



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Miscellaneous Civil Application 671 of 2007

JOSEPH KARANJA MBUGUA.....APPLICANT

VERSUS

HON. MUSA CHERUTICH SIRMA.....RESPONDENT

RULING

The application dated 30th January 2012, is made under the provisions of **Section 1A, 3A, and 63 Civil Procedure Act**, and **Order 10 Rule 11 Civil Procedure Rules**, seeking that the exparte ruling made by Hon. W. Kagendo on 22/11/2011 be set aside.

It is premised on grounds that:

1. The Respondent's application dated 27/09/2007 proceeded exparte on 22nd November 2011 and ruling was delivered in the absence of the applicant.
2. The applicant's counsel SAMSON NYAGAKA was indisposed, so he did not attend court although the hearing date had been taken by consent.
3. It is in the interest of justice that the ruling be set aside and taxation be done interpartes to enable parties canvass the real issues in controversy.
4. The Applicant will suffer substantial loss if the application is not granted.

In the supporting affidavit sworn by the applicant's counsel, he deposes that he was indisposed on the date the matter was set for hearing and the taxation carried out was unjust to his client who has a merited defence.

The application is opposed, and in a replying affidavit sworn by the Respondent, he states that the issues raised by applicant in the supporting affidavit are hollow and lack substance and no explanation has been given as to why it took the applicant so long to file this application. Further that no explanation has been offered by the Respondent's counsel as to why he failed to delegate a lawyer to attend court and seek an adjournment on his behalf or at least convey a message regarding his indisposition.

The bill taxed is described as having been rightfully arrived at after due consideration by the taxing officer and the issue of a defence in an advocate-client bill of costs is not available especially where there is no dispute in retainer. It is further contended that this court has no jurisdiction to set aside, review or vary its decision on taxation and the Deputy Registrar's powers are limited to taxing the Bill of Costs, so any aggrieved party's next course of action lies with the High Court. The cited provisions of the Civil

Procedure Rules are challenged as having no place in an advocate-client bill of costs and what the applicant ought to do is file a reference to the High Court.

The matter was disposed off by way of written submissions, but counsel addressed court on relevant areas for emphasis. Mr. Nyagaka urged this court to consider that although he was the one handling the matter before the taxing officer, he was indisposed and that the advocate's word is his honour, so there would be no need for filing a medical report.

The background to this is that sometime in September 2007, the Respondent served the applicant with an Advocate-Client Bill of Costs. The Applicant objected to the same and filed and served a preliminary objection. The respondent then swore an affidavit objecting to the Bill of Costs. The Bill was taxed exparte and the applicant is aggrieved.

It is submitted that as to whether the procedure adopted by the Respondent is improper and irregular, Mr. Nyagaka invokes the **provisions of para 11(1) and (2) of the Advocates (Remuneration) Order**, and argues that since no certificate of taxation had been issued, then, there is no recourse to the Advocate's (Remuneration) Order and the provision of the Civil Procedure Rules apply.

On this aspect, Mr. Karanja submits that a party aggrieved by any decision of a Taxing Officer, whether it relates to a point of law, the manner in which an Advocate-Client Bill of Costs has been taxed, or any final or preliminary decision of a Taxing Officer can only move to the High Court by way of reference in accordance with paragraph 11 of the Advocates (Remuneration) Order.

I have considered the arguments regarding procedure, a reading of the Advocates (Remuneration) Order with regard to setting aside a Taxation Order, the procedure open to aggrieved party is found under para 11(1) that:-

“Should any party object to the decision of the Taxing Officer, he may within 14 days after the decision give notice in writing to the Taxing Officer of the items of taxation to which he objects.”

The Taxing Officer then records and forwards the decision on those items and states the reasons for the decision. In this instance the applicant has not made any reference to provisions of the Advocates Remuneration Order at all. On the issue as to whether Rules of the Civil Procedure apply, I can do no better than quote from the case of **MACHIRA & CO. ADVOCATES V ARTHUR MAGUGU** HCCC Misc. Appl. No.358 of 2001 that:

“.....The Advocates Remuneration Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. . . .”

Secondly, as I understand the practice relating to taxation of bills of costs, any complaint about decision of the taxing officer (emphasis mine) whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs, is ventilated by way of a reference to the Judge, in accordance with paragraph 11 of the Advocate's Remuneration Order.”

I have no doubt in my mind, drawing from case law and from provisions of the Remuneration Order, that the Civil Procedure Rules have no place in this matter and the court cannot invoke its provisions to set aside the taxation carried out. I honestly think that the applicant's counsel has misapprehended the analogues reference by Justice Kassango in **Humphrey Gitonga Ashford V Board of Governors Chuka High School** (2011) eKLR, her reference was with regard to the standard to be taken into account when challenging the Bill of Costs.

If the applicant is contesting the issue of retainer, then he was required to specify which item it falls under in the Bill and not peg it to issues of a triable defence – with the greatest of respect to applicant's counsel, that limb of his argument is misplaced.

But even if the court was to exercise its discretion – surely there would have to be a justifiable reason for such exercise. Counsel claims he was indisposed but he has no medical document to support that. It may of course be that although he was unwell, he carried out self-medication without going to a health facility for treatment. That is a possibility, but if that be the case, then the applicant’s counsel has not demonstrated due diligence – which would involve at least sending a phone message or call another counsel to hold his brief and explain his absence, then apply for adjournment. This is lacking, so I have nothing on which to base my discretion.

The upshot is that this application has no merit and is dismissed with costs to Respondent.

Delivered and dated this 27th day of July, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**