



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Civil Application 102 of 2007

**ELIJAH MOMANYI P/A ANASSI MOMANYI & CO.
ADVOCATES...APPLICANT/RESPONDENT**

VERSUS

**JOHN NDUNGU.....RESPONDENT/
APPLICANT**

RULING

This Ruling is in respect of Chamber Summons Application dated 3rd August 2007 presented to Court by the Applicant, a firm of advocates on the 7th August 2007. The Chamber Summons is brought under provisions of Para. 11(2) of the Advocates (Remuneration Order) and the Judicature Act Cap 8. The Applicant is seeking the following orders:

- a) Stay of execution be and hereby granted in regard to the order given on the 3rd July 2007, pending hearing and determination of this application.
- b) This honourable court be pleased to review and set aside the ruling on taxation delivered by the honourable deputy registrar on 3rd July 2007.
- c) That pursuant to prayer (b) above being granted the honourable court be pleased to strike out the bill of costs dated 5th April 2007.
- d) Cost of this application be provided for.

There is an affidavit in support of the application sworn by one John Ndungu. The application is grounded that the Applicant/Respondent is dissatisfied with the ruling of the Deputy Registrar as regards the taxation of the Applicant's bill of costs and that the Applicant consequently requested for reasons for the taxation, which was supplied on the 23rd July 2007. The Applicant relies on further grounds that the taxing officer did not adequately address his mind to the pertinent issues in the Applicants submission on taxation especially the issue of instructions. That the Applicant stands to suffer immensely as the Applicant is intent on executing its bill of costs and that this honourable court has inherent jurisdiction to grant stay of execution pending the determination of this reference.

This Application arose out of a suit filed in the Chief Magistrate Court at Eldoret Civil Suit No. 110 of 2007. In which the value of the subject matter in dispute was a sum of Kenya Shillings two hundred and seventy thousand (KES 270,000). The Applicant was the Plaintiff in Civil Suit No. 110 of 2007, who apparently instructed the law firm to appear for him through an authorized agent by the name David

Ogumbo. The Applicant stated in his affidavit dated 3rd August 2007, in support of this Application at Para 6 as follows:

“THAT I had not given any instructions to the firm Anassi Momanyi Company Advocates but I gave money to one David Ogumbo who without consulting me proceeded to instruct the firm of Anassi Momanyi”.

The Applicant in his affidavit made series of attacks/allegations against the decision of the taxing master. That the taxing master failed to take into account his submissions, that he never instructed the law firm. That the sums of money paid by his agents to the law firm have not been accounted for. That the decision of the taxing master highly prejudiced him and that the Honourable Court has got unfettered discretion to set aside the order given by the taxing master and dismiss the bill of costs dated 5th April 2007. The Application was vigorously opposed by way of affidavit sworn by Respondent Elijah Momanyi Mogona in which he states that he was instructed by the Applicant to act for him in Misc. 110 of 2007 and that the law firm Kariuki Mwaniki Advocates took over the conduct of the case from him by a way of notice of change of advocate. He produced copies of lower court pleadings including a Plaint, verifying affidavit duly drawn and filed by himself /his firm. He has also produced a notice of change of advocate drawn and filed by the firm of Kariuki Mwaniki Advocates. He has also stated severally in his affidavit that the taxing master acted in compliance and conformity with the law regulating advocates fees. That he is entitled to the sums of money awarded to him by the taxing master and that there is no reason for this Honourable court to interfere with the decision of the taxing master as there is no cause to do so and that he is able to refund the sums taxed in the event the reference succeeds.

The matter proceeded where Mr. Mwaniki appeared for the Respondent/Applicant and Mr. Momanyi appeared in person. Mr. Mwaniki Counsel submitted that the entire taxation be set aside by this Honourable court, simply because the advocate was not instructed by the client. An advocate in his view cannot be instructed by way of a proxy. The advocate never met the client that he purports to have represented. That there is no advocate-client relationship on the basis on which an advocate may be entitled to be paid by the client. The Learned Counsel also argued that the amount is extremely in excess of what is provided for under the rules. That the amount paid by the Applicant's agent, the sum of Kenya shillings twenty thousand (Ksh. 20,000) has not been factored in the taxation. The Learned Counsel further submitted that under schedule 7, Rule 1(3), fees in respect of a matter that has not been concluded should have been 85% of the instruction fees provided for under the rule. The Learned Counsel urged the court to dismiss the entire bill of cost for lacking legal foundation. In reply, Mr. Momanyi Counsel opposed the Application and heavily relied on his affidavit dated 8th August 2007. He reiterated that he was instructed and that he has never been paid any fees. He attacked the receipts produced by the Applicant as payment receipts to Mr. Momanyi for a sum of Ksh. 20,000 that the said receipts bear the stamp of Davelak and Company. That he has no knowledge of Davelak & Company or David Ogumbo. That he has dealt with the client directly and indeed it's the Client who instructed him and signed the verifying affidavit. That the Taxing Master allowed fees of Ksh. 73,080 inclusive of taxes. That the awarded fee is not excessive as to warrant Court's intervention to reduce it. He further submitted that the Applicant did not object to any of the items before the Taxing Master during taxation and therefore a reference cannot be based on an item that has not been objected to during the taxation. He urged the Court to dismiss the Application for stay of execution and the entire reference with costs.

After considering the pleadings, the submissions by the respective parties and the law relied on by the parties, I find that the main issue for determination in this Application is whether Mr. Momanyi Advocate has established an advocate-client relationship in respect of Civil Case 110 of 2007 and whether the fees as assessed by the taxing master is excessive by virtue of misdirection on part of the taxing master or wrong application of principle. As stated elsewhere in this ruling, the Taxing Master held that Mr. Momanyi represented the Applicant. It's not in dispute that Mr. Momanyi filed court papers on behalf of the Applicant in this matter although dispute exists as to whether he was directly instructed by John Ndungu or through one David Ogumbo. The Learned Taxing Master confirmed that there is indeed advocate-client relationship on the basis of which the advocate is entitled to the fees. The Client did not appeal against that decision.

It is my considered opinion that Mr. Momanyi was acting for the Applicant before he was replaced by another law firm. He is entitled to the fees he is claiming. It cannot be denied in the circumstance partly because the courts are guided by their record. The documents on record support his case. This Application/Reference is in respect of the taxation. The role of this court as relates to taxation is very limited. This court can only interfere in the decision of the taxing master if its shown that:

- a) The taxing master has misdirected himself;
- b) Applied wrong principles;
- c) The amount taxed is extremely excessive or extremely low.

The above basic principles for taxation matters are set out in the **Premchand Raichand Ltd & Another versus Quarry Services East Africa Ltd (1972) EA 162.**

In the words of **Spry, VP**;

“the taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience merely because it thinks the award somewhat to high or too low: it will only interfere it thinks that the award is too high or too low as to amount to an injustice to one party or the other”

I have looked at the ruling annexed to the pleadings of the Applicants. I note that the taxing officer gave his reason for taxing the instruction. I believe that the taxing officer has the requisite understanding required in taxation matters. As I have already stated, this court can only interfere with the award made by the taxing officer *inter alia* where the same is very high or very low as to occasion an injustice on the parties. This is not a matter that will attract court’s interference of the decision made by the taxing officer. The Application lacks merit.

For this reason, I disallow the Application dated 3rd August 2008 with costs. It is so ordered

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF AUGUST 2012

M. K. IBRAHIM
JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 31ST DAY OF OCTOBER 2012

F. AZANGALALA
JUDGE

In the presence of: Ms Ingutia h/b for Mr. Momanyi for Applicant

Mr. Baraza h/b Kimutai for Respondent