



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILLIMANI LAW COURTS**  
**MISCELLANEOUS APPLICATION 692 OF 2011**

**KCA UNIVERSITY ..... APPLICANT**

**VERSUS**

**KENYARIRI & ASSOCIATES ADVOCATES..... RESPONDENT**

**RULING**

The respondent's application dated 22<sup>nd</sup> February, 2012 seeks the following orders:

**"1. ....**

**2. That pending the inter partes hearing of this application the Honourable Court be pleased to stay the orders of Hon. Justice Musinga made on 21<sup>st</sup> February, 2012.**

**3. That upon inter partes hearing of this application the Honourable Court be pleased to set aside and/or vacate the orders of Hon. Justice Musinga of 21<sup>st</sup> February, 2012 and allow the respondent to oppose the said application on merit.**

**4. That costs of this application be borne by the respondent."**

On 21<sup>st</sup> February, 2012 the applicant's application seeking judgment in the sum of **Kshs.120,739/=** as per certificate of taxation issued on 12<sup>th</sup> January, 2012 came up for hearing. The respondent's advocate did not attend court and consequently judgment was entered as prayed. I may add that no replying affidavit had been filed by the respondent.

The respondent's application was supported by an affidavit sworn by **Ligunya Stephen**, an advocate in the firm of **Rachier & Amollo Advocates**. He deposed that their firm was appointed in this matter on 12<sup>th</sup> January, 2012 and immediately thereafter on 16<sup>th</sup> January, 2012 wrote to the Deputy Registrar requesting for the Taxation Officer's reasons for her decision in allowing certain items of the applicant's bill of costs. A copy of the letter was annexed to the affidavit of **Mr. Ligunya** as annexure "S1". The reasons had not been given as at 19<sup>th</sup> January, 2012 when the respondent filed an application seeking stay of execution of the taxed costs. The application was placed before Justice Mabeya who declined to grant ex parte orders and directed that the same be set down for hearing inter partes.

Mr. Ligunya further stated that on 21<sup>st</sup> February, 2012 while attending to matters before the Hon. Justice Waweru was informed that the applicant's application was listed for hearing before this court. He immediately dashed there only to find that the application had been dealt with in his absence and judgment entered in favour of the applicant as prayed. Upon perusal of the court file he realized that there was an affidavit of service by one **Mr. Kitavi**, a Process Server, indicating that on 6<sup>th</sup> February, 2012 he had served the applicant's application upon a secretary employed by the firm of Rachier & Amollo Advocates and the unnamed secretary received the application but declined to sign in acknowledgment of receipt of service. The Process Server did not disclose the name, gender or description of the person who had allegedly been served with the said application.

Mr. Ligunya further deposed that their firm has five secretaries who do not receive service whatsoever. Every document served upon the firm is signed for by an advocate and not by a secretary. Further, any visitor in the firm can only access the reception and not the secretaries who sit inside the main office behind a coded door separating them from the reception area. In any event, on the alleged day of service the receptionist, one Miss Irene Wangai, was on leave and one Mr. Kenneth Chamwada was relieving her at the reception.

For the aforesaid reasons, Mr. Ligunya contended that there was no service of the applicant's application and urged the court to vacate the order entering judgment in favour of the applicant.

The applicant filed grounds of opposition and a replying affidavit. The grounds of opposition were as follows:

**"1. The application is hopeless, an abuse of the court process and ought to be struck out. Final judgment has been entered.**

**2. The respondent/applicant has not sought leave to enlarge time for filing of reference. If it was dissatisfied with the decision of the Taxing Officer they should have filed reference.**

**3. The respondent/applicant is guilty of laches.**

**4. The orders sought are not obtainable.**

**5. The respondent/applicant has not invoked paragraph 11 of the Advocates Remuneration Order."**

The replying affidavit was sworn by **Christopher Orina Kenyariri, Advocate**. He stated that there was proper service and referred to the affidavit of service sworn by Mr. Kitavi, Process Server. Mr. Kenyariri further stated that the applicant's bill of costs was taxed inter partes and although the ruling was delivered on 19<sup>th</sup> December, 2011, the respondent had not filed any reference if it was dissatisfied with the same. Instead they filed the application seeking stay of execution of the certificate of taxation vide their application dated 18<sup>th</sup> January, 2012 and filed on 19<sup>th</sup> January, 2012. The respondent was directed to serve the application but that was not done. The applicant therefore proceeded to file its application seeking judgment and judgment was subsequently entered as prayed.

In his brief submissions, Mr. Kenyariri stated that the firm of Rachier & Amollo came on record for the respondent on 5<sup>th</sup> March, 2012 when they filed a notice of change of advocates. He added that the said advocates were served with the applicant's application on 6<sup>th</sup> February, 2012 because they were acting for the respondent in another matter, HCCC NO. 608 of 2011.

Mr. Ligunya conceded that his firm came on record for the respondent in this matter on 5<sup>th</sup> March, 2012 and so they could not have been lawfully served with the applicant's application on 6<sup>th</sup> February, 2012 since they were not acting for the respondent.

It is not in dispute that the applicant's bill of costs was taxed on 24<sup>th</sup> October, 2011 before Mrs. L.M. Njora, Taxing Officer, in the presence of Mr. Kenyariri for the applicant and Mr. Ongegu for the respondent. The ruling was delivered on 19<sup>th</sup> December, 2011 in the presence of Mr. Ongegu and in the absence of the applicant's advocate. A certificate of taxation was issued on 12<sup>th</sup> January, 2012.

Under **Section 51 (2)** of the **Advocates Act** a certificate of costs is final as to the amount of the costs covered thereby and the court may enter judgment for the sum indicated thereon where the issue of retainer is not disputed. Further, under **Rule 11 (1)** of the **Advocates (Remuneration) Order**, any party who objects to the decision of the Taxing Officer is required, within fourteen days after the decision, to give notice in writing to the Taxing Officer of the items of taxation to which he objects. **Rule 11 (2)** states that the Taxing Officer shall forthwith record and forward to the objector the reasons for his decision and the objector may within fourteen days from the date of receipt of the reasons file a reference to the High Court.

In this case the respondent did not comply with the provisions of **Rule 11 (1)** of the **Advocates (Remuneration) Order**. The respondent was represented by an advocate and if for any reason it was not satisfied with the decision of the Taxing Officer it ought to have taken the appropriate action within the stipulated period of time.

Regarding service of the applicant's application, I am not satisfied that the same was properly effected. The affidavit of service by Mr. Kitavi does not comply with the provisions of **Order V Rule 15** of the **Civil Procedure Rules**. The Process Server should have indicated the time and the manner in which the application was served and the name of the person upon whom service was effected. The rule further requires the affidavit of service to be in conformity with **Form No. 4** of **Appendix A**. Furthermore, the firm of Rachier & Amollo Advocates were not on record for the respondent in this matter as at 6<sup>th</sup> February, 2012. They had written to the Deputy Registrar on 16<sup>th</sup> January, 2012 but they had not filed a Notice of Change of Advocates since as at the date of writing the said letter Messrs Njenga Mbugua & Nanjua Advocates were still on record for the respondent. The applicant's application therefore ought to have been served upon these advocates that is, Njenga Mbugua & Nanjua and not Rachier & Amollo.

For the reason that there was no service of the applicant's application, the judgment that was entered on 21<sup>st</sup> February, 2012 is hereby set aside. The applicant's application dated 1<sup>st</sup> February, 2012 shall be heard afresh. The costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF MAY, 2012.**

**D. MUSINGA**  
**JUDGE**

**In the presence of:**  
**Muriithi – Court Clerk**

**Mr. Juma for Mr. Ligunya for the Applicant**

**Mr. Kenyariri for the Respondent**