



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. CIVIL APPLICATION NO. 68 OF 2004

WANGA & COMPANY

ADVOCATES.....APPLICANT

VERSUS

DORCAS J. KISORIO.....RESPONDENT

R U L I N G

This is an application under **Rule 11(2)** of the Advocates **(Remuneration) Order**. The main Rule 11 deals with objection to decision on taxation and appeal to the Court of Appeal.

Sub-section (2) of the Rules provides that;

“The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”

The applicant herein basically seeks an order that the taxation of the party and party Bills of costs dated 2nd August 2007 and taxed ex-parte on 21st May 2007 and a ruling delivered on 28th August 2007 be set aside in its entirety with costs to the applicant. The applicant also seeks an order to stay the release of the sum of Kshs.17,463/- deposited in the court and that costs of the execution be borne by the respondent herein.

There are several grounds for the application enumerated in the chamber summons dated 20th December 2007. However, ground two is the most important. Its determination would invariably determine the rest of the grounds.

The said ground two is a contention, that the respondent had no locus to tax any bill against the application.

In her supporting affidavit, the applicant says that the reasons given by the taxing master were insufficient as several items objected to were not explained. Further, the applicant did not instruct **Mr. Francis Omondi**, the current proprietor of Wanga & Co. Advocates to represent her at any stage in the judicial review application being Eldoret HCMCA. No. 96 of 2003.

The applicant contends that the said judicial review application has never been heard. Neither has she been informed of the take over of Wanga & Co. Advocates by Mr. Francis Omondi.

The applicant says that the apparent change of advocates was illegal and that herein, there is a clear case of a person reaping from where he did not sow and unjustly enrich himself.

It is further contended by the applicant that the taxation was as a result of an earlier application withdrawn by the applicant's advocate which application could not be filed prior to the taxing master giving his reasons.

The applicant also contends that there was no decree which could be executed and therefore, the notice to show cause was illegal and "void ab initio."

Learned counsel **Mr. Otieno** argued the application on behalf of the applicant and contended that there is no deed of assignment showing that **Mr. Omondi** took over the firm of Wanga & Co. Advocates,

Learned counsel argued that the respondent has not filed a replying affidavit and instead filed grounds of opposition thereby creating no challenge to the facts contained in the applicant's supporting affidavit.

Indeed, the respondent filed only grounds of opposition and not a replying affidavit. Nonetheless, the grounds may suffice as they are in opposition to the present application.

In essence, the grounds do not challenge the applicant's allegation that the respondent through Mr. Francis Omondi had no locus to tax any bill of costs against the applicant. Instead, the grounds imply that the applicant is not entitled to the orders sought for reasons that the application was filed out of time and that it seeks to subvert the court order of 31st July 2007. Further, the issues raised herein were not raised before the Deputy Registrar thereby divesting this court of jurisdiction to deal with the matter at this stage. The grounds also imply that the application is not within the purview of the notice of objection to Taxation filed by the applicant and that the applicant did not explain why she did not attend the taxation proceedings and raise the issues raised herein.

In arguing the opposition on behalf of the respondent, learned counsel, **Mr. Mwinamu**, reiterated the grounds of opposition and contended that the issue pertaining to capacity should have been raised before the taxing master and that since the applicant withdrew her application, the respondent was entitled to serve bill of costs.

Learned counsel further contended that the issue of "Locus" would arise only in an Advocates/Clients main bill and that the court order made on 31st July 2007 granted costs to the respondent which order was

not challenged by an appeal. Learned counsel therefore urged this court to dismiss the application.

All considered, this court is of the view that Mr. Omondi's "Locus" in taxing the bill of costs was an important factor such that it was incumbent upon him to establish that indeed he took over the firm of Wanga & Co. Advocates and is now lawfully recognized as its proprietor. The applicant contends that she gave instructions to the said firm of Wanga & Co. Advocates and not Mr. Francis Omondi who is said to be the current proprietor. There was no attempt by Mr. Omondi to disprove the allegation that he had no "Locus" to tax the disputed bill of costs against the applicant.

Learned counsel Mr. Mwinamu acknowledged that "Locus" was an important factor but contended that such issue would arise on taxation of a substantive or main bill of costs.

If therefore Mr. Omondi could not herein demonstrate and establish that he indeed took over the firm of Wanga & Co. Advocates in a manner which was proper and lawful then it would reasonably be deemed that he did not have or had not yet acquired the necessary locus to allow him tax the bill of costs against the applicant. Consequently, the taxation proceedings before the learned Deputy Registrar were null and void. It would therefore be an exercise in futility to go into the details of the taxation and determine whether or not the Deputy Registrar was correct in arriving at the decision that he did.

The applicant has contended that the matter which led to the taxation of the disputed bill of costs i.e. Eldoret HCMCA No. 96 of 2003 is yet to be heard. If that be true, then it is intriguing that Mr. Omondi chose to file a bill of costs against the applicant prior to the finalization of the suit. It would have been fair for the bill to be presented after the conclusion of the suit and if it was presented before then to cater for special circumstances then the proper person should have presented it.

In sum, this application is merited on the basis of ground two and is granted in terms of prayers 3, 4 and 5. The applicant is entitled to the costs of the application.

Ordered accordingly.

J. R. KARANJA

JUDGE

(Read and signed this 23rd day of June, 2011 in the presence of Mr. Otieno for applicant and Mr. Omondi for Respondent)