THE ADVOCATE'S (REMUNERATION) ORDER

- **How should a party challenge a bill of costs taxed in his absence.**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 135 OF 2000

HUMPREY GITONGA ASHFORD...PLAINTIFF

VERSUS

THE BOARD OF GOVERNORS CHUKA HIGH SCHOOL..DEFENDANT

RULING

Judgment was entered for the plaintiff in this case on 4th June 2010. The plaintiff was awarded costs of the suit. The plaintiff filed a bill of costs on 18th June 2010. The taxing master as per paragraph 72 of The Advocates (Remuneration) Order issued a notice of taxation dated 21st June 2010 addressed to the defendant's counsel. The taxation of the plaintiff's costs was fixed for 6th July 2010. On that day, the plaintiff's learned counsel Mr. Ashford Gerald Riungu appeared before the taxing master of this court. The learned taxing master on being informed that the defendant's learned counsel Mr. Njeru Nyaga had been served proceeded to tax the bail in his absence. Ruling in respect of that taxation was to be delivered on notice. It was delivered on 19th July 2010 in the presence of plaintiff's counsel but in the absence of defendant's counsel. In my perusal of this file, I came across a hand written note by the taxing master instructing his clerk, Mercy which note stated:-

"Issue notice for 19/7/10 for ruling –

1. A.G. Riungu & Co.

2. Njeru Nyaga & co. Nairobi.”

From the record in the file those instructions were effected because there is a notice to both learned counsels and the address of the defendant’s counsel is clearly indicated. The ruling was delivered on 19th July 2010. On that day, the taxing master taxed the plaintiff’s bail of costs at Kshs. 415,308/=. The defendant has now filed a Notice of Motion dated 9th September 2010. The application seeks the setting aside of the taxation and for an order that the plaintiff’s bail be taxed afresh. The affidavit in support of that application was sworn by the learned counsel for the defendant. The learned counsel deponed that the letter forwarding the notice of taxation was received in his office after taxation had taken place. In that affidavit, the learned counsel did not state when he received the notice of taxation. The annexture attached to the affidavit marked “DNN2” is the letter of the plaintiff’s counsel forwarding the notice of taxation and the letter is dated 8th June 2010. The letter is marked with a stamp of Njeru Nyaga Advocates and a date of 20th August 2010 is reflected on that stamp. It is material that the defendant’s counsel did not include the date of receipt of that letter in his affidavit. The information about the date of receipt of that letter is therefore not supported by evidence under oath. The defendant’s counsel argued that service of that letter was defective because it ought to have been personal service. Personal service is required in respect of summons to an individual. In this case what was being served was a notice of taxation. In any case, the Civil Procedure Rules and in particular order V rule 2 does provide for service by registered posts in respect of corporations. The notice filed by Njeru Nyaga Advocates indicating that they act for the defendant and all subsequent papers filed by that firm clearly show that the address of service for that firm was the address used by the plaintiff’s counsel to forward the notice of taxation. I therefore find that the service on the defendant’s counsel through post cannot be faulted. Section 107 of the Evidence Act provides which party in an action bears the burden to prove an issue. It provides:-

“Whoever desires any court to give judgment as to any legal right of liability dependant on the existence of facts which he asserts must prove that those facts exists.”

The defendant had a burden to prove that his counsel received the registered letter containing the notice of taxation on 20th August 2010 and not any other date. This he could have done by getting a confirmation from the post master general which confirmation would have shown when the defendant’s counsel received the registered letter. The defendant failed to satisfy that burden. Further, if the defendant’s counsel did receive the notice of taxation on 20th August 2010 what did he do to inquire what transpired on 6th July 2010 when the plaintiff’s bill of costs was due for taxation? The defendant’s counsel did not enlighten the court on that. Further, as stated before, the notice of the date of the ruling on the taxation was served on the defendant’s counsel. Even when the defendant’s counsel argued the application before me, the defendant’s counsel stirred clear of mentioning that notice of the ruling by the taxing master. He failed to mention it even though it was mentioned by the plaintiff’s counsel in the replying affidavit. I therefore find that the defendant’s counsel was served with the notice of taxation and with the notice of the ruling of the taxing master. It is not proved before court that the notice of taxation was received in August 2010 in the defendant’s counsel’s office as alleged. The plaintiff’s learned counsel in opposition to the defendant’s application did argue that the application is defeated by failure to follow the steps set out in paragraph 11 of The Advocate’s (Remuneration) Order. In this case, the defendant argued that he had not been served with the notice of taxation and was therefore seeking to invoke the courts inherent power to set aside the taxation. The plaintiff’s counsel in stating that the defendant failed to follow the correct procedure relied on the case **Sankale Ole Kantai T/A Kantai & Co. Advocates Vs. John Nganga Njenga** Msc. Application No. 102 of 2001 where the court stated:-

“In those circumstances, the application being based partly on the wrong procedural rule and party not the correct procedural rule, (sic) I am unable to accept that it is incompetent and/or fatally

defective. To my mind, procedural lapses which neither go to the jurisdiction of the court nor prejudice the adversary in any material respect should not be good grounds for defeating applications. Such are the procedural lapses herein and I accordingly hold that the application is not fatally defective and it ought to be decided on its merits.”

He also relied on the case **Machira & Co. Advocates vs. Arthur K. Magugu & ano.** Civil Suit Misc. Appl. No. 358 of 2001 where the court stated:-

“Secondly, as I understand the practice relating to taxation of bill of costs, any complaint about any decision of the taxing officer 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 Advocates Remuneration Order. In the premises, I reject the submission that the client’s reference is misconceived.”

The Advocates (Remuneration) Order does not provide a procedure where there is an allegation of a non service of the notice of taxation followed by non attendance by the party who should have been served. The defendant in that regard was right to invoke the inherent power of the court. However, I am of the view that the defendant in seeking to set aside taxation which is akin to setting aside *ex parte* judgment needed to show a probable defence to the bill presented by the plaintiff. This the defendant did not do. It was not enough, in my view, for the defendant to state in the affidavit in support of his application:-

“That the defendant finds the bill grossly exaggerated and unfair in the circumstances.

That the defendant is a charitable organization and the costs as assessed are not only punitive but also oppressive.”

Those depositions simply seek to invoke sympathy of this court. That has no place in my view in this matter. The defendant needed to show which items if at all were disputed and the reason of the dispute. Costs are taxed on the work carried out in a matter. In this case, the cause was filed in the year 2000. The judgment in favour of the plaintiff has been set aside at least twice. It is probably for that reason that the bill of costs seems high. On the material presented before me and because the defendant failed to prove the date of receipt of the letter sent by registered post I find that there is no merit in the application dated 9th September 2010. The same is dismissed with costs to the plaintiff. The stay of execution granted herein is vacated.

Dated, signed and delivered at Meru this 17th day of February 2011.

MARY KASANGO
JUDGE