



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE NO. 85A OF 2005**

OLE CHESUSUA KIPUTIT ..... PLAINTIFF

-VERSUS-

AMPANY LEKAKENY ..... DEFENDANT

**RULING**

1. The application before the court is the Notice of Motion dated 8<sup>th</sup> October 2012 where the defendant/applicant sought leave allowing Mr. C. A Okenye, Advocate to act for and on behalf of the defendant/applicant in this case in place of J. S Odongo & Co. Advocates since judgment was entered on the 30<sup>th</sup> May 2008. It also sought that the bill of costs in this case taxed ex parte be set aside and the same be taxed afresh and costs of the application. Following a consent between the two said advocates dated 2/11/12, only the second limb of the application is coming up for determination.
2. The application is premised on the grounds that the applicant has a right to be represented by an advocate of his own choice and that Mr. C. A Okenye, Advocate had instructions to represent the defendant. It is also contended that the bill of costs taxed ex parte is exorbitant and not according to the Advocates Remuneration Order and that it would be fair and just to allow the application.
3. There is annexed the supporting affidavit by Clement Okenye Aboki, advocate who stated that he had instructions to act for the defendant in place of J. S Odongo & Co. Advocate and he sought leave to come on record as judgment had been entered on 30<sup>th</sup> May 2008. He also stated that he had an opportunity to look at the bill of costs dated 2<sup>nd</sup> July 2009 and taxed ex parte on 8<sup>th</sup> December 2011 and considered that the said bill was exorbitant and not drawn according to the Advocates Remuneration Order and prayed that the same should be set aside and taxed afresh and, consequents, that the Notice to Show cause be stood over to await the outcome of this application.
4. The application is opposed. By grounds of opposition by the plaintiff dated 25<sup>th</sup> October 2012 in the plaintiff states that the application dated 8<sup>th</sup> October 2012 is misconceived and otherwise an abuse of the process of the court, lacking in merit and merely serving to delay the case, and, finally, that the applicant is guilty of laches.
5. On the 18<sup>th</sup> April 2013 parties made oral submissions when Mr. Okenye for the defendant submitted that the taxation should have been done in his presence and that of both the parties. He referred to his objection marked "CAO1" showing the correct amounts in each item and he prays that the Deputy Registrar to consider the same so that a fair hearing be given to the defendant.
6. Miss Sagwa who held brief for Mrs. Asati for the plaintiff in opposing the application submitted that it is not true that the bill of costs was taxed ex-parte. The same had been served upon the advocates previously on record and also upon C. A Okenye. Mr. Okenye was aware of the taxation as he was properly on record since 18<sup>th</sup> December 2008 when he filed an application which was dismissed on the grounds that he was not properly on record. She further submits that

the Bill of costs taxed on 13<sup>th</sup> December 2012 was taxed in the presence of Mr. Okenye who at that time was not properly on record thus they raised an objection to that effect and the court allowed the objection and the taxation proceeded. The objection to the bill of costs was filed on 8<sup>th</sup> October 2012 eight months after the taxation was done and was in consequence of service upon the defendant of a notice to show cause. She further submitted that the application herein is an afterthought and had been brought to delay this matter and that the application as filed does not exist in law. Counsel submitted that the defendant should have moved the court under rule 11 of the Advocates' Remuneration Order, which is in the following terms:-

***11(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 the parties concerned, setting out the grounds of his objection.***

***(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

***(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for taking of any step; application for such an order may be made less than three clear days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.***

7. The taxation was technically not ex-parte as notice thereof had been given to the advocate on record for the defendant. However, after the plaintiff successfully objected that Mr. Okenye was not properly on record and therefore he could not be heard even though he was present, in view of the non-representation of the defendant at the taxation, the court ought to have allowed the defendant an adjournment to enable him be represented either by his counsel then on record or for Mr. Okenye to formalize his appointment.
8. I bear in mind the principles for setting aside ex-parte orders as laid down by Harris J. in *Jesse Kimani –vs- Mc Connel* (1966) E. A 547, 555 and approved by the Court of Appeal for East Africa in *Mbogo –vs- Shah* (1968) E. A 93 that:-

***“The court [would], first, ask itself whether any material factor appears to have entered into the passing of the ex parte judgment which would not or might not have been present had the judgment not been ex parte, and that, if satisfied that such was or may have been the case, to determine whether, in the light of all the facts and circumstances both prior and subsequent court of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment ... if necessary, upon terms to be imposed.”***

9. I have considered the defendant's objection by way of his counsel's affidavit indicating the minimum charges under the Advocates Remuneration Order against the amount allowed by the taxing officer, I am satisfied he has a *prima facie* defence to the taxed amounts to justify a reconsideration of the taxation under Rule 11 of the Order, which provides for references to the High Court of taxation matters. I do not consider that the matter should be reopened for protracted taxation process before the taxing officer since the taxation was strictly not ex parte. In the interest of justice, and considering that the dispute should be disposed of expeditiously in accordance with the overriding objection of sections 1A and 1B of the Civil Procedure Act, and further that the taxation was not ex-parte in view of notice to defendant's counsel on record, I find that the defendant's objection to the taxed costs shall be determined by this court as an objection

rather than as a re-hearing before taxing officer. In accordance with Rule 11(4) of the Advocates Remuneration Order, I enlarge the time for reference on taxation under Rule 11(1) to allow for the consideration of the defendant's objection on the taxation to be filed for determination by the court. The Deputy Registrar will give her reasons for the taxation under Rule 11(2) of the Order within 14 days, and the defendant will file his objection within 7 days thereafter and the matter will subsequently be mentioned for directions as to the hearing of the defendant's objection to the taxation.

10. The defendant is guilty of delay in moving the court for the orders sought, for a period of 8 months after the taxation of costs was done in February 2012. For this reason, the defendant will pay the plaintiff's costs for this application to be agreed or taxed by the taxing officer in default of agreement.

**Dated and delivered this 24<sup>th</sup> day of MAY 2013.**

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**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondent**

**Mr. Edwin Mongare – Court Clerk**

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**EDWARD M. MURIITHI**

**JUDGE**