



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Misc Civil Suit 437 of 2006

KANYI J. & COMPANY PLAINTIFF

- Versus -

U.A.P. PROVINCIAL INSURANCE LIMITED DEFENDANT

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

Omwenga for Applicant

Kanyi J. for Respondent

RULING

This application is brought by a notice of motion dated 10th July, 2007, and expressed to be made under section 51(2) of the Advocates Act, Cap 16, and the Civil Procedure Act and Rules. The applicant thereby moves the court for an order that the orders of taxation issued by the taxing master on 8th December, 2006 be vacated and be substituted thereon with costs assessed based on scale, and also prays that the costs of the motion be provided for.

The application is supported by the annexed affidavit of Maryanne Mung'ara, the applicant's legal officer, and is based on the grounds that –

- (a) the orders were irregularly delivered in the absence of the parties without notice and on a date other than that on which they were supposed to be delivered;
- (b) the costs assessed were excessive and outside the remuneration orders taking into account the simple running down matter;
- (c) no reasons were given for the exorbitant assessment in the taxation of costs
- (d) the taxed costs amount to unfair enrichment

The application is opposed on the following grounds –

- (i) THAT the application is frivolous, vexatious and an abuse of the court process.
- (ii) THAT the grounds set out in the application are simplistic and insufficient to support the prayers

sought therein and only succeed in making a mockery of the court process

(iii) THAT the court exercised its discretion properly in the taxation and the application to vacate the orders is meant to delay, buy time and in essence frustrate the plaintiff/decreed holder

(iv) THAT the plaintiff's application is grounded on issues that have no basis and are unsustainable in law

(v) THAT the reference has been made long after the 14 days envisaged by rule 11 of the Advocates Remuneration Order and without leave to extend time

The grounds are amplified in the replying affidavit sworn by Joseph Karanja Kanyi, the plaintiff in this matter, on 27th July, 2007.

At the hearing of the application, Mr. Mabeya appeared for the applicant and Mr. Kanyi for the respondent. Mr. Mabeya submitted that the ruling was suspect as it was not delivered on the appointed day and it does not show the coram, or to whom it was read, and no notice was given to the parties. The applicants became aware of the existence of the ruling on 23rd February, 2007, and therefore, Mr. Mabeya further submitted, the 14 days within which a party should file a reference under paragraph 11 of the Advocates (Remuneration) Order should have started running from that date. He thereupon invited the court to overlook the requirement of 14 days. If the court, however, feels that the applicant should have applied for an extension of time, then he asked the court to extend the time and deem what was done as having been done on 1st March, 2007, when the applicant wrote to the Deputy Registrar asking for reasons for the ruling dated 8th December, 2006.

Mr. Mabeya also submitted that the reasons given were not reasons, and that having regard to paragraph 58 of the Advocates (Remuneration) Order, the bill should have been taxed under paragraph 2 of Schedule VII. Counsel thereupon urged the court to set aside the taxation and order a re-taxation by a different taxing officer.

Opposing the application, Mr. Kanyi argued that there was no record that either counsel appeared before the taxing master when the ruling was due to be delivered, and that it was the taxing officer's discretion when to deliver the ruling. He also argued that after applying for the reasons on 1st March, 2007, these were given to the applicant on 3rd April, 2007 although the applicant's counsel says that the letter was received on 8th May, 2007. But whether it was received on 3rd April, 2007 or 8th May, 2007, the applicant had 14 days within which to file the objection. This was not done. The applicant could also have applied for an extension of time under paragraph 11(4) by chamber summons. As this also was not done, the applicant cannot apply for that extension orally as he purported to do. Mr. Kanyi agreed with Mr. Mabeya that the ruling was delivered in the absence of parties and without notice, but did not agree with him that a ruling delivered after 42 days was not a ruling. He submitted that as he was the last advocate on record, he was the one bound to file the bill for all the other advocates who had handled the matter, and therefore the Order applicable was that of 1997. Mr. Kanyi also submitted that where a matter is first heard in the High Court and then transferred to the lower court, the work done in the High Court should be charged according to the scales applicable in that court, and the work in the subordinate court according to the scales of that court. Otherwise the amount to award on any item is left to the discretion of the taxing master, which discretion can only be interfered with if it is patently erroneous. Finally, Mr. Kanyi contended that the order at page 28 of the applicant's exhibit, which is a consent judgment for Kshs. 210,000/=, should not be taken into account.

In reply, Mr. Mabeya submitted that failure to cite paragraph 11 of the Advocates (Remuneration) Order does not render an application fatal, and referred to Order L rule 12 of the Civil Procedure Rules. Referring to paragraph 62A, he submitted that there should be a certificate as to when each advocate received payment. He also argued that he did not say that a ruling after 42 days was not a ruling, but that the ruling herein did not qualify as a ruling of the court and then posed the rhetorical question – "Which Court?" He finally submitted that when a claim is severed into matters partly done in the High Court and

partly in the lower court, under paragraph 58 of the Advocates (Remuneration) Order, the schedule applicable is the one in the lower court unless the judge orders otherwise. Mr. Mabeya then asked the court to allow the application on the grounds set out on the face of the application.

After considering the application and the arguments of counsel, I find that the issues to be determined are whether this court has jurisdiction to entertain the application; if so, whether the application was filed on time; and, if so, whether this court should interfere with the ruling of the taxing officer. It is common ground, and the court record speaks for itself, that the ruling which is the subject matter of this application was supposed to be delivered on 24th November, 2006. The record does not disclose why it was not delivered on that day. It is on record, however, that the ruling was delivered on 8th December, 2006. But the record does not show the coram and attendances, if any. It also does not show whether the respective parties were served with any notice. In those circumstances, I would share Mr. Mabeya's sentiments that the orders therein were delivered irregularly.

The application now before the court is expressed to be made under Section 51(2) of the Advocate's Act, Cap 16, and the Civil Procedure Rules. Section 51 aforesaid lays down general provisions as to taxation and states as follows –

“51. (1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate. The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

It is clear to me that section 51 (2) has no bearing whatsoever on the matter at hand, which is meant and intended to be an objection to a decision of a taxing officer. An application in respect of such an objection ought to be filed under paragraph 11 of the Advocates (Remuneration) Order, but not section 51 (2) of the Advocates Act.

Mr. Mabeya submitted that failure to cite paragraph 11 does not render the application fatal and referred to Order L rule 12 of the Civil Procedure Rules. That rule is in the following words –

“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

There is a difference between the failure to cite the order, rule or other statutory provision under which an application is made, and the citation of the wrong order, rule or other provision altogether. Whereas the former is curable under Order L rule 12, the latter is not. In the case of JOHN KARURI & ORS. v. P. INVESTMENT PRIVATE LTD., HCCC NO. 1575 of 1991, Bosire J., as he then was, said –

“Order L rule 12 above, to my mind deals with omissions to state statutory provisions under which or by virtue of which an application is brought. However, to my mind, it does not cover a situation where a wrong or incorrect provision of the law is stated. When such is the case a party has the liberty to seek the leave of the court to amend the application in that regard.”

The juridical basis for this rule is not far to seek. The order, rule or other statutory provision which is cited is meant to invoke the jurisdiction of the court. If the jurisdiction of the court is not properly invoked, an application becomes incompetent. Where the wrong or incorrect provision of the law is cited, therefore, the jurisdiction of the court is not properly invoked, and the only recourse for the applicant is to seek leave to amend the application in that regard. In the instant matter, a wrong and incorrect provision of the law has been cited. It does not invoke the court's jurisdiction to deal with the matter at hand. And since the applicant did not seek leave to amend the application in that regard, I find that the jurisdiction of the court has not been properly invoked and the application does not lie.

Secondly, paragraph 11 of the Advocates (Remuneration) Order, under which this application should have properly been made, is in the following words –

“11. (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. 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.”

Although the taxing officer’s ruling was supposed to be delivered on 24th November, 2006, it was delivered on 8th December, 2006, without notice to the parties. Therefore, none of the parties attended. Upon the advocate for the respondent becoming aware that the ruling had been delivered, he wrote to the applicant’s advocates apprising them of that development on 23rd February, 2007. On 1st March, 2007, the applicant’s advocates wrote to the Deputy Registrar asking for the reasons for the ruling. The Deputy Registrar responded by a letter dated 3rd April, 2007, stating that the reasons were as per the handwritten ruling of Hon. Ndung’u dated 8th December, 2006. For some reason(s) which have not been explained, the applicant’s advocates say, at paragraph 6 of Maryanne’s supporting affidavit, that they received the Deputy Registrar’s letter on 8th May, 2007. From that date, the applicant had fourteen days, under paragraph 11(2) of the Advocates (Remuneration) Order, within which to file its application. That was not done. Instead, the application was filed on 11th July, 2007. That was two months after receipt of the reasons from the Deputy Registrar, and therefore a breach of paragraph 11(2) which requires filing within fourteen days.

Paragraph 11(4) empowers the court to enlarge the time fixed by paragraph 11(1) and (2). It states –

“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.”

At the very latest, this application ought to have been made within fourteen days after receipt of the Deputy Registrar’s letter on 8th May, 2007. Upon expiry of those days, it was still open to the applicant to apply for an extension of time. Again, that was not done. Since the application was not filed within the prescribed time, and no extension of time was sought, I find that this application was filed out of time and that its only fate is to be dismissed.

Being of this persuasion, I don’t think it will pay to determine the third issue. Even if such a determination were to be favourable to the applicant, the application will still be dismissed. The determination will therefore have been merely academic.

For the above considerations, the application is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Mombasa this 11th day of December, 2007.

L. NJAGI

JUDGE