



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**Miscellaneous Civil Case No. 841 of 2011**

**between**

**NJONJO, OKELLO & ASSOCIATES ..... APPLICANTS**

**VERSUS**

**KETAN LALIT CHINDRA DOSHI &**

**LALIT CHANDRA POPETLAL DOSHI ..... RESPONDENTS**

**RULING**

1. The Applicants, **Njonjo, Okello & Associates**, Advocates have filed a Notice of Motion dated 26 June 2012 in which they asked for an Order that judgement be entered in their favour against the Respondents in the sum of Shs 664,793/- being taxed and certified costs due to them arising out of their acting for the Respondents in *HCCC No. 573 of 2008*. The Applicants also seek interest at court rates on the said sum from the date of taxation until payment in full. The grounds upon which the Application is based are that the Applicants' Bill of Costs dated at 15 March 2011 was taxed on 16 February 2012 in the above sum, all-inclusive, and a Certificate of Taxation has been issued to that effect. Further, the Respondents have not paid the said sum of Shs 664,793/- despite request for payment made to them.
2. The Application is supported by the affidavit sworn by **Francis Maina Njonjo** on 28 June 2012. The deponent details that he is an advocate of this Court and noted that the Respondents had been sued on 29 September 2008 in a Milimani Commercial Court case being *HCCC No. 573 of 2008*. The deponent detailed that his firm had filed a Memorandum of Appearance and a statement of Defence, copies of which he annexed to his said affidavit. He went on to say that the case was finalized on 19 January 2011 by the filing of a consent Order dated 19th of January 2011 in which it was recorded that the case was marked as "withdrawn" with each party bearing its own costs. The deponent attached a copy of the consent Order to his said affidavit as well as a copy of the Certificates of Taxation dated 14th of June 2012. The deponent concluded his Supporting Affidavit by stating that the Respondents were truly indebted to his firm to the tune of Shs 664,793/- plus interest accruing from the date of filing of taxation dated 15 March 2011. (Underlining mine).
3. The Application is opposed and Messrs. **Wandabwa** Advocates filed Grounds of Opposition on behalf of the 2 Respondents on 10 July 2012. The Grounds simply stated that the Application is an abuse of the court process and does not lie, as well as being premature.
4. Mr. Njonjo for the Applicants and Mr. Khasiani for the Respondents appeared before me on 23 July 2012. Mr. Njonjo submitted that the Applicants were seeking to confirm the Certificate of Costs annexed to his Affidavit in support of the Application as Exhibit 3. He relied totally on the Supporting Affidavit

sworn on 28 June 2012. He stated that the Affidavit highlighted the parties in the matter and more particularly detailed *HCCC No. 573 2008* in which the Applicants acted for the Respondents. He noted that the Certificate of Costs has not been set aside and neither has there been an application for a stay. He also referred the court to the consent Order annexed to the Affidavit in support of the Application.

5. Mr. Khasiani detailed that the Application was opposed and he sought to rely upon the Grounds of Opposition filed on 20 July 2012. He observed that under section 51 of the Advocates Act under which the Application is brought, a court can only ordinarily enter judgement as sought where the retainer is not disputed. From the submissions filed in reference to the taxation of the Bill of Costs, the Respondent did dispute the retainer amount and for that reason, this Application does not lie. His firm had filed a Notice of Objection to the Ruling of the Taxing Master and had requested reasons for the taxation which they were still awaiting. In that regard, the Respondents asked that the Application should be dismissed with costs.

6. In reply, Mr. Njonjo submitted that the issue of the retainer was fully canvassed upon taxation and the Deputy Registrar had passed and signed the Certificate of Taxation. The Notice of Objection to which his learned friend referred, had been filed in March this year but such does not operate as a stay. He urged the court to grant the Application.

7. Although counsel produced no authorities before this court as regards the Application or opposition to the same, I have had the opportunity of considering the Rulings of two of my learned brothers being Waweru J. (see post) and **Ochieng J.** in **Kerandi Manduku & Co v Gathecha Holdings Limited (2006) eKLR**. In that case, the learned Judge asked the question as to whether the Applicant was aware of the query in relation to the retainer in the taxation proceedings? If it wasn't so aware, then the learned Judge was of the opinion that the application, similar to the application before this court, was premature. In the Judge's own opinion, an advocate cannot file a reference until the Taxing Officer provides his reasons as to the figure allowed for the retainer. The other case which has proved helpful to me is that of **Musyoka & Wambua, Advocates v Rustam Hira, Advocate (2006) e K L R** as per **Waweru J.** One of the grounds of the application in that suit was that it was in the interests of justice to allow parties to fully adjust claims against each other before any judgement is entered against client. As regards section 51 of the Advocates Act, under which the current Application before court is brought, the learned Judge had this to say:

**"Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has a discretion to enter judgement upon a certificate of taxation which has not been set aside or altered where there is no dispute as to retainer. This, in my view, is a mode of recovery of taxed costs provided by the law, in addition to the filing of suit, where such suit would be unnecessary because one, the certificate of taxation has not been set aside or altered and, two, there is no dispute as to retainer. Unless there is any other matter as would require ventilation in a trial, what would be the necessity of filing suit? In my view the court would be entitled to enter judgement under section 51 (2) even where there is no suit filed. I so hold.**

**In the present case there is no allegation that the Advocate had no instructions to act in the matter for the Client. Indeed the taxation was largely by consent except for the instruction fee. So, there is not, and there cannot be, a dispute as to retainer. As it stands now the certificate of taxation has not been set aside or altered. 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 to the taxation is disposed of. There is no such application before the court. In the circumstances I find no reason to deny the Advocate judgement as sought."**

8. In the case of **Joreth Ltd v Kigano & Associates (2002) 1 E.A. 92**, the Court of Appeal held as follows:

**"The Taxing Officer whilst taxing a bill of costs is carrying out his functions as such only. He is an officer of the Superior Court appointed to tax bills of costs..... In any event, what may come after taxation of a Bill of costs in the Superior Court can only be termed as "Certificate of**

**Taxation. See section on 51 (2) of the Advocates Act."**

It can be assumed in this Application before court that the Client/Respondent would express the view that the Certificate of Costs is not a judgement. On the other hand, it is likely that the Applicant/Advocate feels that the learned taxing officer did adjudicate on all the issues which were placed before her. When the taxing officer is called upon to make a decision as between parties on a party/party basis, the court will usually have already made a decision as to which of the parties was liable to pay costs to the other. However as between an advocate and his client, the taxing officer would be determining the quantum of costs payable to the Advocate. In arriving at such determination, the taxing officer is required to be guided by certain appropriate factors such as the value of the subject matter, the complexity of the case and the importance of the matter to the parties. The role of the taxing officer in those circumstances is not a procedural exercise as it obviously requires considerable thought and reasoning. The issue of a Certificate of Taxation does not determine whether the taxing officer's decision amounts to a judgement. The Civil Procedure Act and the Rules thereunder expressly recognises the right of appeal in relation to judgements. This would seem to imply that there is a right of appeal against any decision of the taxing officer. In principle therefore it is open to the Respondent to challenge the Applicant's right to have the costs as certified by the taxing officer converted into a judgement.

9. I have perused the court's file in relation to the taxation proceedings. The detailed Advocate/client Bill of costs was filed on 15 March 2011 and looked to charge a total amount of Shs. 881,858/-. The matter was mentioned before the SPDR on a number of occasions when a question of representation of the Client/Respondent required to be clarified. When the matter came before court on 2 August 2011 the SPDR noted that submissions had been filed on the part of both the Applicant herein and the Respondent. Indeed, the Applicants' submissions were filed on 9 June 2011, the Respondent's replying submissions on 18 July 2011 and the Applicants' Reply to the Respondent's submissions was filed on 20 July 2011. Owing to a change in court personnel, the matter was mentioned on 30th of January 2012 whereupon the Deputy Registrar of the Commercial Division reserved her ruling to 16 February 2012. On that date, the Ruling on the taxation was duly delivered. The Deputy Registrar as regards the instruction fee, item no. 1 of the Bill, taxed off the amount of Shs. 84,565/= allowing a sum therefore all in of Shs. 565,935/-. As to item no. 11 of the Bill, the Deputy Registrar taxed off an amount of Shs. 9960/-, allowing Shs. 5040/- in relation to this item. The conclusion was an amount taxed off of Shs. 217,080/-. The entire amount allowed in the Bill was Shs. 664,783/-. Thereafter, on 17 February 2012, the Applicant/advocates applied to the court for a Certificate of Costs to be issued in the above amount. Such Certificate of Taxation was issued on 14 June 2012 but in the amount of Shs. 664,793/-. Interestingly enough, there is no letter from **Wandabwa Advocates** on the court file. However there is a letter from the Applicant/advocates dated 22 March 2012 addressed to **Wandabwa Advocates** and copied to the Deputy Registrar. That letter refers to the firm of advocates addressing a letter to the taxing officer dated 29 February 2012 and a subsequent notice of objection dated the same day but served on the Applicant/advocates on 22nd of March 2012. The purpose of the letter was to enquire as to whether **Wandabwa Advocates** had come on record for the Respondents as the Applicant/advocates had not received any notice of change. Despite the absence of the said letter dated 29 February 2012, as well as the notice of objection said to be dated the same day but not appearing on the court file, I feel that it can be presumed that the same were so filed as per the dates given in the letter from the Applicant/advocates. However, since the filing of the Notice of Objection on 29 February 2012, what steps have Messrs. **Wandabwa Advocates** taken to pursue the Objection and to obtain reasons for the Deputy Registrar's taxation Ruling? The answer would appear to be "none". I find myself on all fours with the conclusion to the Ruling of my learned brother **Waweru J.** in the **Musyoka & Wambua** case (supra). In the circumstances therefore, I find no good reason for denying the Applicant/advocates herein the prayers of the Application before court and I grant judgement in favour of the Applicants against the Respondents in the sum of Shs. 664,793/- being the taxed and certified costs due to the Applicants. I also grant interest thereon at court rates as from the date of the Ruling on the taxation proceedings being the 16 February 2012. Orders accordingly.

**DATED and delivered at Nairobi of this 18<sup>th</sup> day of September 2012.**

**J. B. HAVELOCK**

**JUDGE**