



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc. Appli. 950 of 2006

PETER O. NGOGE T/A

O.P NGOGE & ASSOCIATES.....PLAINTIFF/ADVOCATE

VERSUS

JITIHADDA SHOPPING COMPLEX.....DEFENDANT/CLIENT

R U L I N G

This is a reference brought by way of Chamber Summons application by the Applicant/Advocate challenging the decisions of the Taxing Masters in two different applications being Misc. Civil Appl. 950 of 2006 and Misc. Civil Appl. No. 1005 of 2005 between the Advocate/Applicant herein and the Respondent/Client herein. This references are brought under Rule 11(2) and (3) of the Advocates (Remuneration) Order and section 3A of the Civil Procedure Act. The following orders are sought.

- (2) THAT the decision of the Taxing Officer and Deputy Registrar Hon. Mrs. Odero given on the 18th January 2008 be recalled and set-aside or quashed *ex debito justitiae*.
- (3) THAT the Honourable Court be pleased to allow the Bill of Costs dated 4th September, 2006 as claimed to bring this litigation to an end or to direct that the said Advocate/Client Bill of Cost be taxed before another Taxing Officer who has not handled this file before.
- (4) THAT the decision of the Hon. Mrs. Meoli given in Milimani HC Misc. Application No. 1005 of 2005 on the 24th May 2006 and the manner in which she conducted herself without jurisdiction, interfered with the independence of the Taxing Officers of this Honourable Court and arrived at the said decision be declared a nullity and set-aside and a copy of this order be extracted and placed in every affected file.
- (5) THAT the costs hereof be borne by the Respondent/Client

There are seven grounds cited on the face of the application which I have considered. There is a supporting affidavit sworn by the Advocate with the Bill, which I have considered.

The application is opposed. There is a replying affidavit sworn by Ali Ismail Mwangi, a Director of the Respondent client dated 2nd May, 2008 which I have considered. I considered the submissions that were made by Mr. Ngoge, the Advocate for himself and Mr. Muchoki on behalf of the Respondent/Client.

The Respondent has raised issues of technicality which are pertinent to this application. The first issue

raised is that the application is incompetent by reason of the fact that it is a single reference filed to challenge two different decisions on taxations by two different Taxing Masters that is, Mrs. Meoli in Misc. Civil Appl. No. 1005 of 2005 and Mrs. Odero in Misc. Civil Appl. No. 950 of 2006. Mr. Muchoki submitted that ordinarily the reference should be filed in the same cause as the taxation and therefore the Advocate was abusing the court process by filing one reference to challenge two decisions emanating from two different cases by two Taxing Masters. Mr. Ngoge who argued this application for the Advocate, which is his firm, did not respond to this issue in his submission.

The second issue raised on a technicality is that the application is incompetent for reason that the Advocate has not annexed the reasons for the decision in Misc. Civil Appl. No. 1005 of 2005, on which ground the entire reference is fatal and should be struck out. Mr. Muchoki argued and correctly so, that the court cannot interfere with a decision which has not been placed before it. Mr. Muchoki challenged the order annexed to the application as 'PON 7' and submitted that the same did not amount to reasons for the decision as it did not give any reasons of the decision of the Taxing officer. In addition to that, Mr. Muchoki pointed out that even if the order annexed to the application would suffice as the reasons for the decision, the reference challenging the decision of Mrs. Meoli was filed out of time since the order was issued on 25th May, 2006 and this reference was filed on the 3rd April 2008.

Mr. Ngoge for the Applicant/Advocate did not respond to this issue in his submissions.

The third technical issue raised by Mr. Muchoki for the Respondent is that the reference challenging the decision of Mrs. Meoli in Civil Appl. No. 1005 of 2005 was incompetent by virtue of the fact that the Advocate withdrew the Misc. Appl. Cause No. 1005 of 2005 on the 11th September, 2006 as evidenced by his own annexure 'PON 8' annexed to the application. Mr. Muchoki submitted that the Applicant is seeking to challenge a ruling in an application which was duly withdrawn and that there is nothing therefore before the court to decide. Mr. Ngoge for the Applicant/Advocate did not respond to this issue.

I have looked at the application and the supporting affidavit together with the annexures therein. It is true as Mr. Muchoki submitted, that the Advocate with the Bill is challenging the decisions of two Taxing Masters in one file. The instant file which is Misc. No. 950 of 2006 can only be used to competently challenge the decision of the Taxing Master made within the file itself. The Applicant cannot bring in a decision of a Taxing Officer made in a different Misc. application file unless there was a proper application made to consolidate the two applications. There is no application to consolidate the two causes. The consolidation of the two applications has been objected to by the Respondent/Client. It was done without leave of the court. That renders the entire reference defective.

I note from the letter which the Advocate/Applicant herein wrote to the Deputy Registrar on 11th September, 2006 and marked PON 8 in this application. In that letter the Advocate is informing the Deputy Registrar that he has withdrawn Misc. Civil Appl. No. 1005 of 2005. The Advocate requests the Deputy Registrar to mark the file as duly withdrawn. If that is the case, it means that the Advocate is challenging an alleged decision of a Taxing officer in a file he subsequently withdrew. Having withdrawn the entire application or cause, the Advocate cannot revive it through an application filed in a different file. This is an abuse of the court process which the court cannot countenance. There is no law which allows an Applicant to challenge a decision of a judicial officer in a file which he has withdrawn. For this reason alone, the entire reference is totally incompetent and is good only for striking out.

Even without going into any further issues raised by Mr. Muchoki for the Respondent, it is very clear that the reference before me is fatally defective for the reasons that have been given above. In the circumstances, the only order which can be made is to strike out the entire reference for being fatally defective, which I hereby do. The Application is struck out with costs to the Respondent/Client.

Dated at Nairobi this 30th day of April, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mr. Koech holding brief Mr. Ngoge for the Applicant/Advocate

Wachira holding brief Mr. Muchoki for Respondent/Client

LESIT, J.

JUDGE