



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**MISC APP NO. 404 OF 2006**

**OGOLA & OCHWA ADVOCATES .....APPLICANTS**

**VERSUS**

**GENERAL TYRE SALES LTD. ....RESPONDENT**

**RULING**

The subject matter of this ruling is the motion dated 12<sup>th</sup> February 2007 taken out by General Tyre Sales Ltd, the Respondent herein, pursuant to Order L rule 17 of the Civil Procedure Rules and Sections 3 A and 63(e) of the Civil Procedure Act. In that motion, the Respondent prayed for the certificate of taxation of Anna Ndung'u of 16.6.2006 to be set aside and for the bill of costs dated 18<sup>th</sup> April to be retaxed.

The applicant, a firm of Advocates called Ogola & Ochwa Advocates resisted the motion by relying on the replying affidavit of Patrick Okoth Ochwa sworn on 11<sup>th</sup> April 2007.

When the motion came up for interpartes hearing, Mr. Noorani, learned advocate argued the motion on behalf of the Respondent. It is his submission that the bill of costs was taxed exparte on 16<sup>th</sup> June 2006. There was a copy of the cause list for 16<sup>th</sup> June 2006 which showed that the bill of costs was not listed on the aforesaid date. The learned advocate claimed that the Respondent's advocate did not attend court when upon perusing the cause list he realized that the matter was not scheduled for hearing. On that account he urged this court to set aside the order on taxation because the Respondent was not heard. It is admitted in paragraph 6 of the supporting affidavit of Manish Dudhiya that the Respondent was served with a notice of taxation dated 31.5.06 and a bill of costs dated 18.4.2006. It is admitted that service was received on 31.5.06. It is the argument of Mr. Noorani advocate that the Respondent had been invited to attend to the taxing officer on 14.6.2006 by his advocate Muturi Gakuo and that on 16.6.2006 the Respondent was informed by the same advocate that there was no need to attend court because the bill of costs had not been cause listed. The Respondent claims that it was shocked to received a letter from Ogola & Ochwa Advocates demanding payment of Kshs.555,462/50 being taxed costs. Mr. Manish

Dudhiya says that he contacted the offices of Muturi Gakuo & Co. Advocates for an explanation but there was no satisfactory advice. That is what prompted them to seek the services of Inamdar & Inamdar Advocates. It is claimed that that is when the Respondent became aware that the bill of costs was taxed exparte.

Mr. Ochwa, learned advocate from the firm of Ogola & Ochwa advocates urged this court to reject the motion. It is his submission that the bill was cause listed on 10<sup>th</sup> June 2006 after he lodged a complaint when the file went missing mysteriously. It is the argument of Mr. Ochwa that the Respondent has been indolent in this matter hence it should not benefit from the mercy of this court. It is further the argument of Mr. Ochwa that it was not necessary for Respondent to be present during the taxation neither was it necessary for it to be heard because it had not entered appearance as required by law. It is also argued that the Respondent never raised any objection to any of the items taxed.

I have considered the arguments of both sides. I have also perused the material placed before me. What emerges clearly is that the bill of costs and the notice of taxation was served upon the Respondent. This fact is admitted. In other words, the Respondent was aware that the bill of costs has been filed and that the same had been scheduled for hearing before the taxing officer of this court on 16<sup>th</sup> June 2006. The Respondent stated that it instructed the firm of Muturi Gakuo & Co. Advocates to appear. The record indicates otherwise. There is no notice of appointment or an appearance filed by the aforesaid firm of advocates. This fact is confirmed by the fact that the firm of Inamdar & Inamdar Advocates filed a notice of appointment of advocates instead of the usual notice of change of advocates. It is therefore not wise to trust the averment that Mr. Muturi Gakuo had informed the Respondent that the bill of costs had not been cause listed. It was incumbent upon the Respondent to secure an affidavit from the firm of Muturi Gakuo & Co. Advocates. Even assuming that the firm of Muturi Gakuo had been instructed to appear in the matter then the taxing officer was right to tax the bill exparte pursuant to paragraphs 73 and 76 of the Advocates (Remuneration) Order. There is no evidence that the Respondent nor its advocate made effort to make inquiries from the court or the registry staff of the fate of the matter on 16<sup>th</sup> June 2006.

There is one thing which is puzzling in this matter. The Respondent avers that it learnt from the firm of Ogola & Ochwa Advocates on 1.8.2006 that the bill had been taxed exparte. It never took any steps to deal with the matter until some eight(8) months had lapsed that it filed the current motion under a certificate of urgency. I do not know what woke up the Respondent so that it now realizes that the matter is of utmost urgency. Even if I was to exercise my discretion in the matter I think I will deny the Respondent the orders sought however strong and meritorious the case is on account that it is indolent and that it is guilty of laches. A court of law and equity will not come to the aide of such a party. I am inclined to believe the averment of Mr. Patrick Okoth Ochwa that the Respondents may have received information that the applicants have filed a civil suit to recover the taxed costs and that is why they are engaging the applicants in such a circus to forestall the proceedings.

In conclusion I dismiss the motion with costs to the Advocate/Applicants.

**Dated and delivered at Mombasa this 17<sup>th</sup> day of May 2007.**

J.K. SERGON

J U D G E

In open court in the presence of Onyango h/b Inamdar for Applicants

N/a fro Respondents.