



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 101 OF 2005

OBUTTU AND COMPANY ADVOCATES:.....:APPLICANTS

VERSUS

LORNA JEBIWOTT KIPLAGAT:.....:DEFENDANT

RULING

The applicants, **Obuttu and Company Advocates** (“hereinafter the advocates”) have, by their Notice dated 15th March, 2010, and filed on 16th of the same month, raised a preliminary objection to the Notice of Motion dated 18th January, 2010. That motion challenges the taxing Master’s/ Deputy Registrar’s decision disallowing the respondent Lorna Jebiwott Kiplagat’s (hereinafter “the client”) preliminary objection to the taxation of a bill of costs lodged by the advocates.

The grounds upon which the objection herein is made are that the said Notice of Motion is brought under irrelevant and inapplicable provisions of the law; that it contravenes an earlier consent entered into by the parties; that the court has no jurisdiction to entertain it since no reference has been preferred and that the motion on notice contravenes the clear and mandatory provisions of Rule 11 of the Advocates (remuneration) Rules.

Arguments on the preliminary objection were made before me on 8th march, 2011, by **Mr. Njuguna**, Learned Counsel for the advocates and **Mr. Katwa**, Learned Counsel for the client. Counsel for the advocate submitted that the said Notice of Motion is incompetent as the correct provisions of law have not been invoked. Counsel contended that the provisions of rule 11 of the Advocates’ (Remuneration) order envisage the filing of a reference where a dissatisfied party is challenging a decision of the Deputy Registrar acting as a taxing Master which prethod the client has not invoked; that the Notice of Motion is, in any event, *Res judicata* in view of the consent recorded between the parties on 19th October, 2009, and by reason of the said matters the court is *functus officio*.

Responding to the Preliminary Objection, counsel for the client submitted that the Motion on Notice does not seek to challenge the said consent. The gist of his argument was that once the previous taxation was set aside and a fresh bill ordered to be served, the challenge made against the bill was competent and it was wrong for the Deputy Registrar to disallow the objection raised against the same. In counsel’s view, the Deputy Registrar had power to determine whether any costs were payable by the client. Counsel, therefore, contended that the client’s Notice of Motion is competent and the preliminary objection should be overruled.

I have carefully considered the grounds of the preliminary objection, the submissions made to me by Counsel and the relevant provisions of the advocates (Remuneration) Order. Having done so, take the following view of the matter. The first ground of objection challenges the manner in which the client has moved the court. The short answer to the objection is that the citing of irrelevant and inapplicable provisions of the law *parse*, cannot defeat the client's application that being an objection on form and not substance. In any event the client is challenging the apparent determination by the Taxing Master that, she could not entertain the clients' argument that, there existed no client/advocate relationship between her and the advocate for any taxation to take place. That determination was not a taxation and it is doubtful if Rule 11 of the Advocates (Remuneration) Order would properly be invoked. The client cannot however be left without a remedy. I cannot therefore shut her out merely because there is no clear provision for moving the court.

The second objection is predicated upon the consent order dated 19th October, 2009, by which, among other things, the ex-parte taxation of 7th June, 2005, was set aside and the advocates were to serve upon the client their bill of costs which was to be placed before the Deputy Registrar for taxation. In the opinion of the advocates, the consent order acknowledged the relationship between the parties as that of client/ advocate and could not be subsequently challenged. The client on her part, while admitting there being the consent order, argued that the order to serve the bill of costs a fresh opened it to the challenge she made before the Deputy Registrar and she should not have been shut out. The positions taken by both parties are not without foundation but in my view cannot conclusively be determined in the narrow confines of a preliminary objection. The plea of *Res-judicata* by reason of the said consent cannot therefore be resolved in this preliminary objection.

The 3rd objection raised by the advocates is related to the 1st and 2nd objections. It is that this court is *functus officio* and further lacks jurisdiction to entertain the client's application given that no taxation has taken place. As already observed, a challenge against a decision of the Taxing Master need not be against taxation alone. The client is challenging the very basis of the taxation, that is, as to whether the relationship of client/advocate existed to found the basis of taxation. Once more, I find that a preliminary objection is not the appropriate manner of resolving the positions taken by the parties.

The last objection is that the application contravenes the clear and mandatory provisions of Rule 11 of the Advocates (Remuneration) Order. I have already observed that the client is not challenging a taxation and strictly speaking the said rule may not be applicable. In **Kuloba J's** Judicial Hints on Civil Procedure at page 121, the following passage appears;

"A taxing officer's jurisdiction in Kenya is to tax a bill and deal with all questions in relation to the bill..... he is concerned with the taxation of litigants' costs as authorised by the order of the court. His function is to interpret the order of the court, not to make one for the parties...." (emphasis supplied)

And **Mutungi J.** in **Mura Park Investments Limited -VS- Kenya National Assurance Company Limited & another (HCCC NO. 5357 of 1993)(UR)** delivered himself as follows:-

"it is the law that the Deputy Registrar is the Taxing Master and in that capacity it is his/her duty to Tax the Bills of Costs pursuant to the court's decrees....., To recap, it is within the Deputy Registrar's jurisdiction to tax Bills of Costs. This is only however, if there are items for taxation. If there aren't it is no violation of the court's orders/decrees to strike out the taxation (sic) bill as presented by any party....."

I should be careful not to touch on the issues for determination before the Taxing Master and this court. I should therefore conclude this ruling by dismissing the Preliminary Objection.

Costs shall however be in the cause.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 7TH DAY OF APRIL, 2011

F. AZANGALALA
JUDGE

Read in the presence of: -
Mr. Njuguna for the Advocate

F. AZANGALALA
JUDGE

7TH APRIL, 2011

Ms. Ndiritu appears and states she is holding brief for Mr. Katwa.

F. AZANGALALA
JUDGE

7TH APRIL, 2011