



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**MISC. CIVIL APP. (JR) NO.15 OF 2011**

REPUBLIC.....  
.....APPLICANT

VERSUS

MUNICIPAL COUNCIL OF BUSIA.....1<sup>ST</sup> RESPONDENT

THE CLERK, MUNICIPAL COUNCIL OF BUSIA.....2<sup>ND</sup> RESPONDENT

AND

JULIUS ORINA MANWARI

P/A MANWARI & CO. ADVOCATES .....EXPARTE APPLICANT

**RULING**

According to the Exparte Applicant, his firm was instructed by the 1<sup>st</sup> Respondent to act on its behalf in various civil matters. The Exparte Applicant complained that despite performing his part of the bargain, the 1<sup>st</sup> Respondent had failed or neglected to settle his professional fees. In that regard, the Exparte Applicant filed 75 Advocate – Client bills of cost before this court for taxation. The said bills of cost were duly taxed. In some of them, the 1<sup>st</sup> Respondent had the bills assessed by consent. The total amount taxed as due and payable to the Exparte Applicant is the sum of Kshs.7,804,294/-. According to the Exparte Applicant, the 1<sup>st</sup> Respondent had not settled the amount even after due notice was given. It was this recalcitrance by the 1<sup>st</sup> Respondent that compelled the Exparte Applicant to file the present application for Judicial Review.

The Exparte Applicant was granted leave by this court to apply for the Judicial Review orders of Mandamus to compel the 2<sup>nd</sup> Respondent, as the Chief Executive of the 1<sup>st</sup> Respondent, to pay to the Exparte Applicant the sum that was taxed in his favour by this court. The Exparte Applicant filed the substantive motion within the period stipulated by the court. In the statement filed pursuant to **Order 53 Rule 4(1)** of the **Civil Procedure Rules**, the Exparte Applicant listed the 75 Miscellaneous Applications which he had filed before this court and the various sums that were assessed as due to him on account of professional services that he had rendered to the Respondents. In the substantive notice of motion, the Exparte Applicant prayed for an order of judicial review to compel the Respondents, by Mandamus, to pay to him the sum that was taxed in his favour by this court. In the grounds in support of the notice of motion, the Exparte Applicant states that after the Advocate – Client bills of cost were taxed, certificates

of cost were issued in the 75 cases. He stated that the Respondents had applied various delaying tactics in a bid to frustrate him from being paid the taxed costs. He was of the view that although the Respondents had capacity to pay the sum, the Respondents had refused to settle the same hence his decision to file the present suit.

The Respondents duly entered appearance and filed a preliminary objection to the entire suit. The Respondents contended that the judicial review application was fatally and incurably defective because of failure by the Exparte Applicant to file a verifying affidavit in support of the application. It was the contention of the Respondents that the Exparte Applicant had not placed before the court any material that would enable this court to grant the order sought in the application. Jonathan Kerio, the Clerk of the 1<sup>st</sup> Respondent swore a replying affidavit in opposition to the application. In the material part of the said affidavit, he swore that the application was incompetent and had not raised any issues capable of making this court issue the order in his favour. In paragraph 8 of the affidavit, he stated thus:

***“That I know as of personal knowledge that sometimes in the month of August 2011, the auditors (sic) of public accounts carried out investigations over the payments demanded by the Applicant and made a report to the effect that the sums demanded by the Applicant were unjustified, could not be accounted for and therefore cannot be budgeted in the Respondent’s expenditure.”***

In essence, what the Respondents were saying is that they would not pay the Exparte Applicant the amounts that were taxed in his favour by this court.

Prior to the hearing of the application, counsel for the parties to this application filed written submission in support of their respective opposing positions. During the hearing of the application, this court heard oral submission made by Mr. Manwari for the Exparte Applicant. For some reason, the Respondents’ counsel did not attend court. This court has carefully considered the submission, both oral and written, made by the parties to this suit. The issue for determination by this court is whether the Exparte Applicant made a case for this court to grant him the order of Mandamus that he craves for. After evaluating the facts of this case, it was apparent that the 1<sup>st</sup> Respondent had instructed the Exparte Applicant to act on its behalf in various cases that were the subject of the taxation in the Advocate-Client bills of cost. The Respondents did not deny that they had given instructions to the Exparte Applicant to act on their behalf in the various cases that were listed in the application. The Respondents did not make any allegations to the effect that they had settled the Exparte Applicant’s professional fees upon issuing the instructions. When the Exparte Applicant filed his bills of cost before this court, the Exparte Applicant participated in the proceedings. In the said proceedings, the Exparte Applicant did not raise any objection in regard to the question whether or not it had instructed the Exparte Applicant.

This court holds and finds that the Exparte Applicant was infact instructed by the Respondents to act in the various cases that were the subject of taxation. Since instructions were not disputed, then it follows that the Exparte Applicant is entitled to be paid his fees. The Respondents cannot raise legal technicalities to defeat the legitimate claim by the Exparte Applicant to be paid his costs. The Respondents did not appeal by way of reference against the decision that was made by the taxing officer when he assessed the legal fees to be paid to the Exparte Applicant. They cannot, in this application, challenge the validity or otherwise of the said taxed bills of costs. This court agrees with the Exparte Applicant that the Respondents have not only frustrated him from being paid the said sum of money, but have blatantly refused to pay the same. The remedy that the Exparte Applicant craves for is an appropriate one to compel the Respondents to perform their legal and statutory duty.

In the premises therefore, this court allows the Exparte Applicant’s application to be granted the Judicial Review orders of Mandamus. The Respondents are ordered to pay the Exparte Applicant the sum of Kshs.7,804,294/- within thirty (30) days of this court’s ruling. The Respondents are hereby compelled by order of Mandamus to the pay the above sum in performance of their statutory duty. The Exparte Applicant shall have the costs of this application and costs for the application which sought to be granted leave to file the present application for Judicial Review. It is so ordered.

**L. KIMARU**

**JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 30<sup>TH</sup> DAY OF JULY 2013.**

**F. TUIYOT**

**JUDGE**