REPUBLIC OF KENYA

IN THE H

I
G
H

C
O
U
R
T

A
T

N
A
I
R
O
B
I

M
I
L
I
M
A
N
I

L
A
W

C
O

URTS Miscellaneous Application 603 of 2011

MULONDO OUNDO MURIUKI & COMPANY ADVOCATES……..……ADVOCATE/APPLICANT

VS.

CHINA WU YI (KENYA) LIMITED…….....CLIENT/RESPONDENT

ETERNAL FOUNDATION LIMITED……CLIENT/RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 2nd April 2012brought by the Advocate/Applicant under Section 51(2) of the Advocates Act, cap 16 of the Laws of Kenya. The application seeks orders for judgment to be entered for the Applicant in the sum of Kshs. 5,799,704/- together with interest thereon at 14% per annum from 27th June 2011 until payment in full.

2. The application is based on grounds set out in the face of the application and is further supported by the affidavit of Daniel MwendaMuriukisworn on 2nd April 2012.

3. The Applicant is a firm of advocates which had been retained by the Respondents to render legal services. On 27th June 2011, the Applicant lodged a Bill of Costs in this court for taxation which Bill was allowed on 2nd December 2011 by the Taxing Officer of the court in the claimed sum of Kshs. 5,799,704/-. A certificate of taxation was then issued on 13th December 2011. The Applicant claims that the Respondents have failed to settle the taxed costs. Further the taxation has not been set aside nor appealed against within the prescribed period. Retainer is also not disputed. It is therefore in the interest of justice that summary judgment should be entered to enable the advocates access the taxed costs.

4. The application is opposed. There is a replying affidavit by Chen Xiongguan a director of the 2nd Respondent sworn on 15th May 2012 in which the Client/Respondents state that the application is pre-mature because upon delivery of the ruling of the taxing officer, they wrote to the Deputy Registrar pursuant to the provisions of Rule 11(1) seeking reasons for the ruling of the taxing officer. To-date, counsel for the Respondents had not received these reasons. The certificate of taxation therefore remains challenged until the reasons are granted and the court should not therefore enter judgment as prayed in the advocates' application.

5. At the hearing of the application *inter partes*, Mr. Muriuki, learned counsel for the Advocate/Applicant submitted that the ground that no reasons had been provided by the taxing master was not a basis to deny the applicant judgment. He relied on the case of ***KalonzoMusyoka and Paul M. Wambua (practicing as MusyokaWambua& Company Advocates vs. RustamHira (practicing as RustamHira Advocate) Misc. Appl. No. 444 of 2004*** where judgment had been entered notwithstanding that a challenge to taxation was pending. In any event, no pursuit of the reasons had been done six months after delivery of the taxing officer.

6. On his part, Mr. Kiprop learned counsel for the Clients/Respondents submitted that the Respondents had not been indolent in seeking the reasons for taxationof the Bill of Costs. Until such reasons were given they would not be able to challenge the taxation. He relied on the case of ***KerandiManduku& Company vs. Gathecha Holdings Limited [2006] eKLR***where***Ochieng J.*** held that where the Respondent has proved that it had taken steps to challenge taxation, an application by the advocate for judgment on taxed costs is pre-mature.

7. I have carefully evaluated the application on the basis of the law, affidavit evidence placed before me and the rival submissions by counsel for the parties.

8. Section 51(2) of the Advocates Act provides:

"The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs"

9. On the other hand, Rule 11 of the Advocates Remuneration Order sets out timelines for a party wishing to challenge the decision of the taxing officer. Rule 11(1) provides that within 14 days of the decision, the party wishing to challenge must give notice in writing on the items to which the objection is directed. Under Rule 11(2), the taxing officer is required to provide the reasons "forthwith". This is understandable as the reasons should be readily available, even from the ruling of the taxing officer itself. In view of this strict timeline, it is incumbent upon the intended challenger to apply for the reasons simultaneously with

the notice of objection of the decision or soon thereafter and to follow up issuance of the reasons by the taxing officer. In any event, the reasons must be obtained well within 14 days of the date of application as Rule 11(2) requires that the application to the judge objecting to the taxation must be lodged within 14 days of receipt of the reasons from the taxing officer.

10. In the instant matter before the court, the ruling of the taxing officer was delivered on 2nd December 2011. On 16th December 2011, the Client/Respondents gave notice to the taxing officer of the intention to object the taxation under Rule 11(1) and simultaneously applied for reasons of the decision of the taxing officer pursuant to Rule 11(2) of the Advocates Remuneration Order. This was just within the timespan allowed under both Rule 11(1) and 11(2) of the Remuneration Order. Thereafter, neither did the taxing officer give the reasons nor is it apparent that the Advocates for the Client/Respondents exhibited any zeal in pursuing the reasons. The only effort made was vide a reminder letter issued to the taxing officer dated 27th February 2012 and filed in court on 6th March 2012. Even then, there is no indication of any follow up made to the letter until the application before the court was filed on 4th April 2012 and indeed until the same was heard and even as this ruling is delivered. A period of 6 months has since elapsed and the Client/Respondents still wish this court to believe that they are keen to challenge the taxation under Rule 11 of the Advocates Remuneration Order.

11. The position taken by the courts on whether or not judgment should be entered while an intention to challenge taxation is underway have been varied. In the case of ***KalonzoMusyoka and Paul M. Wambua (practicing as MusyokaWambua& Company Advocates vs. RustamHira (practicing as RustamHira Advocate) Misc. Appl. No. 444 of 2004*** H.P.G. Waweru J held as follows:

"It has been submitted that the client has taken steps to challenge the award on instruction fee. If that be the case, what the Client should have done was to seek a stay of further proceedings until the challenge of the taxation is disposed of. There is no such application before the court. In the circumstances, I find no reason to deny the Advocate judgment as sought"

12. Similarly, ***Njagi J. in MachariaNjeru vs. Communications Commission of Kenya HCCC No. 1029 of 2002 (UR)*** held that the words of Section 51(2) of the Advocates Act were very clear that where a certificate of taxation had neither been set aside nor altered by the court, and where there was no order of stay, the certificate was final as to the amount of costs covered thereby and to allege a dispute at the summary judgment would amount to a contradiction of the express and mandatory statutory provisions.

13. On the other hand, Ochieng J in ***KerandiManduku& Company vs. Gathecha Holdings Limited [2006] eKLR***where***Ochieng J.***held as follows:

"In the circumstances prevailing, I hold that the Respondent has demonstrated a desire to challenge the certificate of taxation. That desire has not materialized into a reference because the taxing officer has not yet provided the Respondent with his reasons for the decision he arrived at. To my mind, those circumstances, for now, dispel the presumption of finality as to the certificate of taxation, even though the certificate itself has not been varied or set aside by the court. For that reason alone, I decline to grant judgment in favour of the Applicant, as it may ultimately turn out that such action was premature".

14 In the face of the above divergent positions taken by courts of concurrent jurisdiction, I wish make my view on the import of Section 51(2) of the Advocates Act as read together with Rule 11 of the Advocates Remuneration Order and through which I will have made my determination of the application before me.

15. On the outset, I do not think that the law contemplates that taxation of costs and any ensuing challenges thereof should be a protracted process. That is why Rule 11 of the Advocates Remuneration Order sets out very tight timelines which timelines are cushioned in mandatory terms. These timelines in my view are in line with the contemplation of the law that the process should be expedited so that early finalization of litigation can be achieved and the court system released to embark on new business. They cannot therefore be seen as procedural technicalities as would be excusable under Article 159 of the Constitution.In the premises, a party who fails to meet these timelines should be deemed to have lost the

opportunity availed in law for challenging taxation unless the party moves the court for enlargement of time under Rule 11(4) of the Advocates Remuneration Order.

16. The present application before me while having met the timelines for seeking reasons of the taxation from the taxing officer has nevertheless failed to meet the timelines for filing of the challenge to taxation under Rule 11(2) of the Order. No application for enlargement of time has been filed. In the circumstances, the Client/Respondents have lost the opportunity to challenge the taxation until they move the court to exercise its discretion and enlarge time. It is not enough to allege that the reasons for taxation have never been provided as that would mean that parties can sit back indefinitely and hamper enforcement of taxed costs. The law simply does not permit such dilemma andfavoursspeed and vigilance on the part of the party wishing to challenge taxation. The excuse of lack of reasons from the taxing officer therefore has to crumble under the weight of the inertia exerted by Rule 11 of the Advocates Remuneration Order.

17. Turning to Section 51(2) of the Advocates Act, my interpretation is that the section has two parts to it. Firstly, the Section declares that unless taxation has been altered or set aside by the court, the same is final as to the amount of costs allowed. In the present matter, it is not contested that the taxation comprised in the ruling of the taxing officer of 2nd December 2011 has never been altered or set aside by the court. As the position stands now, the taxed amount contained in the certificate of taxation dated 13th December 2011 issued by the taxing officer is deemed to be final as to the amount taxed. This takes us to the second part of the section.

18. The second part of Section 51(2) of the Advocates Act provides that the court may, unless taxation has been altered or set aside, make such orders as it thinks fit including, where retainer is not disputed, an order entering judgment for the sums certifiedby the taxing officer to be due. To my mind, the only caveat to entry of judgment in respect of taxed costs is if retainer is disputed.

19. What constitutes 'retainer' has been defined by courts and is fairly well settled. I will not review each of the authorities cited before me on the term and is contend to borrowing the definition rendered by Fred Ochieng J in the case of ***OwinoOkeyo& Company Advocates vs. Fuelex Kenya Limited [2005] eKLR***. He held as follows:

"In a nutshell, the act by a client, of engaging an advocate is known as a retainer. In that regard, I have not come across any rule or regulation which makes it mandatory for the client to give his instructions in writing. Indeed, the reality is that some clients may be illiterate, but that would not stop them from hiring advocates. Secondly, advocates may be given instructions over the telephone or at meetings with the client. In such situations, there would not necessarily be a written note of instructions. To my mind, therefore, the non-existence of written instructions would not negate the fact that the advocate had been duly retained".

20. I lack the words with which to agree any better with the above position rendered by my brother Hon. Ochieng J.

21. In the matter before the court, the issue of retainer is not contested by the Client/Respondents. This is clear from the replying affidavit of Chen Xiongguan sworn on15thMay 2012 as well as from the oral submissions by counsel for the Client/Respondent. The court record also contains correspondence between the Advocates/Applicants and the Client/Respondents which to me constitutes retainer. Without more therefore, it is plain that the caveat in the second part of Section 51(2) of the Advocates Act does not apply and the court has no basis to withhold entry of judgmentfor the amounts stipulated in the certificate of taxation.

22. The issue may well arise as to whether a challenge on the item of instruction fees is a challenge on 'retainer' of the advocate. I do not think so. In my view, Rule 11 of the Advocate Remuneration Order allows for objection of items in taxation and not the larger issue of whether the advocate had been retained. A challenge on the item of instruction fees cannot therefore be equated to a challenge of retainer. In the instant case, the notice of objection to the Deputy Registrar includes a challenge on Item 13 which

relates to instruction fees. The taxing officer having found that the advocates had been instructed, I am unable to determine if the challenge relates to the amount allowed under the item or whether the same relates to a challenge against the taxing officer's finding that instructions had been given to the advocate to act for the Client. This questioncan only be determined from the reference to this court which reference is yet to be filed. In the absence of such an application, there is no other basis for me to find that retainer is disputed as to render entry of judgment under Section 51(2) of the Advocates' Act pre-mature.

23. Finally, courts have held and I hereby concur that the position of Client where a challenge is intended can always be safeguard through an application for stay of execution of judgment pending the conclusion of the objection proceedings, which I think is a measure that the Client/Respondents in this matter may wish to consider should they still be keen on filing a reference in this matter.

24. For these reasons, the Notice of Motion dated 2nd April 2012 is hereby allowed and judgment entered for the sum stipulated in the certificate of taxation issued on 13th December 2011.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH DAY OF JUNE 2012.

J.M. MUTAVA
JUDGE