



REPUBLIC OF KENYA

High Court at Kisumu

Civil Suit 197 of 1999

DANIEL DAVID NJUGUNAPLAINITFF/RESPONDENT

VERSUS

NATIONAL BANK (K)1ST APPLICANT / DEFENDANT

LEGACY AUCTIONEER SERVICES LTD.....2ND RESPONDENT

RULING

The applicants Notice of Motion dated 31st October 2012 prays that the certificate of costs issued in this cause on 3rd October 2012 and dated 23rd October 2012 and all consequential order founded on it be set aside. The other prayers have been spent.

The application is supported by the affidavit of one **Albert Simiyu Murambi Advocate** sworn on 31st October 2012. The applicant seeks to set aside the said taxation proceedings basically because they were undertaken exparte and that the date served upon them was different from when the taxation was done.

According to the applicant taxation was effected on 3rd October 2012 whereas the Notice served upon them was dated 11th April 2012 and the taxation was to come up on 9th October 2012. Consequently the Deputy Registrar presumed that the applicant had been served which was not the truth.

Mr. Onsongo Advocate for the 1st respondent has filed the Replying Affidavit dated 1st November 2012. He has deponed that the bill of costs taxed on 3rd October 2012 relates to the counterclaim by the applicant National Bank of Kenya Ltd against Up and Down Saw Mills Ltd. He further attacked the procedure in which the applicant has challenged the certificate of costs arguing that the applicant ought to have come by way of a reference. He urged this court to dismiss the said application.

I have perused the application as well as the rival affidavits. From Mr. Simiyu's affidavit it is clear that the firm of **Musyoka Wambua & Katiku** were served with a bill of costs dated 11th April 2012 which was to be taxed on 9th November 2012. This is the same bill of costs which was attached to Mr. Onsongo replying affidavit.

The same affidavit by **Mr. Simiyu** contains attached certificate of costs showing that it emanated from the bill of costs dated 11th April 2012. As a consequence of the said certificate of costs **M/s Madume Auctioneers** proceeded to procure a warrant of attachment and sale against the applicants goods which they have since proclaimed. If the bill of costs as deponed by Mr. Onsongo did not relate to

the applicants why were its goods proclaimed by M/s Madume Auctioneers?

The respondent has further argued that the applicants were served “**out of courtesy and abundant caution**”. Why then were they served in the first instance? Equally why tax the bill on 3rd October 2012 and not 9th October 2012 as indicated in the Notice of taxation?

My findings therefore is that the applicants were not served for taxation of the bill of costs on 3rd October 2012 but on 9th October 2012. The purported affidavit of service by one **Cyrus Sagana** attached to **Mr. Onsongo** affidavit relates to a hearing on 11th May 2012 and not taxation on either 3rd October 2012 or 9th October 2012.

The argument by the respondent that the applicant ought to have filed a reference in line with Rule 11 of the Advocate Remuneration Rules is untenable. What is being challenged is an *ex parte* taxation and not an *inter partes* taxation. If they had been served then perhaps this court would have considered this line of argument.

In the premises I do find merit in the application. If the respondent did not find that the applicant was not a party to the taxation then it would not have proclaimed its properties.

By reason of the proclaimed and the risk of them being attached and sold to satisfy the certificate of costs the applicant was a proper party to the bill of costs and it ought to have been served and be involved in the taxation.

I shall allow the application dated 31st October 2012 with costs to the applicants.

Orders accordingly.

Dated, signed and delivered at Kisumu this 21st day of January 2013

**H. K. CHEMITEI
JUDGE**

In the presence of:

..... Advocate for the Plaintiff

.....Advocate for the defendant

HKC/aao