



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(Milimani Commercial Courts Commercial and Tax Division)

MISC APPLI 21 OF 2005

D NJOGU & COMPANY ADVOCATES.....
.....APPLICANT

VERSUS

KENYA NATIONAL CAPITAL CORPORATION.....
RESPONDENT

R U L I N G

By a Notice of Motion dated 23rd February 2006, the applicants applied for judgement to be granted in their favour, in the sum of KShs. 2,897,458/75, which constituted the taxed costs.

When faced with that application, the respondent filed a Notice of Preliminary Objection, raising the following two points.

“1. The Certificate of Taxation dated 6th February 2006, upon which the Applicant relies is a nullity.

2. Consequently, there is no valid Certificate Of Taxation before the Court, and the Honourable Court has no jurisdiction to Exercise the discretion vested under Section 51(2) of the Advocates Act, Chapter 16.”

It was the respondent’s submission that pursuant to the provisions of Section 51(2) of the Advocates Act, the only person who was authorised to issue a valid Certificate of Taxation was the taxing officer. Yet in this case the taxing officer was Miss N. Maina, whilst the Certificate of Taxation was signed by one J. M. Were, a Deputy Registrar. Insofar as the certificate was not issued by Miss N. Maina, the respondent contends that it is a nullity.

On the other hand, the applicant says that the role of the taxing officer is to render a decision on the bill being taxed. If thereafter, any party to the taxation should require the reasons for the decision, the taxing officer would be obliged to give his reasons.

Having given his decision or reasons therefor, the taxing officer was not obliged to execute the certificate of taxation, submitted the applicant. The process of signing and issuing a certificate of taxation was likened to that of issuing a Decree. Thus, the applicant submitted that any judicial officer who has jurisdiction may sign a certificate of taxation, much in the same way as a Deputy Registrar issues a Decree in respect to a judgement which had been pronounced by a judge of the High Court. In this case,

the certificate of taxation was executed by Mr. Were, a Deputy Registrar. And, according to the applicant, Mr. Were had not been shown to lack the requisite jurisdiction to sign the certificate of taxation.

Section 51(2) of the Advocates Act stipulates as follows:-

“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 judgement be entered for the sum certified to be due with costs.”

I accept the respondent’s contention that when a court is interpreting any statutory provision, if the said provision was ambiguous, the court shall have regard to the intentions of parliament. That means that in instances where the words of a statute were clear and unambiguous, the words will spell out the intention of parliament.

In **HALSBURY’S LAWS OF ENGLAND**, 3rd Edition, Volume 36, at page 385, paragraph 572, the learned authors said:

“Reluctance to upset established Interpretation. When there are ambiguous expressions in a statute, but not where the language is clear, and a particular interpretation, on which certain supposed rights are founded, has been acted upon for a long period, a court will be cautious in holding that the supposed rights do not exist. Similarly where, in relation to an ambiguous statute a construction has been uniformly adopted in a course of decisions, and rights to property or under contracts have been founded on that construction, a court of review will not lightly overrule that course of decisions and adopt a different construction; but the meaning placed on the words must not be clearly wrong.”

Those words do make a lot of sense to me, as courts must always strive to ensure that there was certainty in the law and in the interpretations thereof.

What caused me a lot of anxiety in this case is that if I were to uphold the submissions of the respondent, there might be thousands of certificates of taxation which may be rendered nullities. If that were to happen, I cannot begin to fathom the impact, especially more so on the judgements which were founded upon certificates of taxation which were signed by deputy registrars who had not been involved in the taxations which gave rise to the certificates.

But notwithstanding my said anxiety, I failed to trace any decisions directly on the issue before me. In other words, it appears that in practice, parties, advocates and the courts have always assumed that provided certificates of taxation were signed by a Deputy Registrar either of the High Court or of the Court of Appeal, they were valid. If that be the case, I can safely say that such assumptions cannot be equated to the construction or interpretation of Section 51(2) of the Advocates Act.

However, I am also alive to the fact that the said assumptions have been the foundation of rights, such as judgements granted on the basis of certificates of taxation which were signed by persons other than the taxing officers by whom bills had been taxed. In the circumstances, even though I have not traced any decisions on the legal issue before me, I nonetheless caution myself that there is need for me to be careful about making a decision which could upset a practice which may have gone on for many years.

At the same time, I do acknowledge the fact that the cardinal rule of construction is that words and sentences must be construed in their ordinary and natural meaning.

In **RE: PRITCHARD (DECEASED) [1963] 1 ALL E.R 873 at 884**, UpJohn LJ held as follows:-

“There has been a fundamental failure to comply with the requirements of the statute relating to the issue of the proceedings; it was not a mere irregularity. The all important and essential

requirement of the issue of a proceeding, whether it initiates the action (or is some interlocutory proceeding in an already pending action) is that it must be issued with the seal of the issuing office. If the proceeding is issued from the wrong office and the statute or rules give power to transfer it to the right office, that may cure the defect, but there are no such powers in this case. It seems to me that in Lord Herschell's words 'it is much more than an irregularity.' I think it is a nullity and that it is not possible for the defendants to waive the defect."

Danckwerts LJ concurred with the verdict of Upjohn L.J. However, Lord Denning MR dissented; to his mind the mistake of taking out an originating summons at the District Registry, instead of issuing a writ at the Central Registry, was not a nullity.

On my part, I do believe that if a case was commenced before a court which did not have the requisite jurisdiction to entertain it, such a proceeding would be a nullity for want of jurisdiction. It could not be clothed with validity by a transfer to the proper court, as there would be nothing capable of being transferred.

I also hold that a certificate of taxation cannot be compared to a Decree, as the applicant would like the court to do. The reason why a Decree is not comparable with a certificate of taxation is that a Decree is drawn up in accordance with the provisions of Order 20 rule 7 of the Civil Procedure Rules. That rule spells out the steps to be taken in the preparation and dating of decrees and orders.

By virtue of the provisions of Order 20 rule 7 (2), the registrar is empowered to sign and seal the decree, once he is satisfied that the draft decree is drawn up in accordance with the judgement. However, the power to do so is only in relation to decrees in the High Court.

Pursuant to the provisions of Order 20 rule 7 (5), in a subordinate court the decree shall be drawn up and signed by the magistrate who pronounced it or his successor.

Wherein a rule spells out the procedure for the execution of any order, pleading or judgement, the validity thereof stems from the compliance with the said rule.

In **JHAZI V CHEROGONY [1984] KLR 814**, the Election Court dealt with the issue of the interpretation of Rule 4(3) of the National Assembly Elections (Election Petitions) Rules, which stipulated that petitions **"shall be signed by the petitioners."**

In that case, the petition was signed by Mr. Adambesa, advocate for the petitioner. The court dismissed the petition, and in so doing expressed itself as follows:

"The requirement that a Petition be signed by a Petitioner is not a formality. Equity demands that a Petitioner assumes responsibility for his Petition by signing it.

We are satisfied and find that the provision contained in rule 4(3) that the Petition shall be signed by the Petitioner is mandatory and that this Petition not having been signed by the Petitioner it is not properly before the court. The Petition is dismissed."

Can the applicant escape from the express wording of Section 51(2) of the Advocates Act which clearly require a certificate to be that of the taxing officer by whom any bill has been taxed?

I have perused the Interpretation and General Provisions Act, (Cap. 2) and found that Section 43 thereof stipulates as follows:

"where a written law confers a power or imposes a duty on the holder of an office as such, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office."

I understand that provision to mean that if the power to issue certificates of taxation was vested in

registrars, such as the power to execute decrees in the High Court, any person holding the office of a registrar would have authority to issue the said certificates. That would imply that where authority is vested on a particular person, it is only that person who could do or enforce the doing of the act or thing, as specified in Section 48 of the Interpretation and General Provisions Act.

In Section 51(2) of the Advocates Act, the only certificate which would be final as regards the amount of costs covered thereby would be a certificate **“of the taxing officer by whom any bill has been taxed”**

It is only such a certificate that can form the foundation upon which the court can make such order in relation thereto as it thinks fit, including in a case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due.

As the certificate herein was executed by Mr. Were, who did not tax the bill herein, it cannot form the foundation for any further court orders. Therefore, the application before me is a non-starter. Accordingly, it is hereby struck out, with costs to the respondent.

However, it must be emphasized that this decision is not a bar to the issuance of a certificate by the taxing officer by whom the bill herein was taxed.

Dated and Delivered at Nairobi this 17th day of May 2006.

FRED A. OCHIENG

JUDGE