



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Miscellaneous Civil Application 564 of 2011**

**IN THE MATTER OF: THE ADVOCATES' ACT, CHAPTER 6 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT**

**STEPHENS KITHI NGOMBO T/A STEVE KITHI & COMPANY**

**ADVOCATES.....RESPONDENT**

**VERSUS**

**BAZRA A. TABULO.....APPLICANT**

**Coram:**

Mwera J.

Kithi for Respondent

Opulu for Applicant

Furaha Court Clerk

**RULING**

The respondent, Bazra Tabulo, in this miscellaneous application moved the court on 24<sup>th</sup> July, 2012 by filing a motion under sections 1A, 1B, 3A of the Civil Procedure Act, section (paragraph?) 11 (1) (2) (4) of the Advocates (Remuneration) Order, section 51 (1) (2) of the Advocates Act and Articles 25 (c), 50 (b) of the Constitution with prayers:

- (i) that there be a stay of execution of judgment herein;
- (ii) that the *ex parte* judgment entered on 22<sup>nd</sup> May, 2012 regarding the certificate of costs following the taxation ruling of 22<sup>nd</sup> September, 2011 be set aside;
- (iii) that the bill of costs herein be taxed afresh; or
- (iv) **in the alternative** the applicant be granted leave to object to the taxed costs out of time.

In the ten grounds set out in the body of the motion, it was contended that the deputy registrar had no jurisdiction to enter judgment herein and the nominal value of the property was not considered. That the notice of taxation was served on 29<sup>th</sup> June, 2012 (the same day of taxation?) yet the bill had not been served thirty (30) days before filing. The bill had, in error, been taxed at Shs. 4,129,733, manifestly excessive for consideration of Shs. 1,166,524/60. That on 24<sup>th</sup> October, 2011 M/S Musyoka Mogaka Advocates filed in court an application for leave to object to taxation which application was still

pending. And at some stage the file went missing from the registry and an inquiry was placed before the deputy registrar, with no response. So the whole process that ensued, was unjust and unfair to the applicant.

The applicant filed a supporting affidavit, in which he averred that he bought a plot of land KWALE/MWAVUMBO/43 for a consideration of Shs. 1 million as per the agreement of 12<sup>th</sup> March, 2010. On execution of the agreement, the advocate (to be disclosed?) was paid. No other service was rendered. So by notice of 4<sup>th</sup> March, 2011 the retainer was terminated.

On 29<sup>th</sup> June, 2011 the applicant received a notice of taxation while he was in Nairobi, that taxation was on the same 29<sup>th</sup> June, 2011. The bill was for Shs. 4,129,733/= as against the purchase price of the property – Shs. 1 million. The applicant was unable to arrive before the taxing officer who taxed the bill at Shs. 1,166,524/=. He was never served with the bill prior to taxation even as the applicant/advocate in this miscellaneous cause had on 5<sup>th</sup> July, 2011 intimated to the court that the bill had been served. The matter came up for taxation on 26<sup>th</sup> August, 2012 and without inquiring in the fact whether the respondent/applicant was served or not, the taxing officer gave 23<sup>rd</sup> September, 2011 as the date of ruling. It was delivered on that day with thirty (30) days stay granted. That on 24<sup>th</sup> October, 2011, the applicants' lawyers M/S Musyoka Mogaka filed an application for leave to give notice to object to taxation which application remains pending. Then the court file went missing. On 27<sup>th</sup> April, 2012 the matter came before Ms. J. Gandani to hear a certain motion. The hearing was deferred to 4<sup>th</sup> May, 2012. That motion was not served on the applicant. When the matter came up again on 11<sup>th</sup> May, 2012, it had not been served on the applicant or the hearing notice therein, the applicant/advocate prayed for judgment on the certificate of costs dated 27<sup>th</sup> October, 2012 for Shs. 1,166,542/= (annexure bundle BT1) and a ruling followed on 29<sup>th</sup> May, 2012 whereby judgment was entered against the respondent/applicant as per the said certificate of costs. The execution was imminent – hence this application.

It was contended further that the *ex parte* judgment was entered in error since under section 51 (2) (above) only the court (read, a judge) should make such entry and not a deputy registrar. Thus the applicant saw the whole process as flawed and invalid. If orders sought are not granted the respondent/applicant (client) would suffer irreparably.

The record contains a further affidavit by the applicant sworn on 1<sup>st</sup> October, 2012. It was said to be a response to a replying affidavit by the respondent/advocate. A copy of such replying affidavit was not easily traced on the record. However, its contents can be gleaned from the further affidavit and the submissions that were filed.

The further affidavit corrected some dates in the supporting affidavit e.g. that the bill of costs and the notice of taxation was received on 29<sup>th</sup> June, 2011 and not 29<sup>th</sup> June, 2011 and that the correct date of taxation was 5<sup>th</sup> August, 2012. That when the bill and notice of taxation was served on 29<sup>th</sup> July, 2011 on the applicant in Nairobi, he did not have enough time to conduct his lawyers. He took it all as an ambush, because even as the bill of costs was filed on 29<sup>th</sup> June, 2011, it was not posted to the applicant until 25<sup>th</sup> July, 2011 for taxation on 5<sup>th</sup> August, 2011. He had not had time to study the bill or lodge any document in court. Then the court file went missing and the applicant made an inquiry of it with the deputy registrar (annexure BTA). That the advocate was paid Shs. 20,000/= which was not acknowledged in the bill of costs of Shs. 4.1 million. As if challenging the ruling of taxing officer in these proceedings, the applicant complained that that officer did not scrutinize item No. 1 of the bill properly and that he fell in error regarding principles of taxation. It was repeated that the taxing officer had no jurisdiction to enter judgment as per the certificate of costs. And in any case there was still pending an application for leave to file an objection to taxation.

Directed to submit the same material set out in the application and the two affidavits were gone over again by the respondent/applicant. The whole piece of the legal services provided by the advocates was reproduced. Emphasis centred on entering judgment under section 51 of the Advocates Act by a judge,

not a taxing officer as the case was here when the deputy registrar entertained the advocate's motion dated 22<sup>nd</sup> March, 2012. Then the need to enlarge time was once again argued, for the sake of justice. The aspects of the value of the subject matter, manifest error etc. did not appear relevant in the present proceedings, but the same were put forth.

On his part the respondent/advocate directed the court's attention to aspects of typographical errors regarding lack of service, *res judicata* and that inherent jurisdiction did not fall to be invoked in this application. Seemingly and notably absent from that submission nothing was said about jurisdiction under section 51 of the Advocates Act. The court is minded to begin with that aspect. It is well known all round that jurisdiction is everything. An adjudicating body can only validly proceed in a matter if it has jurisdiction. If it does not have it then all that it does is a nullity, whether the matter had merits or none at all. It should thus down its tools, at that point.

The respondent/applicant claims that he was not served with the hearing date for the application dated 22<sup>nd</sup> March, 2012. The record shows that on 11<sup>th</sup> May, 2012 the hearing of that matter proceeded *ex parte* before a deputy registrar, probably acting in the capacity of a taxing officer. Or probably she was a deputy registrar simpliciter. But nonetheless that motion was brought citing provisions of law including section 51 (2) of the Advocates Act. It was seeking summary judgment for Shs. 1,161,524/= pursuant to a certificate of costs dated 27<sup>th</sup> October, 2012. After hearing the advocate, the respondent was marked as not being available, the learned deputy registrar concluded by granting the prayer for judgment regarding the sum borne by the certificate of costs – Shs. 1,166,542/= by virtue of section 51 (2) of the Advocates Act.

That provision of law reads:

**“51 (1) .....**

**(2) The certificate of a 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.”**

Under section 2 of the Advocates Act:

**“Court” means the High Court.**

Accordingly, to enter judgment as per certificate of costs can only be done by a judge on application – not a taxing officer or deputy registrar generally. In that regard, the entry of judgment under review here by the deputy registrar was irregular, unlawful and invalid. Any consequential steps, proceedings, orders, etc. are similarly invalid. They are all set aside as prayed. The exercise for taxation to begin afresh but before another taxing officer with all due procedural/legal steps being followed. However, it should be added that the court was left wondering how, with the clear law and practice the motion of 22<sup>nd</sup> March, 2012 proceeded before a deputy registrar as was the case here.

In sum, the orders sought are granted with costs.

Delivered on 20<sup>th</sup> November, 2012.

**J. W. MWERA**

**JUDGE**