



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Miscellaneous Civil Application 51 of 2009

WAMBUA KILONZO & CO. ADVOCATES.....APPLICANT

=VERSUS=

SEBASTIANO PAROLIN.....RESPONDENT

RULING

The Chamber Summons application dated 10/05/10 is made under order IXB Rule 3 (c), 8 of the Civil Procedure Rules seeking that there be a setting aside of all orders emanating from the ruling of 17th February 2010, further that the bill of costs be taxed afresh.

It is premised on grounds that the applicant was never notified of the date of the hearing of the taxation and so was not represented.

1 The Plaintiff is threatening to execute against the respondent.

2 No party stands to be prejudiced if the orders sought herein are granted.

The application is supported by the affidavit sworn by Sebastiano Parolin who depones that in May 2010, he received a telephone call from the respondent who threatened to execute against him for the sum of Kshs.180,282/5005. This took him by surprise as he was never notified of the date of taxation. He had earlier on been served with a bill of costs and the same is annexed and marked A).

The bill was therefore taxed without his participation. So the court did not take into account the fact that he had already paid the applicant a total of Kshs.118,000/-.

In response, the Respondent depones that he represented the applicant in CMCC No. 7 of 2009 (Malindi) yet the Respondent has not paid his professional fees and disbursements, having perused to do so once the matter was concluded. However, as soon as the Plaintiff(applicant) closed his case, and the matter was coming up for defence hearing, he instructed another lawyer to take over the matter.

Respondent maintains that the applicant was served with the taxation notice and the bill of costs as per annexures GK 1 and GK 2 and he avers that the taxation notice clearly indicated the date for taxation and applicant cannot pretend that he did not know about it.

The taxing master was convinced that there was proper service before allowing the taxation, Respondent wrote a letter dated 24/02/10 which was served by hand, informing the applicant of the outcome of the taxation, but the applicant did not respond – that letter is annexed as GK 4 and he denies calling the applicant in the month of May 2010, so he urges for dismissal of the application

At the hearing of the application Osiemo submitted on behalf of the applicant that the only document served on the applicant was the bill of costs which did not indicate the hearing date and the issue of Kshs.118,00/- not being taken into account during the taxation was partly due to the applicant not participating as the taxation process – he refers to a letter annexed as A and prevents out that infact most of the letters

included in that Bill should not be considered in the taxation. The purported service as for the affidavit of service by Alex Muthenya is denied and is termed as not being proper service at all.

Mr Kilonzo (who is the Respondent) urges the court to dismiss the application saying it is filed with malice and intended to ensure he does not get his fees for the work he has done. He submits that there has been inordinate delay in filing this application and is merely an afterthought. It is Mr Kilonzo's contention that if the applicant contests the service, then it is upto him to call the process server for cross-examination and having failed to do so, then it can only be inferred that the service was proper and he urges this court to consider the decision in **HCCC 168 of 2002 (Eldoret Hellen Arinata Kokani V United Insurance Co.** page 3 "which Hon Justice Dulu held that an applicant who disputes the service has a right to call the process server and cross-examined him, and having chosen not to do so leaves only one conclusion, which is that service was effected.

The crux of this application is that there was no service of the hearing date. An affidavit by Alex Wambua Muthenya indicates that applicant and the process server met at BarBar Restaurant within Malindi Township, having contacted the applicant on his cell phone number 0728-526459 and thus served him with copies of the Advocates/Client Bill of Costs dated 14/12/09 and the Taxation notice dated 17/12/09 bearing a Taxation date for 10/2/10.

Applicant does not deny service per se, at the named place and date – but he says he was only served with a Bill of costs which had no hearing date – I suppose that is why he does not challenge the cell phone number cited, nor the meeting with the process server.

The notice of taxation annexed shows that taxation was to take place on 10th February 2010. Applicant is said to have accepted service but declined to sign on the principal copy.

The Bill of costs which applicant acknowledges receiving is dated 14th December 2009 was this the first time that he was learning about the bill being claimed by the Respondent – that would seem to be the case – since there is no demand letter written by the respondent concerning his legal fees 0- it seems the applicant decided to disengage Respondent's services, he immediately filed a bill of costs for taxation – the letter of 24/02/10 came after the taxation could it be that the process server inadvertently served only the Bill of Costs that he had attached the notice of taxation to it? Could it be that applicant was served with the Bill of costs together with the notice of taxation which bore the hearing date, but he chose to ignore that date?

From the conduct of the applicant, he seems to be a prudent individual who expresses his intentions and dealings by written communication, evidenced by the letter addressed to the respondent where he informed him of his intention to engage another lawyer – going by that conduct, then surely once he received the Bill of Costs only, then I would expect him to write back to Mr Kilonzo questioning the astronomical figure and referring to his earlier payments – he did not. I do not think the applicant is being candid – the inference I draw is that having received the bill of costs and notice of taxation, his view was that he had already paid KShs.118,000/- to the Respondent, he expected the respondent to tell the taxing master as much, and he expected the taxing master to accept that as sufficient payment, so he saw no need to attend court for the taxation – need to attend court for the taxation – otherwise if he had only received the Bill of costs minus the notice of taxation, he would have immediately written to the Respondent seeking a clarification for the sums quoted.

As to whose duty it is to summon the process service to court, I think Order V Rule 16 has the answer which is to the effect that:-

“On allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be examined by another court, touching his proceedings and may make such further inquiry in the matter as it thinks fit”

There is no duty placed on the court – the operative word is may – in this instance I did not see the need to summon the process server because interaction with the process server was not denied – the issue was which documents were served. Of course the applicant too had the option of applying for the process server.

The rest of the issues raised as to whether there is justification on some of the items listed in the Bill of Costs – with specific reference to the sum of KShs.118,000/- which was paid to the Respondent and not taken into account when taxing the bill. I take note that Mr Kilonzo does not deny having been paid the same amount as part of his legal fees. There are items which have not been specified, but which he says should not be included in that bill of costs – Mr Kilonzo did not react to this.

I think this really ought to come up as a reference, where under the Rule 11 Advocates Remuneration Order the taxing master will have given her reason, then parties would argue the same and then only then would this court be justified in directing for the same to be taxed afresh.

The upshot then is that the applicant has not persuaded me that there is reason to warrant setting aside the ruling and the application is dismissed with costs to Respondent.

Delivered and dated this 13th day of September 2010

H.A. OMONDI

JUDGE

Mr Osiemo for defendant/applicant

Mr Maosa holding brief for Wambua Kilonzo