



REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

MISC APPLI 262 OF 2002

H.P.G. WAWERU & CO. ADVOCATES APPLICANT

VERSUS

NYERI MUNICIPAL COUNCIL RESPONDENT

RULING

By five applications all dated 20th September 2005 and filed in court on 26th September 2005 being Miscellaneous civil application numbers 253 of 2002, 257 of 2002, 259 of 2002, 262 of 2002 and 277 of 2002 respectively the applicant, **Nyeri Municipal Council** hereinafter referred to as “the applicant” prayed as against **H.P.G. Waweru & co advocates**, a firm of advocates hereinafter referred to as “the respondent” that:-

“..... The taxing master’s order of 29th June, 2005 dismissing the Respondent’s/client’s application dated 15th October, 2002 seeking to strike out the Notice of motion dated 7th October, 2002 (seeking taxation of bill of costs) be varied and set aside and be substituted thereof an order allowing the application and striking out the notice of motion dated 7th October 2002, with costs.”

The applications were premised on the grounds that:

- (i) The learned taxing master erred in not finding and holding that the Bill of Costs together with the accompanying Notice of Motion does not comply with Section 51(1), Advocates Act, Cap 16, Laws of Kenya as it is not made in the matter of a particular Advocate.**

- (ii) The learned taxing master erred in not finding and holding that the Bill of Costs had not been drawn in the matter of a particular advocate and signed by him or her and that a trade name per se has no capacity to institute proceedings in Court as it is not a legal person and this violates Rule 13, Advocates Remuneration Order.**

- (iii) The ruling of the taxing master does not uphold the law.**

The applications were further supported by the affidavit sworn by **Charles Wahome Gikonyo ESq.**, learned counsel, who in the main deposed that:-

4. The learned Deputy Registrar erred in not finding and holding that the Bill of Costs together with the accompanying Notice of Motion does not comply with Section 51(1), Advocates Act, Cap. 16, Law of Kenya as it is not made in the matter of a particular Advocate.

5. That the learned taxing master erred in law in not finding and holding that the Bill of Costs had not been drawn in the matter of a particular Advocate and signed by him or her and that a trade name per-se has no capacity to institute proceedings in Court as it is not legal person and this violates Rule 13, Advocate Remuneration Order.

6. That in totality, the ruling of the

taxing master does not uphold the law and this reference should be allowed in the interest of justice.

The applications were of course opposed. In a replying affidavit sworn by **James N. Nderi Esq**, learned counsel for the respondent deponed that the application was; an abuse of the process of the court, brought under the wrong provisions of the law, devoid of merit, the applicant had failed to lay down the necessary foundation for the grant of the orders sought, the application was calculated to delay the conclusion of the matter, was contrary to law and was founded on a misapprehension of various provisions of the Advocates Act and the Advocates Remuneration Order. Finally counsel deponed that the affidavit in support of the application was defective.

When the instant application came up for hearing before me it was agreed between the parties that the ruling and or outcome in this matter shall apply with equal force with regard to the other four miscellaneous applications already alluded to at the commencement of this ruling.

However for avoidance of doubt these are Miscellaneous Civil application numbers 253 of 2002, 257 of 2002, 259 of 2002 and 277 of 2002 respectively. It was so ordered.

In his oral submissions before me in support of the application, **Mr. Wahome** learned counsel for the applicant stated that the matter was a reference from the decision of the taxing master dated 29th June, 2005. It was his contention that the taxing master erred in dismissing the applicant's application. He ought to have appreciated that the application by the respondent dated 7th October 2003 was filed in the name of **H.P.G. Waweru & Co. Advocates** in breach of section 51(1) of the Advocates Remuneration Order. Further it was the contention of learned counsel that the application was made in the name of the firm of advocates and not individual advocate(s). That a trade name perse had no capacity to institute and maintain court

proceedings as it is not a legal person. That the application therefore ought to have been made by the advocate himself and not by his firm.

In responding to the application, **Mr. Nderi** learned counsel for the respondent chose wholly to rely on the replying affidavit. He however added that there were no proceedings and or ruling of the taxing master annexed to the application, that the application was hopelessly brought out of time and there being no extension of time, the application is devoid of merit. Finally counsel submitted that the application was brought in bad faith. That there had been various unsuccessful applications seeking to strike out the original application for the taxation of the bill of costs filed by the applicant.

I have now considered the applications, the affidavits in support thereof, submissions of learned counsel as well as

the law. I think this matter can easily be disposed off on procedural aspects only. My understanding of a reference is that it is in the nature of an appeal against the decision of the taxing master. Indeed from the respective submissions of the learned counsel herein it is quite evident that they handled the matter as though it was an appeal against the decision of the learned taxing master in refusing to allow the applicant's application dated 15th October 2002. It is quite clear that the applicant was aggrieved by the learned taxing master's decision and that is why it moved to this court hoping to upset it. So that what is before me is actually in the nature of an appeal. In an appeal it is expected that the order sought to be impugned and the proceedings leading to the said order would be brought to the attention of the appellate court. That is to say, certified copies of the proceedings as well as the ruling, judgment and or decree

sought to be overturned are essential documents in an appeal. Without them the appeal, and in this case, the reference is incompetent and has no basis in law. In the absence of those essential documents, how is the appellate judge expected to determine whether or not the taxing master erred in both law and fact in arriving at the decision sought to be impugned unless of course the applicant expects this court to act on pure speculation and conjecture. That is not the role of courts of law.

In the circumstances of this case, apart from the application and the supporting affidavit, the applicant made no efforts at all to prepare as it were a record of appeal in which he would have included the proceedings before the taxing master and the resultant ruling. This court is therefore left groping in the dark as to whether indeed there were any proceedings before the taxing master, whether the

taxing master made any ruling and whether such ruling could have been the subject of a reference and if indeed whether the reference was filed in time. All these concerns would have been easily settled by the applicant availing the proceedings and ruling of the taxing master as part of the reference. No explanation was forth coming from the applicant as to the failure to include these vital documents in the reference. Or is it because as submitted by **Mr. Nderi**, that there were indeed no such proceedings before the taxing master and that the matter was in fact dealt with by a judge and therefore not subject to a reference? I am not able to discount such possibility as **Mr. Wahome**, counsel for the applicant did not at all respond to that submission.

In the end I hold that in the absence of the proceedings and ruling, in the reference application and or record before me, the reference is fatally defective and incompetent. Accordingly it is for dismissal. The reference and or application dated 20th September 2005 is hereby dismissed with costs to the respondent. This order applies equally to miscellaneous civil application numbers 253, 257, 259 and 277 all of 2002.

Dated and delivered at Nyeri this 20th day of November 2007

M. S. A. MAKHANDIA

JUDGE