



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 713 OF 2012

IN THE MATTER OF THE ADVOCATE ACT CAP 16 LAWS OF KENYA
AND
IN THE MATTER OF TAXATION OF AN ADVOCATE CLIENT BILL OF COST

BETWEEN

WAFULA SIMIYU CO. ADVOCATE APPLICANT

VERSUS

EASTLAND HOTEL LIMITED RESPONDENT

(FOR LEGAL SERVICES RENDERED IN HCCC NO. 167 OF 2012)

BETWEEN

QIAN GUO JUN PLAINTIFF

VERSUS

QIAN ZENG MAO1ST DEFENDANT

QIAN ZENG DE2ND DEFENDANT

TANG WEI QIN3RD DEFENDANT

MENG BO4TH DEFENDANT

HONG LIZH5TH DEFENDANT

EAST LAND HOTEL LIMITED6TH DEFENDANT

RULING

1. Wafula Simiyu and Co. Advocates (hereinafter “the Advocate”) represented the Eastland Hotel Limited or its nominees (hereinafter “the Client”) in **Milimani HCCC No. 167 of 2012**, **Milimani HCCC No. 193 of 2012** and in an Arbitration Cause before Arthur Mururu Esq. The Advocate and Client seem to have fallen out of each other as a result whereof, the Advocate drew a Bill of Costs in **HCC No.167 of 2012** which was taxed *ex parte* at Kshs.19,374,317/- on 12th April, 2013. On 16th April, 2013, the Advocate took out a Notice of Motion under Section 51 (2) of the Advocates Act and on being satisfied that the same had been served, the court entered judgment for the Advocate against the Client for Kshs.19,374,317/- on 10th May, 2013 in terms of a Certificate of Costs dated 12th April, 2013. In pursuance thereof, on 18th May, 2013, Keysian Auctioneers proclaimed various assets belonging to the client.
2. Fearing attachment, on 3rd June, 2013, the Client took out a Motion on notice praying for a stay of execution of the decree herein pending the filing and hearing of a reference on the taxation dated 12th April, 2013. There was also another prayer for the setting aside of the ruling on taxation dated 12th April, 2013. That first order was granted *ex parte* on an interim basis. That application was argued before me on 13th June, 2013 and this is the ruling in respect thereof.
3. The motion was supported by the Affidavits of QIAN QUO JUN sworn on 3rd and 8th June, 2013 respectively. The Managing Director of the Client deponed that on 24th May, 2013 at 12 p.m., Keysian Auctioneers accompanied by five (5) uniformed administration officers and other unidentified persons forced their way into the client’s premises to attach moveable assets, that the auctioneer with his entourage menacingly removed the client’s furniture in the full view of its guests, that in order to avoid further embarrassment and inconvenience to high profile guests who included the Ambassador of China, the deponent signed an Agreement to pay the Advocate Kshs.5million on or before 7th June, 2013. That the Auctioneers removed two motor vehicle Registration No. KAP 101R and KBP 580Z as security for the payment of the said Kshs.5million.
4. The Client further contended that having not been served with the Bill of Costs giving rise to the taxation, both the taxation and all the consequent orders were irregular. That the taxing master had misdirected herself in awarding costs of Kshs.15,062,000/- based on the wrong value of the subject matter at Kshs.1billion. That the parties had agreed on fees on all the matters at Kshs.3million but the deponent had later discovered that the agreement was only in respect of **HCCC No.193 of 2012**. That the Client was all along under the impression that all fees had been settled. The Client urged that since the attached motor vehicles are its tools of trade, the orders sought should be granted as they are necessary for the client’s operations.
5. It was further contended that from the agreements executed and the pleadings on record, each party was to bear own costs. That the amount agreed as fees had since been paid in full. That the Advocate was guilty of material non-disclosure during the said taxation and that in view of the agreement on fees, the taxation was contrary to Section 44 of the Advocates Act.
6. Appearing for the client, learned counsel Mr. Wambugu submitted that the court should not put undue regard to technicalities, that the Client could not comply with Rule 11 of the Advocates Remuneration Order as the Client was unaware of these proceedings until execution. Counsel relied on the case of **Evans Gakuru & 66 others –vs- NBK CA 287/89**. Counsel further submitted that it was wrong for the Advocate to have served the General Manager of the Client with process having known that majority of the client’s staff are Chinese who are not clear with Kenyan legal process. That since the costs awarded were excessive yet there was an agreement on fees, the taxation should be set aside. Counsel therefore urged that since the Client was valued at Kshs.1B, the Advocate would suffer no damage as the Client would be capable of compensating him if he succeeded.
7. Counsel attached the Agreement between the Client and the Advocate dated 24th May, 2013 and urged that the same was not binding on the Client on the ground that it was entered under duress and referred the Court to the case of **Madhu Paper –vs- KCB & 2 others HCCC No.126 of 1992** in support of that contention. Counsel urged that the application be allowed.
8. The Advocate opposed the application relying on the Notice and Further Notice of Preliminary Objection filed on 6th and 7th June, 2013, respectively. The Advocate also relied on the Replying Affidavit of Jimmy Wafula Simiyu. The preliminary Objections were argued in opposition to the motion.

9. The Advocate contended that the application was an abuse of the court process, that the application contravened the provisions of Rule 11 (1) and (2) of the Advocates Remuneration Order, that there is no Reference from the taxation of 12th April, 2013 as none was preferred within 28 days of the ruling, that the Client was bound by the Agreement of 24th May, 2013 wherein the Client had agreed to pay an initial sum of Kshs.5million and negotiate to pay the balance in instalments and that the Affidavits of Qian Quo Jun and Phillip Wambugu had not been commissioned by Peter Gichuki King'ara.
10. In his Replying Affidavit, Mr. Simiyu deponed that there was no dispute as to retainer, that he personally served the Bill of Costs upon the Client whereby he was summoned to the client's offices on 3rd and 18th December, 2013 whereby the Client indicated its willingness to negotiate the fees only if the Bill of Costs was withdrawn which he declined, that a sum of Kshs.750,000/- was paid on 13th December, 2012 as an apology for the delay in paying the legal fees. He contended that while there was an agreement as to fees in HCCC No. 197 of 2012 and resultant arbitration there was none in respect of HCCC No.167 of 2012 which is the subject of the current proceedings. That he had served upon the Client the motion that culminated in the judgment that is the subject of execution herein but the client's director Mr. Qian Guo Jun became rude to him, that the client's assets were proclaimed on 18th May, 2013 in the presence of Miss Song Li Hua. That the Client was now estopped from seeking a stay having executed the agreement of 24th May, 2013.
11. Mr. Simiyu appearing for the Advocate submitted that prayer 2 of the motion which sought the setting aside of the taxation of 12th April, 2013 be dismissed for being in breach of Rule 11 of the Advocates Remuneration Order, that the General Manager of the Client had not sworn an Affidavit to deny service. Mr. Simiyu cited the definition of the term duress in **BLACKS LAW DICTIONARY 8TH EDN** and submitted that the circumstances of this case did not satisfy the definition of duress as the agreement of 24th May, 2013 was entered into in the presence of the client's Advocate, one Philemon Koech. Counsel therefore urged that the application be dismissed.
12. Having carefully considered the Affidavits on record, submissions of Counsel and the authorities relied on I take the following view of the matter. Rule 11 of the Advocates Remuneration Order provides:-

“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 to 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 the taking of any step: application for such an order may be made by chamber summons upon giving to every other interested party not 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.” (Emphasis supplied)

From the foregoing, it is clear that taxation of costs is to be contested in the High Court only as laid down in that rule, that is, by filing a reference. The filing of the reference is preceded by the party objecting to the taxation giving notice to the taxing officer of the items objected to. To my mind, without a reference, the High Court lacks jurisdiction to entertain any matter touching on taxation of costs by the taxing master.

13. In this case it is alleged by the Client that taxation was done *ex parte* as the Client was not served with the Bill of Costs. The Advocate denies that allegation. I have on my part seen the Affidavits of service of Jimmy Wafula Simiyu sworn on 4th December, 2012. It states that one Miss Song Li Hua was served with the Bill of Costs but refused to sign a duplicate copy thereof. Miss Song has not filed any Affidavit to contradict that averment. Further the Client never sought to cross examine Mr. Simiyu on that Affidavit if it seriously contented the contents. That being the case, can this court set aside the taxation ruling of 12th April, 2013 as sought? I entertain some doubts.
14. My view is that if the Client intended to challenge the ruling on taxation on the basis that the taxation was under taken *ex parte* – the proper forum would have been to make an application to the particular taxing officer for that purpose but not to come to this court. The second issue is, there being no reference against the ruling of 12th April, 2013, is prayer No. 3 of the motion properly before this Court? I do not think so. To my mind the same is misconceived and is hereby dismissed with costs.
15. That leaves me with the prayer for stay of execution of the decree pending the filing and hearing of a reference on the ruling of 12th April, 2013. The basis for the application is that the proceedings herein were at all times undertaken *ex parte* by the Advocate and that the Client only came to know of the same on execution. On his part, the Advocate contended that he had served the Client which led to some negotiation meetings in December, 2012 and some part payment of Kshs.780,000/-. Although the Client denied the alleged negotiation meetings, the court noted that the Client was silent on the circumstances under which cheque No.000114 for Kshs.780,000/- dated 13th December, 2012 was paid to the Advocate.
16. The Advocate also produced Affidavits of service of Jimmy Wafula Simiyu sworn on 11th April, 2013 for service of a ruling notice, as well as the assertion that the Client was served twice with the motion for judgment and hearing notice thereof. There was no credible evidence by the Client to controvert these averments. I am alive to the provisions of Article 159 (2) (d) of the Constitution and Mr. Wambugu's submissions that the court should overlook technicalities and deal with the matter with a view to render substantive justice. Whilst appreciating that technicalities are to be disregarded on matters pertaining to justice, I am alive to the requirement of Article 159 (2) (c) that justice should not be delayed. I note that although the attachment was effected on 24th May, 2013, as at the date the motion was argued, no steps had been undertaken by the Client to regularize its position under Rule 11 of the Advocates Remuneration Order to challenge that subject taxation. No application was made or prayer included in the present motion to extend time for complying with Rule 11 aforesaid. The Client did not state when it intended to file the reference. In my view, if the Client was serious with its protestations regarding the *ex parte* nature of the proceedings so far, it should have made a prayer in these very proceedings for extension of time. This it did not. If it did not want to go back to the taxing officer to set aside the *ex parte* proceedings it should have prayed for extension of time under Rule 11(4) and issue a Notice of Objection. How and when then does it intend to pursue the reference? This has not been disclosed. To my mind, this information lacking I do not see what purpose the stay sought will serve. It will lead to further delays contrary to Article 159 (2) (c) of the Constitution.
17. An issue was raised about the Agreement of 24th May, 2013. The Client contends that the same is unenforceable as it was entered into under duress. The Advocate submits otherwise. On my part, I have noted that the Client had admitted that the agreement was entered into after it had called its Advocate who was present when the same was being executed. I have also noted that although it was entered on 24th May, 2013, as at the time the application before me was being argued, there had been no application or suit filed challenging or meant to set aside the agreement or invalidate the same. So long as there have been no proceedings undertaken to invalidate the agreement, the same remains binding upon the parties.
18. For the foregoing reasons, I am not satisfied that the Client has established a case for the grant of

the orders sought. Accordingly, the application is dismissed with costs. The interim orders in force are hereby discharged and set aside.

DATED and **DELIVERED** at Nairobi this **28th** day of June, 2013.

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A. MABEYA

JUDGE