



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc Civ Appli 763 of 2006**

**J. M. NJENGA & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**KENYA TEA DEV. AGENCY LTD.....RESPONDENT**

**R U L I N G**

The Deputy Registrar of this court taxed the applicant's advocate – client bill of costs at KShs.643,856.60. The said costs were taxed on the 30<sup>th</sup> August, 2006 in the absence of the respondent. The Deputy Registrar was satisfied that the respondent was duly served with the Advocate –client bill of costs together with the notice of taxation of the date that the said bill of costs was scheduled to be taxed. The respondent filed a Chamber Summons on the 16<sup>th</sup> January, 2007 which it later amended. By an amended Chamber Summons dated 25<sup>th</sup> July, 2007, the respondent made an application under **Rule 11 (4)** of the **Advocates (Remuneration) Order, Order IX B Rule 8** of **Civil Procedure Rules** and **Sections 3, 3A and 63** of the **Civil Procedure Act** seeking the following orders of this court:

*“1. Pending the hearing and determination of this application, there be a stay of execution or enforcement of the Certificate of Taxation issued herein and all orders issued consequent thereto and including the proceedings in **J. M. Njenga & Co. Advocates – vs- Kenya Tea Development Agency Limited Nairobi CMCC No. 12714 of 2006** (henceforth the “Second Suit”).*

*2. The taxation carried out herein on 30/8/2006 and any orders consequential thereto be set aside and unconditional leave be granted to the Respondent to defend the Bill of Costs dated 1/8/2006.”*

The application is supported by the annexed affidavit of Rebecca Mbithi, the Legal Services Manager of the respondent. The grounds in support of the application are on the face of the application. In essence, the respondent contends that it was not served with the bill of costs or the notice of taxation before the applicant's bill of costs was taxed by the Deputy Registrar of this court. The respondent disputes the alleged service of the bill of costs and the notice of taxation. It is the respondent's contention that the alleged service was irregular. The respondent pleaded with the court to give it an opportunity to challenge the applicant's bill of costs, which in its opinion, was grossly inflated and totally unjustified in view of the work that the applicant undertook.

The application is opposed. The applicant filed grounds in opposition to application. He also filed a notice of preliminary objection. The applicant stated that the respondent's application had been overtaken by events as execution had already been levied and the decretal amount paid in full. The applicant contended that since the respondent had not challenged the taxation by the Deputy Registrar of the court in time, the respondent could not be allowed to proceed with the present application. The applicant was of the view that the respondent should to have filed a reference to the High Court challenging the decision

of the Deputy Registrar instead of making an application to set aside the said taxation. The respondent stated that the application was therefore incompetent and filed in abuse of the court process.

At the hearing of the application, I heard the rival submissions made by Mr. Muri on behalf of the respondent and Mr. Nyaga on behalf of the applicant. Mr. Muri reiterated the contents of the amended application and the supporting affidavit thereof. He submitted that the respondent had not been served with the applicant's bill of cost. Neither was it served with the notice of taxation. He maintained that no proper service was effected upon the respondent since no principal officer of the respondent was served. He faulted the purported service to one 'Mercy' who at the material time was not an employee of the respondent.

Mr. Muri was of the view that since there was improper service, this court should set aside the said taxation by the Deputy Registrar of this court as a matter of course. He submitted that the respondent had a good case for the review of the sum taxed in favour of the applicant. He maintained that the said bill of costs, being in respect of a non-contentious matter, was in the circumstances grossly inflated. He explained that the respondent did not file a reference to this court challenging the said taxation since it only became aware of the taxation after the statutory period of fourteen (14) days had expired. He submitted that even though the respondent had paid the amount which was taxed to the applicant, in the event that the respondent is successful in its application, the applicant would be required to refund the amount which was overpaid. He referred the court to several cases in support of his arguments. He urged the court to allow the application.

Mr. Nyaga for the applicant opposed the application. He submitted that after the bill of costs was taxed, the applicant filed a suit in the subordinate court. The respondent filed a defence. The applicant made an application for summary judgment which was allowed. He submitted that the respondent raised in the subordinate court issues similar to the issues raised in the present application. He was of the view that the issue of service of the notice of taxation had been dealt with by the subordinate court. No appeal was filed in respect of the said ruling by the subordinate court. He maintained that the respondent was properly served since a copy of notice of taxation was stamped with the official rubber stamp of the respondent's legal department. Mr. Nyaga submitted that since the applicant had been paid the decretal sum and since no appeal had been filed against the entry of judgment by the subordinate court, this court could in the circumstances not grant the orders sought by the respondent. Mr. Nyaga challenged the procedure by which the respondent approached this court. He submitted that the respondent should have filed a reference to the High Court if it was dissatisfied with the taxation by the Deputy Registrar. He urged the court to dismiss the application with costs.

I have carefully considered the submissions made before me. I have also perused the pleadings filed by the parties in this application in support of their respective opposing positions. The issue for determination by this court is whether the respondent made out a case to enable this court grant it an order setting aside the taxation by the Deputy Registrar of this court. The respondent approached this court by filing an application to set aside the taxation in question. The applicant challenged the procedure adopted by the respondent in seeking to impeach the taxation of the applicant's bill of costs.

I agree with Mr. Muri's argument that where a party is challenging service of the notice of taxation and the bill of costs, such a party is at liberty to file an appropriate application to set aside the said taxation. Azangalala J ruled in the case of **Khan & Katiku Advocates –vs- Shabbir Motor Spares Ltd Nairobi HC Misc. Application No. 653 of 2003 (Milimani)** (unreported) that a party who was not served with a notice of taxation cannot be shut out of the court on the basis that such a party ought to file reference under **Rule 11** of the **Advocates Remuneration Rules**. I have no reason to deviate from the principle of Law enunciated in the said ruling. I therefore do not agree with the applicant that the respondent should have filed a reference under the **Advocates Remuneration Rules** instead of an application to set aside under provision of the **Civil Procedure Rules**.

The respondent submitted that it was not served with the applicant's bill of costs and the notice of taxation. On its part, the applicant insisted that he served the respondent. I have read the affidavit of service filed by Christopher Githui on the 30<sup>th</sup> August, 2006. He deponed that he served a lady called

Mercy whom he found in the respondent's Legal Officer's office. The said Mercy informed him that she was secretary to the legal officer. The said process server served the notice of taxation to the said Mercy. She acknowledged receipt of the notice of taxation by stamping the official rubber stamp of the respondent's legal department. It was the respondent's case that the said Mercy, who was not a principal officer of the respondent, should not have been served as she was not authorized in law to receive any legal processes on behalf of the respondent.

I have considered the arguments made in this regard. It is clear to this court that the respondent was served through a person who was then working at the office of the legal officer. The respondent did not challenge the stamp on the notice of taxation filed in court indicating that the respondent had received the said notice of taxation. If the respondent was seriously challenging the service by the process server, it should have filed an appropriate application to have the said process server cross-examined on the said affidavit of service.

This court however has discretion to set aside the said taxation even where it is established that service was regular. This court will do so if it is satisfied that the ends of justice would be served and that the respondent had a valid defence to the said taxation. (see **Patel –vs- E. A. Cargo Handling Services [1975] EA 75** and at page 76 para C – F). In the circumstances of this case, I will however not exercise my discretion in favour of the respondent. This is because the respondent, despite of being served, failed to attend court. Even after becoming aware that the said costs had been taxed, the respondent took over two months before filing the present application to set aside the said taxation. Further, the respondent made no effort to stay proceedings either in this court or in the subordinate court so as to preserve the *status quo* pending the hearing and determination of this application.

As it were, judgment was entered in favour of the applicant by the subordinate court. The applicant executed against the respondent for the amount awarded in the decree. The respondent paid the decretal sum. The respondent did not appeal against the decision of the subordinate court. The respondent now wants this court to exercise its discretion and set aside the taxation of the applicant's bill of costs by the deputy Registrar of this court. I think if the court were minded to grant the application, it would occasion injustice to the applicant who has all along been vigilant in the pursuit of his claim against the respondent. On the other hand, the respondent has been indolent. This court cannot exercise its discretion in favour of such a litigant. The justice of this case demands that the respondent accepts that it has reached the end of the road in so far as concerns the matters in dispute in this case.

The application by the respondent dated 15<sup>th</sup> January, 2007 and which was amended on the 20<sup>th</sup> July, 2007 is hereby dismissed with costs to the applicant.

**DATED at NAIROBI this 27<sup>th</sup> day of FEBRUARY, 2008.**

**L. KIMARU**

**JUDGE**