



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 128 of 2005

KIPLAGAT & ASSOCIATES T/A KIPLAGAT ASSOCIATES.... APPLICANT/ADVOCATE

VERSUS

NATIONAL HOUSING CORPORATION.....RESP/CLIENT

R U L I N G

Before me is a chamber summons dated 15th October, 2007, brought under Section 60 of the Constitution of Kenya, Section 3A and 5 of the Civil Procedure Act, and paragraph 11(1), (2), (3) & (4) of the Advocates Remuneration Order, in which National Housing Corporation (hereinafter referred to as the client), seeks the following orders:

1. That the ruling on taxation herein dated Saturday, 15th October, 2005 together with the reasons for taxation and certificate of taxation be set aside and the Advocates Bill of Costs herein be referred to another taxing officer for taxation afresh.
2. That in the alternative the Honourable court do give directions as to the forwarding of the reasons for taxation to the Client's Advocates and leave for the client to file a reference to the taxation.
3. That the costs of this application be provided for.

The application is premised on the following grounds:

1. The ruling on taxation was delivered on a Saturday, 15th October, 2005, which being a nonworking day is irregular, unlawful and has compromised the client-Corporation's right to file a reference to taxation.
2. The taxing officer never forwarded to and the Client never received the reasons for her decision on taxation.
3. The Court proceedings from the delivery of the ruling on taxation, extracting of the certificate of taxation, preparation and non-delivery of the reasons for taxation are riddled with such anomalies and irregularities that it is only fair and just to set aside the entire taxation proceedings and remit the Bill of Costs for taxation afresh before another taxing officer.
4. The taxation of the Advocates bill of costs in the sum of Kshs.23,160,106.95 is not a fair and proper reflection of the work done by the Advocate. The majority of the party and party costs herein relied on by

the Advocate herein relates to work done by the previous Advocates who acted for the Client/Corporation and the Advocate herein cannot base his claim to Advocate/Clients costs on the same.

5. The Client/Corporation has a good case for referring the taxation to a Judge as the taxing officer made several errors of principle in taxing the Bill of Costs.

6. The Advocate withheld material facts relating to this matter, specifically, that:

(i) The Advocate herein was only instructed to act for the client after judgment had already been entered and not the entire suit.

(ii) The party and party costs in respect of the work done by the Advocate herein were taxed in the sum of Kshs.250,000/=. The Advocate cannot therefore claim Advocate/Client costs in respect of the entire suit.

(iii) The Advocates have received a substantial amount of money from the City Council of Nairobi in respect of the Party and party costs.

The application is also supported by a detailed affidavit sworn on 15th October, 2007 by William K. B. Keitany a Senior Legal Officer of the Respondent, and a supplementary affidavit also sworn by Keitany on 16th November, 2007. It is contended that the advocate/client bill of costs was filed on 24th February 2005 and the parties made their submissions on the bill of costs before the Hon. Miss Wekesa, Deputy Registrar on 3rd October, 2005. The Deputy Registrar reserved the ruling on the taxation to 13th October, 2005. The ruling was not ready on that date and was adjourned to 19th October, 2005, then 24th October, 2005, but the ruling was not delivered on that date. Subsequently, the client's advocate perused the court file and noted that the ruling on taxation was indicated as having been delivered in the absence of both parties on a date which was not clear, but which looked like either 15th or 18th October, 2005.

On 28th October, 2005, the client lodged a notice of objection to the taxation. Thereafter, the client's advocate made inquiries at the Registry for the reasons for the taxation. On 7th March, 2006, the Deputy Registrar wrote to the client's advocates informing them that they will be notified when the reasons for the taxation will be ready. On 25th April, 2006, the client's advocates again wrote to the Deputy Registrar, requesting for the reasons for the taxation to enable them file the reference. On 5th May, 2006, the client's advocates were served with a notice of motion dated 4th May, 2006, in which it was alleged that the client's advocates were informed of the reasons for the taxation, by a letter dated 27th March, 2006.

It is maintained that no such letter was received by the client's advocate. A copy of a ruling annexed to the notice of motion dated 4th May, 2006, indicated that the ruling was delivered on the 15th October, 2005 in the absence of both parties. The reasons for taxation (also annexed) is dated 3rd March, 2006 and certified on 24th March, 2006. It reflects the Bill of costs to have been taxed in the sum of Kshs.23,160,106,195/=. A certificate of taxation duly signed by the Deputy Registrar has also been availed. It shows that the bill of costs was lodged on 25th February, 2005 and taxed on 3rd June, 2006. The Bill of costs is indicated as allowed against the defendant in the sum of (in words) Twenty three million one hundred and sixty one hundred and six hundred and ninety two cents and in figures as Kshs.23,160,106/95. It was pointed out that the bill was in fact lodged on 24th February, 2005 and taxed on 13th October, 2005.

On 12th May, 2006, the clients advocate wrote to the Deputy Registrar, Miss Wekesa, pointing out the irregularities and requesting clarification on the date of delivery of the ruling, the contradiction regarding date of the reason for ruling, and the failure to forward the reasons to the client's advocate. Despite following up the matter, Miss Wekesa did not respond to these issues, and is said to have since left the Judiciary.

It was maintained that in view of these anomalies, the client was unable to file the reference to the judge in chambers regarding the taxation. The client has now brought this application explaining that the delay was further caused by the file being held by the Judge whilst awaiting a ruling with regard to a preliminary objection which was raised before the judge. It was contended that the ruling on the taxation was irregularly delivered on a Saturday in the absence of both parties, and therefore, the client had no notice of the ruling to enable him challenge the same by way of a notice of objection. The client was further unable to file an appropriate reference as the reasons for taxation were never sent to them. It was contended that the certificate of taxation was riddled with anomalies and inconsistencies which further denied the client the right to put its case by way of a reference. The court was therefore urged to set aside the taxation and the certificate of taxation as the same were done in an irregular and unlawful manner.

It was further contended that during the taxation, the taxing officer made errors of principle in taxing the bill of costs. For instance, contrary to paragraphs 13 and 13(a) of the Advocates (Remuneration) Order, she refused to investigate the certificate of costs issued in the party and party taxation, when the client maintained that it did not instruct the advocate to act for it in respect of the total sum claimed in the party and party bill of costs.

It was contended that the party and party costs in the main suit having been already paid, it ought not to have been computed in the client/advocate costs. It was contended that the instructions to the advocate were specific instructions for the seeking of orders against Nairobi City Council restraining it from interfering with the collection of rent from Kariokor and Madaraka Tenants from the Client/Corporation. It was maintained that the advocate did not act for the client from the inception of the suit or during the pendency of the suit, but was only instructed after judgment and decree had been passed. The client therefore, claimed that the reasonable fees due to the advocate in this regard, is kshs.250,000/= in respect of party and party costs plus Kshs.125,000/= in respect of advocate/client costs.

It was contended that the client having paid the advocate a sum of kshs.1,000,000/= on account, it was the advocate who owed the client a refund. The court was referred to ***High Court Civil Misc. No.555 of 2003 Ahmednasir Abdikadir & Co. Advocates vs. The Postal Corporation of Kenya***, where Kasango J ruled that since the court was unable to state precisely when the reasons of the taxing master were received by the client, the court was unable to state that the reference was filed out of time. It was submitted that in this case, the proceedings were so irregular as to prevent the client from filing the reference within time. It was maintained that the client has good reasons to challenge the decision of the taxing master. Referring to ***High Court (Meru) Civil application No.171 of 2001, Chogoria town council vs Alice N. Nyaga***, the court was urged to use its inherent powers to ensure that justice is done. Relying also on ***Civil appeal No.216 of 1997, Joseph Njuguna Muniu vs Medicinal Giovanni***, the court was urged to set aside the taxation and the certificate of taxation.

Kenneth Kiplagat t/a Kiplagat & Associates (hereinafter referred to as the advocate), is the advocate where bill of costs was subject of the taxation. The advocate opposed the application through grounds of opposition filed on the 8th November, 2007, and a replying affidavit sworn by Kenneth Kiplagat on the 8th November, 2007. Briefly, the advocate contended that the application is incompetent, an abuse of the court process and calculated to delay the hearing of the part-heard application of the advocate. It was claimed that the client/applicant has made rude, presumptuous and inconsiderate allegations against judicial officers without any foundation.

The advocate further contended that at the time he was instructed to take over the conduct of the suit in March, 1998, a decree compromising the client's counterclaim had already been executed. He maintained that there was a balance of the claim which still subsisted and the suit had therefore not been fully compromised. The suit was subsequently finalized. The advocate stated that although Party and party taxation was heard and determined by Hon. Mrs. Lesiit (as she then was) on 24th February 2000 and a certificate of taxation issued, the client instructed the advocate to contest and seek review of the said taxation.

The advocate recalled that the application was heard before Onyango Otieno J (as he then was), and a ruling was delivered on 22nd September, 2000, in which the Judge ruled *inter alia*, that Kiplagat &

Associates would not be the right advocates to represent the client in the application for review of party and party bill since it was an interested party. It was maintained that the client failed to challenge the taxation done by Mrs. Lesiit (as she then was), and was unable to raise any credible defence in the current taxation.

The advocate further brought to the Court's attention the fact that during the hearing of the advocate/client bill of costs, a notice of motion seeking the production of documents under paragraph 13 and 13(a) of the Advocates Remuneration Order to challenge Mrs. Lesiit's taxation order was heard and a ruling delivered dismissing the application. Leave was granted to the clients to appeal against the same ruling, but no appeal was lodged.

The advocate therefore submitted that the issue of party and party costs was *res judicata* and cannot be revisited. It was maintained that the taxation of the advocate/clients bill proceeded to full hearing and a ruling was delivered. It was maintained that the ruling of the Taxing officer was in actual fact delivered on 18th October, 2005 and that the date indicated on the certificate was a mere typographical mistake.

The court was urged to find that the typographical errors were rectifiable, and that there was no sufficient reason to disturb the orders made by the court. It was contended that although the client's advocate claimed to have become aware of the reasons for the taxation on the 5th May, 2006, it filed no reference, nor did the client take any action to challenge the taxation between 11th September, 2007 when Justice Waweru delivered his ruling and 17th October, 2007 when the chamber summons was filed. The client only came up with this application when the advocate pursued his part-heard application for judgment in respect of the taxed sum. The court was urged to find the client guilty of inordinate delay. The court was further urged to find the application an abuse of the court process and motivated by malice. The court was therefore implored to dismiss the application.

Paragraph 11 of the Advocates (Remuneration) Order which deals with objections to decisions on taxation states as follows:

“(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

The above provision sets out the following steps to be adopted in proceedings relating to objections to decisions on taxation.

1. Notice of objection to the taxing officer indicating the items of taxation objected to, to be filed within 14 days after the decision of the taxing officer.
2. Taxing officer to forward reasons for the decision on the items objected to, to the objector.
3. The objector to file and serve chamber summons within 14 days from the date of receipt of the reasons

for decision of the taxing officer.

4. If objector aggrieved by decision of the Judge he may with leave of the Judge apply to the Court of Appeal.

The chamber summons which is before me relates to an objection to the taxation of the advocate/clients Bill of cost. The chamber summons purports to have been brought *inter alia*, under paragraph 11 of the Advocates Remuneration Order. It is therefore necessary to consider whether the application has been brought in compliance with that provision. In order to arrive at such determination, the following facts are crucial:

(1) The date when the decision of the taxing officer was given so as to determine when the 14 days within which the objection to the taxation could be lodged, started to run and ended.

(2) The date when the reason for the decision of the taxing master was given so as to determine when the 14 days within which the chamber summons could be filed started to run and ended.

As regards the date when the decision of the taxing officer was given, it is evident from the original record of the court that the date is not very clear and could pass for either 15th October, 2005 or 18th October 2005. However, in the typed ruling which was duly certified by the Deputy Registrar the date is indicated as 15th October, 2005. Notwithstanding the uncertainty on the date, what is worthy of note is the fact that the decision is indicated to have been read in the absence of the parties. A question therefore arises as to whether the decision of the taxing officer can be said to have been given on the date indicated when in actual fact it was not delivered in the presence of any of the parties. The contention of the advocate for the client that they were informed that the decision would be given on 24th October and had no knowledge of the date of either 15th or 18th has not been disputed. Moreover 15th October 2005 has been established to have been a Saturday and therefore not a working day.

I find that the decision of the taxing Master purported to have been given on 15th October, 2005 was not given to the parties on that date. For the purposes of paragraph 11(1) of the Advocates Remuneration Order, the 14 days within which to give notice of objection to the taxing officer could not start running on the 15th October, 2005. Be that as it may, the notice of objection having been filed on 28th October, 2005. It was filed within time.

As regards the reasons for the decision of the taxing officer, paragraph 11(2) of the advocates Remuneration Order as above reproduced required that the reasons for the decision of the taxing officer be forwarded to the objector immediately after a notice of objection is lodged.

In this case, the objector has maintained that the reasons for the decision were never forwarded to it. I have perused the court record and have not found any indication that the reason for the decision was ever forwarded to the objector. Indeed Mr. Kiplagat did concede on the 25th November, 2007, that the reasons for the decision of the taxing officer were never forwarded to the objector. The question that arises is whether the objector's chamber summons which was filed on 17th October, 2007 is properly before the court given paragraph 11(2) of the Advocates Remuneration Order which requires such an application to be filed within 14 days from the date of receipt of the reason for the decision of the taxing officer, and the fact that the reason for the decision of the taxing officer was apparently not forwarded to the objector.

In *High Court Misc. 555 of 2003 (Milimani) Ahmednasir & Co. vs Postal Corporation of Kenya Ltd*, Kasango J. dealing with a similar matter where the court was unable to pin-point the exact date when the reason for the taxing officer's decision was given, found that it could not rule that the reference was filed out of time.

In *Postal Corporation of Kenya vs Donald Kipkorir & 3 Others* (Supra), Waweru J. differing with the position taken by Mwera J. in *Oseko & Co. Advocates vs Accidental Insurance Co. Ltd Machakos HC. Misc. Application Nos.149, 153, 156, 157, 158, 159, 160 & 161 of 2000*, ruled that there was no need for

further reasons to be sought or supplied under paragraph 11(2) of the Advocates Remuneration Order where the taxing officer has already given a considered ruling when giving his decision for the taxation.

I have considered paragraph 11(1) & (2) of the Advocates Remuneration Order and the two differing interpretation of these provisions as represented by the position taken by Mwera J. and that taken by Waweru J. in the above quoted cases. My understanding of paragraph 11(1) & (2) is that the taxing officer can give a decision on the taxation without giving any reasons. However, once an objection is raised to that decision, the taxing officer will have to give reasons for his decisions as provided under paragraph 11(2). In such a situation there will be the original decision and the second ruling giving reasons for the decision. However, where the taxing officer gives reasons in support of his decision at the time of giving the decision the provisions of paragraph 11(2) of the Advocates Remuneration Order is complied with by the forwarding of that same decision to the objector and time for the filing of the chamber summons begins to run from the time the objector receives a copy of the decision of the taxing officer. In my view, in such a situation there is no need for a second ruling giving reasons for the decision, and to this extent, I would concur with Waweru J. and disagree with the position taken by Mwera J. in *Oseko & Co. vs Occidental Insurance Co. Ltd* (Supra).

With the above in mind, the issue is whether the taxing officer gave reasons for her decision in the original decision of 15th October, 2005 and if so, when such decision was forwarded to the objector if at all. I have perused the original decision of the taxing officer on the taxation. The decision was short and precise and contained clear reasons for the decision of the taxing officer on the items no.1, 2 and 3 of the Bill of costs. These were actually the items subject of the objection. It is not disputed that this ruling was delivered in the absence of the client. I have perused the court record and have come across a letter filed in court on 28th October, 2005 by the client's advocate requesting for copies of the proceedings and ruling. I have also come across a notice of objection filed by the client on the 28th October, to the decision on the taxation. There is however no evidence as to when a copy of the decision of the taxing officer was availed to the client. To the contrary, there is a letter dated 12th May, 2006 written by the client's advocate addressed to the taxing officer in which the client protests at a letter dated 27th March, 2006 which was annexed by the advocate to a notice of motion dated 4th May, 2006 contending that the client had been advised of the availability of the reasons for the ruling but has failed to file a reference. No evidence was availed to this court confirming that the letter dated 27th March, 2006 purported to have been addressed to the client's advocate was ever forwarded to the client's advocate.

I come to the conclusion that paragraph 11(2) of the Advocates Remuneration Order was not complied with. Although it is conceded by the client that his advocate perused the court file and saw the decision of the taxing officer, that did not satisfy the requirements of Paragraph 11(2) of the Advocates Remuneration Order. Time for filing the chamber summons under paragraph 11(2) did not therefore start to run and the issue of the chamber summons having been filed out of time cannot arise.

It was contended that there were anomalies regarding the taxation and that the taxing officer made several errors of principle in taxing the bill of costs. For these reasons the client seeks to have the taxation set aside and the bill of costs referred to another officer for a fresh taxation. However, those are issues to be canvassed before a judge at the hearing of a reference under paragraph 11(3) of the Advocates Remuneration Order. Although the client applicant has partly moved this court under paragraph 11(1), (2), (3) and (4) of the Advocates Remuneration Order, what is before me is not a reference *stricto sensu*. As the provisions of Paragraph 11(2) and (3) have not been complied with, the client's main prayer is premature. Moreover, in view of the order that I propose to make with regard to the alternative prayer, I do not think it will be appropriate for me to consider the merits of the taxation. Suffice it is to state that in exercise of this court's inherent jurisdiction it is in the interest of justice that the objector should be given appropriate time to file a chamber summons in accordance with paragraph 11(2) of the Advocates Remuneration Order. It being apparent that the client is now sufficiently possessed of the reasons of the taxations, I direct that the client shall file and serve a reference in accordance with paragraph 11(2) of the Advocates Remuneration Order within 14 days from the date hereof. The costs of this application shall be in the cause.

Orders accordingly.

Dated and delivered this 22nd day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Mwenda for the Client

Okoth for the Advocate