:

“Procedure is also a handmaiden of just determination of cases.”

The Supreme Court pronounced itself on the provisions of Article 159 (2) (d) as follows in the case of Shabir Ali Jusab – Vs – Anaar Osman Gamrai & Anther [2013] eKLR and Raila Odinga – Vs – IEBC & 4 Others, Petition No. 5 of 2013,

“The essence of the provisions of Article 159 (2) (d) of the Constitution is that a Court of Law should not allow the prescriptions of procedure and form to triumph the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the process of justice is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best course.”

This Court therefore has the discretion to examine the circumstances of each case and conscientiously determine the best course. It may allow the ‘reference’ filed in the form of a letter supported by an affidavit or strike it out all together. In the circumstances of this case, where the provisions under which the reference ought to be filed are crystal clear, I see no reason why I should not demand that those provisions should be followed. They were not made in vain.

Before I depart from this point, I mention that paragraph 11 rule 2 of the Advocates Remuneration Order does not even require that the Chamber Summons reference thereunder be supported by an affidavit. Nonetheless, there is no harm in having a supporting affidavit to a Chamber Summons however superfluous as it sets out the essential facts that inform the Court whether conditions prescribed under Sub

rule 2 of paragraph 11 have been met to wit:-

- a. That the objector do within 14 days of receipt of reasons apply to a Judge;
- b. That the application be by Chamber Summons;
- c. That the Chamber Summons do set out the grounds of objection to the taxation; and
- d. That the Chamber Summons be served upon all the parties concerned.

I employ the cardinal principle that no party should be ousted from the seat of justice on a procedural technicality. This is not however to say that parties are at liberty to come to Court in any manner they so wish (except under Article 22 of the Constitution and the rules made thereunder), especially where there is an established mode of filing of pleadings of this nature. Having said that, I hold that the applicant's 'reference' filed by way of letter addressed to the Deputy Registrar on 19th February 2014 is incompetent and I proceed to strike it out.

However, in the interest of justice, and bearing in mind the right to be heard to challenge the orders of the taxing master, and in order to bring this acrimonious matter to an expeditious and economical end.

I grant the respondent/applicant leave to file and serve upon the applicant/respondent with a reference by way of Chamber Summons as required under paragraph 11 (2) of the Advocates Remuneration Order. The same shall be filed and served within 7 days from the date of this ruling hereof failure to which the leave herein granted lapses.

Costs of this Preliminary Objection shall be borne by the respondent/applicant.

Dated, signed and delivered at Nairobi this 23rd Day of October, 2014.

R.E. ABURILI

JUDGE