



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 854 of 2010

WAMBUGU KARIUKI & ASSOCIATES ADVOCATES ..... PLAINTIFF

VERSUS

ONDIEKI & ONDIEKI ADVOCATES ..... DEFENDANT

R U L I N G

1. This is an Application dated 1 October 2012, brought by the Plaintiff requesting of this Court to set aside the Order of the Taxing Officer made on 25 January 2012 in which the learned Deputy Registrar dismissed the Plaintiff's Bill of Costs dated and filed in court on 5 October 2011. The Court was further requested to reinstate the Plaintiff's Bill of Costs. The Application was brought under **Rule 11** of the *Advocates (Remuneration) Order* and the grounds upon which the Application was made are detailed as follows:

**“(i) It is clear that in dismissing the Bill of costs the learned taxing officer considered issues/facts that were not before her at all and which issues/facts were actually not germane to the Bill before her E.G. she says “she looked at the letters filed in support of the .... Bill” yet the Bill was not supported by any letters not even affidavit.**

**(ii) The taxing officer completely misapprehended the Bill further by failing to comprehend the law on professional undertaking (though all that was not actually before her at all) but went ahead to form that as a basis to dismiss the Bill.**

**(iii) The taxing officer without any basis in law at all dealt with the Bill of costs as if it was an application PERSE that was before her for consideration (which was outside of her jurisdiction as a taxing officer) because even if for one reason or the other she did not like the Bill or she may have formed her mind it had to go she ought to have applied the provisions of Rule 13A or 77.**

**(iv) By dismissing the Bill of costs on 25/1/2012, the taxing officer acted as if she was an appellate court from the orders of the Hon. Mr. Justice Njagi dated 29/9/2011 which had clearly ordered for party & party Bill of costs to be filed.**

**(v) Further to ground no. (iv) above, all what the taxing officer was supposed to do is to tax the Bill before her (as to who was to pay the taxed costs was an issue/fact not before her at all the taxing officer appeared overzealous to protect the defendant hence dismissing the Bill).**

**(vi) The entire reasoning of the taxing officer/ Deputy Registrar in all the considerations she made had no basis in law at all and this Hon. Court has a duty to safeguard the mutilation and circumvention of the law by granting the orders sought”.**

2. The Application is supported by the Affidavit of **P. W. Kariuki** advocate of the Plaintiff firm sworn on 1 October 2012. The deponent reiterated the contents of the grounds of the Application as above and noted that Mr. Justice Njagi had ordered, on 29 September 2011, that the Plaintiff do file a party and party Bill of Costs so as to be taxed as against the Defendant. He further observed that once his firm had served the Bill of Costs on the Defendant, it had responded thereto by filing a lengthy 39 paragraph Affidavit. Mr. Kariuki detailed that the Defendant had adopted the wrong procedure by replying by way of Affidavit rather than specifically detailing those items in the Bill of Costs which were disputed. Moreover, the deponent expressed the opinion that the matters raised in the Replying Affidavit had already been considered by the Court when the Order was made for the Bill of Costs to be filed on a party/party basis. Mr. Kariuki concluded his Supporting Affidavit by saying that he felt that the facts/issues raised by the Defendant in the Replying Affidavit may have influenced the Taxing Officer particularly as regard to her jurisdiction, to make the Ruling that she had in dismissing the Bill of Costs.

3. On behalf of the Defendant advocates, **Mr. Evans Ondieki** swore a Replying Affidavit on 26 November 2012. In his opinion the Taxing Officer in arriving at her Ruling had exercised her discretion judiciously in that the Bill of Costs had been filed in bad faith as the subject matter thereof concerned the Plaintiffs. In the Defendant's opinion, it is wrong to tax a Bill drawn on a party/party basis when there were none. There was no justification whatsoever to tax a Bill for a cause that was non-existent. In the Defendant's opinion the Bill of Costs filed by the Plaintiff was frivolous and vexatious and properly dismissed, as it lacked any legal basis therefore whatsoever. Thereafter, Mr. Ondieki set out what he considered as to the Bill of Costs being full of misrepresentations more particularly as regards for whom the Plaintiff was acting. It was noted that the Defendant firm of advocates were not a party to the transaction to which the Bill of Costs related. Further, the deponent maintained that the Plaintiff had misapprehended the directions issued by Justice Njagi who had never looked at the merits or demerits of the application. In his view, the Bill of Costs was mischievous, filed in bad faith and was misleading. Since the deponent had already paid the entire amount of the undertaking as well as the costs of filing suit, the Taxing Officer was within her rights and justified to dismiss the Bill of Costs on its merits.

4. On 20 December 2012, Mr. Kariuki appeared before court on behalf of the Plaintiff. There was no appearance for the Defendant. He noted that this matter and the date had been taken before court on 7 November 2012. The Plaintiff was seeking to set-aside the Ruling of the Taxing Officer dismissing the Plaintiff's Bill of Costs dated and filed on 5 October 2011. Mr. Kariuki relied upon the Affidavit in support of the Application. The Bill of Costs arose out of a suit seeking to enforce a professional undertaking in the amount of Shs. 30,000/- given by the Defendant to what he termed "to bail out his client". After the suit had been filed, the Defendant Advocates' firm made some payments but it was only fair that the Plaintiff be paid costs as the matter had gone to court. Counsel noted that that Mr. Justice Njagi had made an Order for a party/party Bill of Costs to be filed. This was done and the said Bill was dated 5 October 2011. After the same had been filed, the Defendant's advocates firm paid an amount of Shs. 18,000/-perhaps to pre-empt the taxation proceedings. Counsel noted that submissions on both sides had been made to the Taxing Officer. The Defendant Advocates' firm had responded to the application for taxation by filing a Replying Affidavit opposing the Bill of Costs rather than notifying the Taxing Officer as to which items it disagreed with, in relation to the Bill of Costs. Counsel believed that the Taxing Officer may have ruled outside her powers in dismissing the Bill of Costs. He referred the court to the case of **Masore Nyang'au and Co. Advocates versus Ombura HC MiscAppl No. 127 of 2008 (unreported)**. In that case my learned brother **Waweru J** had held that the Taxing Officer had no powers to dismiss a Bill of Costs. He asked that the Bill of Costs be reinstated and taxed afresh.

5. I have examined the record of this court for 2011. On the 6 May 2011 my learned brother **Njagi J** had noted:

**"By consent, parties to discuss the issue of costs and report back to court on 8/6/2011."**

The file then went before **Apondi J.** before it reverted to Justice Njagi on 29 September 2011. On that day the learned Judge made a note:

**"Party and Party costs be paid after taxation."**

There is nothing further on the file until the parties appeared before the learned Principal Deputy Registrar as Taxing Officer on 3 November 2011. Again I have perused the Ruling of the Principal Deputy Registrar dated 25 January 2012. In the second going on to the third paragraph of that Ruling, the Taxing Officer stated:

**“I have seen an undertaking by the firm of Ondieki & Ondieki Advocates to pay some Kshs 30,000/-. It appears it was not paid and this is what has been used to form the basis as instruction fees. Could this be instructions? I say not. Nowhere did the defendant – Ondieki & Ondieki Advocates instruct the plaintiff to file suit on their behalf and as such this item and all the others arising collapse.”**

Basically what the Taxing Officer found was that there was no relationship between the Plaintiff and the Defendant herein. However she went on to comment on the second page of the Ruling:

**“29/09/2011 Justice Njagi directed that party & party costs be paid after taxation. But who pays? Is it the advocate or the client? Who was the client? It was not Ondieki & Ondieki Advocates. Reasons wherefore, this court finds that this party and party Bill of costs before the court lacks merit and is hereby dismissed with costs to the defendant.”**

6. In my view, the learned Principal Deputy Registrar could not have been clearer so far as her Ruling was concerned. The emphasis was on **“this party and party Bill of Costs”** (Underlining mine). To my mind this meant that the Bill of Costs was improperly drawn in the name of the wrong party hence the reason for its dismissal. Further, I have looked at the Party & Party Bill of Costs filed herein on the 5 October 2011. It seems quite clear to me that at least the name of the Plaintiff therein is in error. I do not consider that the Plaintiff was the firm of advocates acting for the client, it was the client who suffered loss as a result of the breach of the professional undertaking by the Defendant firm. The Plaintiff’s advocates were acting as agents for the client in the collection of the monies undertaken to be given by the firm of Ondieki & Ondieki. It seems to me therefore that the only way forward for the Plaintiff to comply with the obvious order of **Njagi J.** made on 29 September 2011 is for them to file a fresh Bill of Costs properly addressed. In all the circumstances therefore, I dismiss the Chamber Summons dated and filed 1 October 2012 with costs to the Defendant.

**DATED and delivered at Nairobi this 27<sup>th</sup> day of February 2013.**

**J. B.HAVELOCK  
JUDGE**