REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Application 786 of 2007

MBUGUA & MBUGUA ADVOCATES ……. ADVOCATES

VERSUS

KENINDIA ASSURANCE COMPANY LTD …….

CLIENT

RULING

M/s Mbugua & Mbugua Advocates filed an advocate/client bill of costs against Kenindia Assurance Company (hereinafter referred to as the respondent). The matter came up for taxation on 13th November 2007 and both parties agreed to file written submissions. The matter was set down for hearing on 10th December 2007. On that day, the taxing master indicated that the ruling was to be delivered on 31st January 2008. The ruling was however not delivered until 8th February 2008. The advocate's bill of costs was taxed for Ksh.64, 936/- against the respondent. By a letter dated 13th February 2008 the respondent requested to be furnished with reasons. The reasons were given as follows:-

"*Your letter dated 13th February, 2008 refers.*

At the time of taxing the bill herein dated 16th February, 2007, the respondent had not filed submissions and the same are not in the file to date.

I exercised my discretion in taxing item I under schedule V Part II to allow for a reasonable sum.

The rest of the items were allowed to scale because under schedule V there is no provision of attendance for time engaged, letters to check and perusals.

The items not allowed are clearly shown on the face of the bill.

Yours faithfully,

W.B. MOKAYA

DEPUTY REGISTRAR"

Before me now, is an application under paragraph 11(2) and 79 of the Advocates Remuneration (Amendments Act 1997). The Respondent is seeking for an order that the ruling of the taxing master be set aside and the matter be referred for fresh taxation. This application is supported by affidavit of Regina Kitheka. Further, counsel for the respondent faulted the ruling on taxation and the reasons given principally on the grounds that by the time the bill was taxed, the respondent had filed written submissions which were not taken into considerations by the taxing master.

Those submissions were filed on 1st February 2008, and the ruling was not read until six days later. Thus the respondent was condemned unheard. If the respondent's submissions were taken to account the instructions fees, the value added tax (VAT), increment of costs by half and disbursement would have been taxed differently. Counsel submitted that they received the reasons by the taxing master on 3rd March 2009 and they filed the reference on 11th March 2009 within the time frame for filing.

On the part of the advocates, formidable opposition was put on the grounds that no rules of natural justice were flouted as the respondent was supposed to file their written submissions by 10th December 2007 as per the order of the court. They filed the submissions late, perhaps by the time the court wrote the ruling the submissions were not in the court file because they were filed on 1st February 2008 hence the reasons given that the submissions were not in the court file by the time the ruling was written. The taxing master who was seized of this matter had the discretion to write the ruling at her own time after the time provided for the filling of submissions.

The applicants having failed to comply with the order have themselves to blame because the court took into account the submissions which were filed within time. The court also gave consideration to the items that were taxed off and allowed the other items which were drawn on skill. Secondly, counsel for the advocates submitted that the jurisdiction of this court was not properly invoked. There is doubt that the reasons were supplied on 3rd March 2009, because the letter indicated that they were requested for on 13th February 2008. It is inconceivable that the taxing master could have taken one year to write a one paragraph of reasons. According to counsel, the respondents were late to file the reference and ought to have sought for leave. Lastly the reference is bad in law due to mis description of the parties therefore the jurisdiction of this court is also not properly invoked. The court was urged to dismiss the reference.

In considering this application I have gone through the record of proceedings before the taxing master. It is indicated on 13th November 2007 when the bill came up for taxation that the parties had agreed to file written submissions by the 10th December 2007. When the matter came up on the 10th December 2007, the taxing master stated the ruling would be delivered on 31st January 2008. The ruling was eventually delivered on 8th February 2008. It is not clear when the reasons were written but the taxing master is categorical that at the time the ruling on the taxation was written the submissions by the respondents had not been filed. Going by these reasons, the ruling was probably written before 1st February 2008.

The applicant's complaint is that they were denied an opportunity to be heard because their submissions were on record from 1st February 2008, and the ruling was on delivered on 7th February 2008. l find the respondents less than candid, what they are not saying, is why they filed the submissions late and why they did not seek for enlargement of time. The court ordered the submissions to be filed on 10th December 2007. Although the taxing master has not indicated the date when she wrote the ruling, going by the reasons it is more probable that she wrote the ruling before the respondent filed their submissions. The ruling was read on 7th February 2008. If a party fails to comply with a court directive who should be blamed for the ex parte order? As it was held in the decision of the Court of Appeal in the case of *SALEM AHMED HASSON ZAIDI V FAUD HUSSEIN HUMEIDAN 1960 EA PAGE 92*.

"*If a party neglects to produce evidence and to prove his claim as he is bound to do, the court can proceed to decide the suit on such materials as is actually before it, and that decision so pronounced shall have the force of a decree on the merits not withstanding the defaults of the party*"

The respondent failed to advance their own case at the opportune time, for that reason l will disallow the application. Other grounds as to the form were raised. It is correct that a party should always invoke the jurisdiction of the court by following the laid down procedure by correctly citing the parties in order to avoid ambush or confusion. The parties are wrongly described, although perhaps that could not have been a sufficient ground on its own, to dismiss this application, coupled with the aforestated reasons, the application renders itself for dismissal with costs to the advocates.

RULING READ AND SIGNED ON 5TH DAY OF JUNE 2009.

M. KOOME

JUDGE