



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Civ Case 1201 of 2004**

**ONALO & CO. ADVOCATES .....**  
**PLAINTIFF**

**VERSUS**

**EXPORT PROCESSING ZONE .....**  
**DEFENDANT**

**RULING**

The respondent in the Misc. Application moved the court by chamber summons, “**seeking a stay of execution of the order of taxation dated 8<sup>th</sup> December, 2004, pending the hearing and determination or an intended reference from the decision of the taxing master.**”

“**The respondent also prayed that the ex parte taxation of the advocate/client bill of costs lodged by the applicant Messrs Onalo & Co. Advocates, dated 9.9.2004 and taxed on 8.12.2004, followed by a certificate of taxation issued on 11.4.2005, be set aside**”, and finally,

“that in the alternative, this court do enlarge the time for filing a notice of objection, and applying to a Judge under Rule 11(1) of the Civil Procedure Rules.”

The affidavit in support of the application was sworn by Albert Gumo, the Chief Executive Officer of the defendant company. In a nutshell, he complains that the taxed costs of Kshs.7,048,229/= is excessive, considering first that the suit was settled out of court, and again, the money paid to the lawyer by the defendant so far in this case should have been in full and final settlement of their claim.

The replying affidavit to the application was sworn by Peter Leo Onalo, himself. It is dated 19<sup>th</sup> May, 2005. In it he calls for the dismissal with costs of this application on various grounds as appear in the affidavit. These include the fact that the defendant did not attend the hearing of the taxation conducted by the Deputy Registrar, on 7.12.2004 and no good reason has been shown why this was so. He also complained of the delay by the defendant in filing this application.

The defendant’s Chief Executive Fred Gumo filed a further affidavit dated 8<sup>th</sup> August, 2005.

Thereafter the parties did by consent file written submission for the determination of this application.

In their submissions to oppose the application, Messrs Peter Onalo & Co. Advocates submitted that the Bill of costs was fixed for taxation on 8.12.2004, and the date was served on the respondent Export Processing Zone, on 9.9.2004. That this fact was admitted by the Chief Executive, Mr. Albert Gumo, who did not give any convincing reason why he did not appear in court personally or through an

advocate.

That upon taxation a certification of taxation was forwarded to the respondent. The receipt of this letter too was confirmed by Mr. Albert Gumo in his affidavit.

Counsel for the applicant complained that the respondent was now coming back to court about four months after the taxation to ask for the setting aside of such taxation and seeking extension of time to file objection to taxation. This he said is not acceptable. He urged the court to dismiss the application with costs.

He relied on several decided cases on taxation which he annexed to his submissions, for example the case of

**RE: PIONEER AGENCIES LTD AND THE ADVOCATES REMUNERATION AND TAXATION OF COSTS RULES**, where it was held inter alia,

*(ii) “the taxing officer did not act on any mistaken principle nor did he exercise his discretion without due care”,*

Also relied on was the case of **COAST BRICK AND TILE WORKS LTD AND OTHERS V PREMCHAND RAICHAND LTD NO. 2**, where it was held inter alia,

“there were no grounds to interfere with the well considered ruling of the Taxing Officer or with the equally reasonable ruling of the Vice-President.....”

On the exercise of a Judge’s decision to set aside ex parte judgment, the counsel relied on this court’s decision in **SHAH v MBOGO & ANOTHER**.

Turning to the submissions of the respondent’s counsel, he referred to HCCC No. 434 of 2004, where the applicant Messrs Onalo & Co. acted for them and a consent judgment for a sum equivalent to Kshs.23,786,163/= was recorded, and the suit never proceeded for hearing.

He submitted further that even after the applicant/advocate had presented the bill of costs, the 2 still got into negotiations and the respondent paid the advocate Mr. Onalo, a further sum of US Dollars 17,770.34 (approximately Kshs.1,437,784) bringing the total sum paid to the advocates so far in the suit to Kshs.4,256,800/= which was believed to be in full and final settlement of the claim.

That because of this continued negotiations and payment of further sums to the applicant even after the bill of costs had been served on the respondent and again due to the fact that the applicant advocate was acting for the respondent in several other cases, the respondent did not instruct any advocate to act for it in the matter of taxation of the bill of costs, because it genuinely believed that Messrs Onalo & Co. Advocates would not proceed with taxation, in the circumstances.

The advocate submitted that the respondent’s Chief Executive in his supplementary affidavit sworn on 8<sup>th</sup> August, 2005, gave reasons which led to him not being present in court on the day of taxation by the Deputy Registrar (the taxing master), on the 8<sup>th</sup> December, 2004.

Having considered the pleadings on record so far and the written submissions by both learned counsel, I came to the conclusion that though the respondent, the Export Processing Zone Authority, termed the taxed costs “**excessive**”, it did not complain about the manner in which the Registrar taxed the bill of costs. It did not for example, allege that the Registrar used the wrong principles in taxing the costs, or that there was any mistake. The complaint as I understand it seems to be that the taxed costs was excessive considering the costs already paid so far, said to be in “**full and final settlement**”.

I did not however, find any evidence that the costs paid to Messrs Onalo & Co. Advocates was in full and final settlement of their claim in the particular suit for which the bill was taxed.

The respondent was aware of the Notice of Taxation, and even the date of taxation, but gave reasons why he was not in court himself or through an advocate. As the records show, these basically amount to “**a busy schedule of work,**” which necessitated the Chief Executive to travel overseas and or out of his station.

For the Chief Executive to say that he did not appoint an advocate to represent the authority on the day of taxation because he had made a further payment to the advocate after having been served with a Notice of Taxation, and therefore expected the advocate not to pursue the taxation is “**rather naïve**”, in my view, because the further payment he made did not clear the advocate’s Bill of costs as shown in the Notice of Taxation served, and further as I have already said, there is no evidence to show that the further payment was “**in full and final payment.**”

I have not found any reason to interfere with the discretion exercised by the taxing master when he taxed the bill of costs presented to him by Messrs Onalo & Co. advocates.

I therefore refuse to grant the orders prayed for by the respondent in the application dated 11.5.2005, filed in court the same day. I proceed to dismiss the said application with costs to the applicant, Messrs Onalo & Co. Advocates.

**DATED at NAIROBI this 27<sup>th</sup> day of July, 2006.**

**JOYCE ALUOCH**

**JUDGE**