



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CIVIL APPLICATION NO. 49 OF 2009

ROSEMARY HALUBWA SHAKALA.....1ST
APPLICANT

CHARLES FORO WAWERU.....2ND APPLICANT

VERSUS

EDWARD K. SHAKALA.....
RESPONDENT

RULING

By a Notice of Motion dated 12th October 2010 the Applicants sought the following prayers -

- (1) that this application be certified urgent and be placed before the duty Judge forthwith for hearing and determination.***
- (2) that there be a Stay of Execution of the Certificate of Costs, Decree or any other order emanating therefrom.***
- (3) that the taxation proceedings before the Honorable E. Tanui (Ms) Deputy Registrar on 27th May 2010, the Certificate of Costs issued pursuant thereto and all consequential orders including the Warrants of Arrest issued herein be set aside.***
- (4) that the Bill of Costs dated 15th March 2010 be fixed for inter partes Taxation.***
- (5) that this court does grant any other or further remedies as it deems just.***
- (6) that the costs of this application be provided for.***

The Application was supported by the Affidavit of Charles Foro Waweru and the grounds on the face thereof.

This court granted the first two prayers, a stay of execution, subject to the deposit of 60% of the taxed costs in court. The application raises basically one issue, that the taxation proceedings before the Taxing Officer on 27th May 2010 and all consequential orders be set aside. The sole ground for the prayer is that they were not heard at the taxation.

This is a rather unfortunate matter. The Applicants live and work in the Coast Province, and their

first Advocates on record, Nyakoe Macharia & Co. are based in Malindi. The Respondent on the other hand lives and works in Nakuru. His Advocates Wambeyi Makomere & Co. do also reside and work in Nakuru.

It is unclear and also a little confusing that the Applicants M/s Nyakoe Macharia & Co., the Applicants' erstwhile Advocates, in their letter of 19th April 2010 expressed surprise that the firm of Wambeyi Makomere & Co. served them with the Notice of Taxation whereas they had referred the Applicants to the firm of Wambeyi Mokomere & Co. and that the Applicants were now the clients of Wambeyi Makomere & Co. Advocates, and had even handed over their file to Mr. Wambeyi's firm.

Notwithstanding the protestations by Nyakoe Macharia & Co. to Mr. Wambeyi's firm, the Applicant's new Advocates were M/s Murage & Mwangi & Advocates of Vision Plaza, Mombasa Road, Nairobi as per change of Notice of Advocates dated 28th September 2010, and filed on 12th October 2010 who filed the Notice of Motion the subject of this Ruling.

It seems to me from the letter by Nyakoe Macharia & Co. to Mr. Wambeyi's firm that they were laboring under the belief that they had transferred their file to Wambeyi's firm on account of their erstwhile clients, the Applicants in the Notice of Motion. That was a misapprehension. It appears that file to Mr. Wambeyi's firm was for the benefit of the Respondent, who is the client of Wambeyi Makomere & Co. Advocates.

Thus instead of seeking further and better information as to the Applicant's location, following Nyakoe Macharia & Co's letter of 19th April 2010, Wambeyi's firm followed with a Notice of Taxation of the Bill of Costs, dated 27th April 2010, which of course the said firm failed to attend as they believed they had handed over the Applicants' file to their new Advocates Wambeyi Makomere & Co. Advocates. This was not however so, and the taxation proceeded *ex parte*, without the knowledge of the Applicants.

The other issue is the fact that the Bill of Costs was taxed on 27th March 2010, according to the Certificate of Costs issued on 1st August 2010. If the Bill of Costs was taxed on 27th March 2010, the Notice of Taxation dated 27th April 2010 were completely meaningless. It is a cardinal principle of natural justice that the other party be heard, or that no party may be condemned unheard. In this case, the applicants were condemned unheard, and that is reason alone to set aside the proceedings before the Taxing Officer on 27th March 2010, the Certificate of Costs and all consequential orders, including the Warrants of Arrest issued pursuant thereto.

The other reason for setting aside those proceedings is that a client should not be visited with the error or omission of counsel. Although instructed in or about November 2009, the firm of Ogeto & Ogeto, did not file any papers or Notice of Change of Advocate and again the Taxation proceeded against the Applicants without being represented by counsel. The firm of Murage & Mwangi Advocates came on record only on 12th October 2010. Service of Notice on the Applicant's of Notice to Show Cause on 10th September 2010 was well after the Taxation had taken place, and only led the Applicants to file the Notice of Motion herein.

There is no specific challenge on any of the items in the Bill of Costs, and I would not therefore consider whether or not the Taxation was in accord with the principles of taxation of Bills in accordance with the Advocates Remuneration Order. I would however on the grounds explained above, a breach of the rules of natural justice, error of counsel, in these circumstances should not be visited upon the client, allow the motion dated and filed on 12th October 2010. I direct that the matter be mentioned before the Taxing Officer in order to take a mutually acceptable date for re-taxation *inter partes*. Costs in the cause.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 13th day of October 2011

M. J. ANYARA EMUKULE

JUDGE