



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**  
**MISCELLANEOUS APPLICATION 678 OF 2011**  
**GACAU KARIUKI & CO. ADVOCATES.....ADVOCATE/RESPONDENT**  
**VERSUS**  
**ALLAN MBUGUA NG'ANG'A .....CLIENT/APPLICANT\_**

**R U L I N G**

On 13<sup>th</sup> February 2012, the Client/Applicant filed in this court a Notice of Motion dated the same day seeking the following orders:

- “(i) This application be certified as urgent and be heard exparte in the first instance.**
- (ii) That a stay of execution of the decree be granted pending the hearing and determination of this application interparties and/or further orders of the court.**
- (iii) The Honourable Court be pleased to set aside the orders made on 29<sup>th</sup> September, 2011 and 27<sup>th</sup> October, 2011 and all consequential orders therefrom.**
- (iv) The defendant/respondent be allowed to defend the bill of costs filed by the plaintiff herein.**
- (v) The bill of costs dated 17<sup>th</sup> August, 2011 be taxed afresh.**
- (vi) The costs of the application be borne by the plaintiff”.**

The Motion was based on the following the grounds:

- “(a) The respondent was not served with the bill of costs or notices of taxation.**
- (b) The respondent was not also served with the Notice of Motion application dated 11<sup>th</sup> October, 2011.**
- (c) The respondent has paid the applicant advocate amounts in excess of Kshs.286,000/=.**
- (d) The respondent was not served with the certificate of taxation or any other letter from the plaintiff as alleged or at all.**

**(e) The bill of costs as drawn and taxed is excessive and is not based on the scales provided in the Advocates remuneration order.**

**(f) That the judgment entered by the court was unprocedural and irregular”.**

The motion was supported by an affidavit sworn by **Allan Mbugua Ng’ang’a** sworn on the same day in which while admitting that he retained Mr. Gacau Kariuki of Ms. Gacau Kariuki & Co. Advocates (hereinafter referred to as the advocate) to act for him in *Nairobi CMCC No. 4420 of 2007*, he paid the said advocate all the money that was requested by the said advocate amounting to a total of Kshs. 321,050/- by way of M-pesa, in cash or by bank deposits. According to the deponent he does not owe the advocate any money since the total sum paid by him exceeds the amount the advocate is entitled to, going by the Bill of Costs filed herein. According to the client, the advocate has only accounted for Kshs. 25,000.00

He further contends that he was unaware of these proceedings since he was neither served with the Bill of Costs nor any other papers relating to these proceedings. According to him the first time he became aware of the existence of these proceedings was on 16<sup>th</sup> December 2011 when he met a **Mr. Cosmas Gichuki** in the streets of Nairobi and who revealed to him that the matter was coming up on 20<sup>th</sup> December 2011. He then instructed his advocates on record who upon perusal of the record informed him that he was purportedly served with the Bill and the application for entry of judgement by one **Peter Kisilu**. According to him he does not know the said **Peter Kisilu** and has never spoken to him on the phone. He avers that although he has been the advocate’s client he did not visit their offices on the day alleged by the said process server. According to him there are discrepancies in the affidavits of service filed in court and that he has always dealt with the said **Cosmas Gichuki** who served him with notices to show cause and swore affidavits to that effect. Had he been served, the client contends, he would have taken steps to defend himself since he does not owe the advocate any money.

According to the client the institution of these proceedings was a result of bad blood between him and the advocate in the earlier suit, which suit is yet to be finalised, hence the advocate’s claim, even if had not been settled would be unjustified. According to the client, the advocate was obliged to file a suit after taxation without which a decree cannot ensue. Further no judgement was entered by this court on 27<sup>th</sup> October 2011 since the court only allowed prayer 2 of the application dated 11<sup>th</sup> October 2011.

The advocate opposed the Motion by way of a replying affidavit sworn by **Edward Gacau Kariuki** on 17<sup>th</sup> February 2012. According to the deponent, since there is no dispute that the firm represented the client in the said CMCC No. 4429, the firm is entitled to full legal fees for the services rendered. According to the advocate the firm had strict policy to issue receipts in respect of payments made and therefore the client’s tabulation is fictitious. According to the deponent since his relationship with the client was not merely professional but was also a friendly relationship, the said payments were not wholly in respect of legal fees but were only part of the legal fees, favours and appreciation by the client of the work done by the deponent who is a different person from the firm; hence the issuance of receipts for some payments and not for others. Accordingly, the deponent contends that the client’s averment that he has settled full fees is far-fetched since it is not supported by evidence. With respect to Kshs. 70,000.00 the same was in respect of court fees and was not drawn in favour of the firm.

The client’s contention that he was not served, according to the deponent are utter lies relied upon by the client to avoid payment. According to him the client was duly served but failed to appear and relies on an affidavit of service filed. According to the advocate it was the failure by the client to respond to the demand to payment that led to the filing of the application which resulted into judgement which application was personally served. Subsequent to entry of judgement notice to show cause was issued and was duly served and listed a number of times including on 18<sup>th</sup> January 2012 when a **Mr. Wainaina** appeared for the client and stated he had no instructions in the matter hence the same was stood over. According to the deponent the client was well aware of the proceedings but chose not to participate therein. The fact that the client met the advocate’s clerk in the street is admitted which, according to the deponent, made the client to realise that he could hide no more. The issue of bad blood is denied and the

advocate's position is that the payment of an advocate's fees is not based on the success of the case and the firm having diligently represented the client is entitled to be paid. According to the deponent the client has come to court with unclean hands, after inordinate delay and the litigation should come to and in order to avoid further expenses, time and resources.

The application was prosecuted by way of written submissions. According to the client's submission filed on 5<sup>th</sup> March 2012, inquiries from Process Servers Committee revealed that **Peter Kisilu** who allegedly served the client herein was not a licensed process server in the year 2011. The fact that service is denied and there are discrepancies in the signatures in the process server's signature, it is submitted, shows the extent to which the advocate took the process for granted. It is also noted that the said process server has not filed an affidavit to shed some light herein. According to the submissions, the client has a formidable defence which he would have raised in order to rebut the allegations made against him had he been aware of the proceedings herein. Unless the application is allowed, the client contends that he will be prejudiced since he will be unable to show the payments he made. Since the advocate will have his day in court, he will not suffer any prejudice. Relying on **Maina vs. Mugiria Civil Appeal No. 27 of 1982**, it is submitted that the court has wide discretion to set aside ex parte judgement or order, the only consideration being justice to the parties. Where a judgement in default was irregularly obtained, it is submitted, on the authority of **Abraham K. Kiptanui vs. Delphis Bank Ltd & Another HCCC No. 1864 of 1999** that the same will be set aside as a matter of right. Where there are merits in the defence, the client submits, the case of **Kenya Safari & Hotels vs. Tembo Tours & Safaris Ltd [1985] KLR 441**, urges the court not to allow the default judgement to stand. For the proposition that the advocate was obliged to file a suit after obtaining a certificate of taxation reliance is placed on **J M Wafula & Co. Advocates vs. Kiprop Kanda HCMA No. 73 of 2009; D Njogu & Co. Advocates vs. City Council of Nairobi HCMA No. 1492 of 2007.**

It is therefore the client's contention that the cumulative effect of a good defence, sufficient reason for non-attendance and expedition in bringing the application gives merit to the application.

On his part the advocate filed his submissions on 14<sup>th</sup> March 2012 in which he gives a brief background of the proceedings leading to the institution of the present proceedings. It is submitted that on being satisfied that the bill had been served on the client the taxing master proceeded as he was entitled to tax bill after which a certificate of taxation was issued pursuant to which judgement was entered on an application by the advocate which was duly served. These were the events that eventually led to the present application.

According to the advocate the applicant/client filed his submissions 12 days after the due date. As no leave was sought and obtained the same were irregularly filed and should be expunged from the record.

It is submitted that a certificate of costs having been issued, the only recourse available to the client was to prefer a reference. Where there is no dispute as to retainer **section 51(1)** of *Cap 16* empowers the court to enter judgement. It is further submitted that this court has no jurisdiction to stay execution of costs under *Advocates (Remuneration) Order*. The advocate further submits that what is important is service and not whether or not the process server was licensed.

I have considered the application, the rivalling affidavits, the submissions and the cited authorities.

I must make it clear that what is before me is not a reference from taxation but an application seeking to set aside the orders made on 29<sup>th</sup> September 2011 and 27<sup>th</sup> October 2011. The orders which were made on 29<sup>th</sup> September 2011 were made by the Deputy Registrar when the learned Deputy Registrar in her capacity as the Taxing Master taxed the bill as presented. What is the procedure for challenging such a decision? In my view the only available recourse to a person aggrieved by a decision of the Taxing Master is to lodge a reference. Where a person discovers the fact of taxation after the time stipulated as it is alleged herein paragraph 11(4) of the *Advocates Remuneration Order* empowers the court to extend time. It has been said time and again that where there is a specific procedure provided for addressing a grievance that procedure should be strictly complied with. Ringera, J (as he then was) in **Re: Leisure Lodges Limited Nairobi (Milimani) HCWC No. 28 of 1996** was of the view that a party who is

aggrieved by any decision of the taxing officer whether interlocutory or final and whether it be on the quantum awarded on the bill as a whole or any items thereof has a recourse to the High Court by way of a reference under paragraph 11 of the Advocates Remuneration Order. The same Judge in Muthoga Gaturu & Co. vs. Fidelity Commercial Bank Ltd. Nairobi (Milimani) HCCC No. 570 of 2000, held that although it is true that **rule 11** of the *Advocates Remuneration Order* allows reference to the High Court in respect of taxed items of a bill of costs, where taxation has not proceeded on the basis of any items in the bill but the entire bill has been struck out the aggrieved parties only remedy is a reference to the High Court in respect of such a decision in its entirety. In First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65 it was held that the correct procedure to challenge the decision on taxation is not by applying to have it set aside but by reference under **rule 11** of the *Advocates Remuneration Order*. In Behan & Okero Advocates vs. National Bank of Kenya Kisumu HCMA No. 114 of 2004 Tanui, J held:

**“Rule 11 of the Advocates (Remuneration) Order clearly stipulates that any party who is aggrieved by the decision of the taxing officer whether the grievance is against some items of the bill of costs or against the entire bill, has to come to the High Court by chamber summons under rule 11(2) and an applicant who follows such a procedure would have a chance to appeal to the Court of Appeal should he be not satisfied with the decision of the Judge upon reference of the objection from the orders of the taxing officer. Therefore an application seeking to set aside orders made on taxation under Order 9 Rule 8 CPR is incompetent and the Court does not have jurisdiction to entertain it”.**

I am also of the same school of thought as the learned judges’ as expressed above. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the taxing master has directed himself on a matter of principle. If the same is found to have been the case the usual course is to remit the matter back to the taxing master with the necessary directions. The decision whether or not to proceed with taxation is an exercise of discretion and if he proceeds ex parte in circumstances in which he should not have so proceeded, in my view, that would amount to an error of principle and the Judge may remit the matter back with directions that the bill be re-tax in the presence of the parties. It is therefore my view, and I so hold, that the only recourse available to the client herein was to come by way of a reference. Accordingly, I decline to set aside the taxing master’s decision made on 29<sup>th</sup> September 2009.

With respect to the order made on 27<sup>th</sup> October, 2011, that was not an order made by the taxing officer. Accordingly, the client is properly before this court in challenging the said decision whether due to non-service or on jurisdiction. It has been submitted by the advocate that since the client’s submissions were filed outside the time limited for the purpose the court should expunge the same from the record. In my view the mere fact that submissions are irregularly on record does not justify the drastic step of expunging the same of the record especially where there is no allegation of prejudice to the other side. In my view the failure to comply with the directive of the court can be properly dealt with by an appropriate order as to costs. Submissions are not evidence and the mere fact that a party fails to file submissions does not deprive the court of the power to decide the matter in accordance with the law. Accordingly, I decline to expunge the client’s submissions from the record.

The client’s contention is that he was never served with an application that gave rise to judgement. According to him, he would have raised the issue of jurisdiction of the court to enter judgement before a suit was filed. That issue may or may not be meritorious. However, the mere fact that the respondent’s version has no merit does not justify depriving him of his constitutional right to a hearing. A person cannot be deprived of his right to be heard simply because the other party or the court believes he has a hopeless case to present.

When the application dated 11<sup>th</sup> October came before me on 27<sup>th</sup> October 2011, **Mr. Kariuki** for the applicant informed me that the respondent had been served. There was an affidavit of service sworn by **Peter Kisilu** on 26<sup>th</sup> October 2011 purporting that service was effected on the client herein on 12<sup>th</sup> October 2011 after having called him on his mobile. He does not disclose where he obtained the mobile phone number from. If he had obtained it from the advocate nothing would have been easier than for him to have stated so. Again he does not state how he knew that the person who turned up was the client. Was

he acquainted with him before that day? We cannot tell. However, more telling is that there is an affidavit of service purportedly sworn by the same person on 13<sup>th</sup> September 2011. One does not need to be a handwriting expert to see that the two signatures do not resemble. That they were made by the same person or not cannot be conclusively determined at this stage on affidavit evidence. However, the appearance of the discrepancy lends credence to the client's complaints. Similar fate befalls the mark purportedly made by the Commissioner for Oaths on the said documents.

I am not therefore satisfied that the client was served before the order made on 27<sup>th</sup> October 2011 was made. Where service is unsatisfactory I agree that the order must be set aside ex debito justitiae. In those circumstances it would be unjust to order the applicant to deposit the amount into court as such an order would amount to condemning him un-heard.

In the circumstances whereas I am unable to set aside the taxing master's order made on 29<sup>th</sup> September 2011 as the same is not properly before the court, I am amenable to and I do hereby set aside the order made on 27<sup>th</sup> October 2011 together with all the consequential orders. Since it is admitted that the client did not comply with the orders of the court with respect to the timelines for filing submissions, there will be no order as to costs.

**Ruling read, signed and delivered in Court this 26<sup>th</sup> day of April 2012**

**G.V. ODUNGA**  
**JUDGE**

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**In the presence of:**

Mr. Kariuki for the Advocate/Respondent

Mr. Wainaina for the Client/Applicant