



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
MISC. CIVIL APPLICATION NO.345 OF 2011
WAMAASA & CO. ADVOCATES APPLICANT
VERSUS
NAKAUTO HOUSE (K) LIMITED RESPONDENT
RULING

The application dated 11/05/2011 is brought pursuant to the provisions of **Rule 11(2)** of the **Advocates Remuneration Order**. It arises from the Deputy Registrar's decision dated **30th April 2012** where he dismissed with costs the applicant's application dated **4th November 2011**. The applicant had sought orders for review and setting aside the order dated **31st October 2011** taxing the applicant's bill of costs at Kshs.544,125/75 cents less 200,000/=.

- a. The applicant prays that the bill of costs be allowed as drawn in the sum of Kshs.2,131,464/=.
- b. The costs of this application are also sought.

The application is premised on grounds that the applicant was instructed by the respondent to file suit for the recovery of land whose value was in excess of Kshs.34,100,000/=. The applicant filed suit in the High Court and obtained interlocutory relief, but before the same could be heard interpartes, the respondent instructed the firm of Waruhiu, K'Owade and Nganga Advocates to take over the conduct of the case. Within the period of one month after taking over the suit, the firm of Waruhiu, K'Owade and Nganga Advocates recorded a consent, settling the matter.

The applicant filed his bill of costs dated 14th September 2011 and the bill was taxed on 31st October 2012 in the sum of Kshs.344,125/75 cents.

Subsequent to the taxation, the applicant came across information and documents showing that the respondent's advocate had in fact been paid Kshs.3,900,000/= as party and party costs – this information was not within the knowledge of the applicant.

It is the applicant's contention that pursuant to provisions of Schedule **VI B** of the **Advocates Remuneration Order** the applicant was entitled to the fees agreed by the parties under **paragraph 57** of the said Order increased by 1/3 of the Advocate-client costs. Applicant maintains that it was on account of discovery of new facts that he sought for review.

What grieves the applicant is that the subsequent advocate was paid 3.9 million and since there is

no provision for review of orders of taxation on account of discovery of new matters, the prayers sought should be allowed.

In an affidavit supporting the application, ISAAC WAMAASA (the applicant) repeats the same issues raised on the face of the application and says that if the orders are not granted he will suffer prejudice for being denied the right to earn fees for work done.

The application is opposed and the respondents filed a notice of preliminary objection stating that the application is grossly incompetent and is an abuse of the court process so it should be struck out with costs.

There is also a replying affidavit sworn by the respondent's director, one **JAYEN M. DODHIA** in which he states that the sum of Kshs.3.9 million which was paid out covered the fees as well as to clear all the matters touching on the properties.

The application is described as a case of sour grapes as the applicant's costs were already taxed at Kshs.544,125/75 cents and not Kshs.344,124/75 cents. It is explained that taxing master directed the respondent to pay Kshs.344,125/75 cents after the applicant admitted that the respondent had initially paid Kshs.200,000/= to them. Thus the initial sum of Kshs.200,000/= plus Kshs.344,125/75 cents makes a total of Kshs.544,125/75 cents.

At the hearing, Mr. Wamaasa who acted on behalf of the applicant submitted that the suit property was worth Kshs.34,100,000/= and in fact the consent which was entered saw the applicant in that case being paid Kshs.344,125/= plus costs. Counsel urged this court to look at the work done by his firm and the work done by the subsequent counsel, to assess whether what he seeks is fair. Mr. Wamaasa's lament is that once the costs were awarded to the respondent, the latter parted with a larger sum than the figure that was quoted in the consent, so the applicant was not able to know how much party and party costs was paid, so as to enable him to tabulate the bill of costs.

Counsel points out that it is the applicant who paid the court filing fees of Kshs.75,000/= which was not included in the taxed sum. The applicant then came across information that the subsequent advocate was paid Kshs.3.9 million which he says was party and party costs.

The taxing officer dismissed the application for review in grounds that under the Advocate's Act, there was no provision for review and in any case the sum paid was excessive. Counsel argues that the person who should have complained about excess was the person who paid, not the respondent who benefitted. His contention is that advocate-client costs should have been Kshs.3.9 million increased by one half and since the respondent had instructed two advocates in the matter, then the same should be shared between the advocates.

It is to be noted that the other reason the trial magistrate gave for rejecting the application for review was that the succeeding firm of advocates were going to tax another bill of costs. Mr. Wamaasa faults this reasoning saying by the time the application for review was being argued, the succeeding firm had already been paid the 3.9 million.

The bottom line of the applicant's grief is **"I took instructions, filed suit and helped preserve the suit property by going to court and successfully applying for orders of injunction, yet I only get Kshs.544,125/75 cents. The succeeding firm only got to record a consent and is paid Kshs.3.9 million. That is not fair. There is underpaying and overpaying on an inequitable manner."**

In support of his arguments, counsel relied on the case of **E.A Power Management Ltd. V Steve Kithi Advocate Court of Appeal Case No.56 of 2008** which raised questions as to whether the Civil Procedure Rules can apply in a matter between advocate-client under the Advocates Act.

In opposing the application, Mr. Matiri on behalf of the respondent submits that the applicant is

proceeding on the basis of misinformation, which is why a notice of preliminary objection was filed. He points out that Taxation matters are guided by the Advocates Remuneration Order and not the Civil Procedure Rules. In the event of any objection to a decision, then a party is required to give a notice of objection to the Taxation master within 14 days on the items he objects to. The Taxing officer will then give reasons and if there are not acceptable the aggrieved party files a reference in court. This procedure was never followed, and I confirm as much.

Mr. Matiri points out, that the arguments raised here are the same ones which were raised before the taxing officer when the applicant sought a Review. It is counsel's contention that this application is being filed 7 months after taxation, yet the provisions clearly require that one acts within 14 days.

Mr. Matiri urges this court to bear in mind that the suit was over a price of land worth 34 million, in fact he drew up the agreement where Naka Auto was buying some property. The deal went sour and the property was sold to someone else and the respondent was refunded his money. He argues that what the applicant is not disclosing to this court is that there was no defence filed in the matter and the Provisions of Schedule 6 (lower scale) of the Advocates Remuneration Order were used.

As to comparing the amount of work done by the two firms, Mr. Matiri points out that after sorting out instructions the court must consider how many times Mr. Wamaasa appeared in court, and that it must be borne in mind that the application was never argued. It is submitted that the letter which is said to be the source of information about Kshs.3.9 million paid out was not just an advocate's costs and it cannot be a basis for fresh taxation. He distinguishes this case from the **E.A. Power Management Ltd. Case** (supra) saying the situation in this preset case falls clearly under the Provisions of **Rule 11** of the **Advocates Act** and the **Civil Procedure Rules** has no place here.

Mr. Wamasa's response is that the challenge is not against the taxing officer's decision which would be covered by Rule 11, rather it is for review due to new information, and since there is no such provision under the Advocates Act and Rules, the Civil Procedure Rules apply. He poked holes at the contention that Kshs.3.9 million was not just costs to the firm of Waruhiu, Kowade and Nganga, saying:-

- a. Since there was no defence filed, the firm should not be paid so much money.
- b. The respondents did not require to pay the defendant any other money because they had paid the purchase price.
- c. There ought to have been a tabulation by the respondent, showing how much of the 3.9 million was advocate costs and how much was for other expenses.

Where a party is aggrieved by the taxation of a bill of costs, the decision is **"appealable"**, so to speak, by way of a reference to the High Court.

Rule 11 of the Advocates Remuneration Order provides as follows:-

"11(1) should any party object to the decision of the taxing officer he may within 14 days after the decision, give notice in writing to the taxing officer of the items of taxation 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 14 days from the receipt of the reasons, apply to a Judge setting out the grounds of his objection."**

In this instance however, Mr. Wamaasa is saying his grievance on the assessment of costs is not pegged to any specific item that was on the bill of costs which he filed BUT that the succeeding advocate was paid a much higher figure, for comparably little work done and they ought to share

the spoils.

In taxing the bill, the taxing officer was guided by the value of the property, the number of attendances, perusal of documents and the usual disbursements. It doesn't appear to me that Mr. Wamaasa is arguing that the suit property value was more than what he stated in his bill of costs.

Ringera J (as he then was) stated in the matter of **Winding Up of Leisure Lodges Ltd. (HCCC Winding Up Cause No.28 of 1996)**, that where a party is aggrieved by a taxation of the bill of costs, the proper remedy is a reference to the High Court under paragraph 11 of the Advocates Remuneration Order and not an appeal to the High Court under the Civil Procedure Rules and he restated the position in **Machira & Co., Advocates V Arthur Magugu & Another High Court Civil Misc. Application No.358 of 2001** (unreported) – that:-

“First the Advocates Remuneration Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. . . .”

This decision and several others seemed to put to rest the issue as to what legal provisions applied in cases of a contested outcome relating to a bill of costs. Several years later, the Court of Appeal sitting in Mombasa, a bench of Otieno, Koome and Okwengu JJJ A held in the case of **E.A. Power Management Limited V Stephens Kithi Ngombo T/a Steve Kithi & Co., Advocates** considered the provisions of **Rule 11** of the **Advocates Remuneration Order**, and acknowledged that the same provided its own procedure and there was no reference to the Civil Procedure Rules. However they held that since both the Advocates' Act and Remuneration Order do not make provisions of how an application to set aside an exparte certificate of taxation can be dealt with, then the only fall back available to the aggrieved party are the provisions of the Civil Procedure Rules and that the court could allow an approach under the Civil Procedure Rules by invoking its inherent powers.

A distinguishing feature in the **Steve Kithi case** (supra) is that the taxation had proceeded exparte and the applicant wished to have it set aside. In the present case, the taxation was not exparte, in fact the present applicant was the main participant. So yes there are instances where Civil Procedure Rules may be invoked to challenge some aspect in a bill of costs if there are no provisions under the Advocates Remuneration Order. However in this instance if it is the work done in terms of preparation and court attendances, I am of the view that those were catered for in the Bill of Costs drawn by none other than the applicant himself.

Then there is the letter (which this court cannot ignore), written by the firm of Githui & Company dated 15/9/2011 on which read in part:-

“Our instructions forward the sum of Kshs.3,900,000/= to M/s Waruhi, Kowade and Nganga Advocates. THIS SUM SHALL BE UTILIZED TO SETTLE COSTS IN THE CASE AND TO CLEAR ALL MATTERS THAT MAY BE OUTSTANDING AND TOUCHING ON THE PROPERTY” [Bold emphasis mine]

The terms of that letter are so clear, I don't think there is need to dissect it any further so as to get a hidden meaning, certainly the 3.9 million was not just costs for the firm which succeeded the applicant. In any event the costs awarded should be shared equally between itself and the successor, then the most prudent thing would have been to abide the outcome of the matter then move under Rule 62A (1) of the Advocates Remuneration Order. He elected to file a separate bill of costs and cannot now begin to complain that the successor was paid more because:-

- a. There was no evidence of taxation done involving Waruhi, K'Owade & Nganga Advocates – their payment of costs seems to have been a negotiated deal between advocate and client.
- b. The letter referred to, does not state that Kshs.3.9 million is exclusively costs paid to the succeeding firm of advocates, confirmed also by Jayen Dodhia in his replying affidavit.

Finally, the terms of the consent were recorded to reflect the actual value of the suit subject as had been stated by the applicant when he prosecuted the bill of costs. There has not been a departure from that figure. It would therefore defeat logic to peg applicant's fee to the sum referred to in the letter already mentioned.

The upshot is that the application has no merit and is dismissed with costs to the respondent.

Delivered and dated this 26th day of April, 2013 at Nakuru.

H.A. OMONDI

JUDGE