



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Misc Civil 239 of 2005

NJAU KAYAI & 10 ADVOCATES.....APPLICANT

VERSUS

JAMES NYIRA.....RESPONDENT

RULING

By a chamber summons dated 28th March 2006 and brought under **Order XXI rule 22** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, the respondent applied for stay of execution of an order allowing the applicant's bill of costs pending an application for review that he intended to file. In his affidavit in support of his application, the respondent stated that he had engaged the applicant to act for him in a certain matter which was decided in his favour but after its conclusion, the applicant refused to pursue the issue of payment of costs which were ordered to be paid to the respondent. The applicant and the respondent disagreed and the applicant filed his bill of costs and served the respondent with a notice of taxation showing that the same was to be taxed on 29th April 2005. The respondent filed grounds of opposition and subsequently some preliminary issues as to whether the taxation could proceed or not were argued and the ruling was reserved. However, on 24th March 2006, the respondent received a notice that the ruling would be delivered on 22nd March 2006, a date that had already passed. When the respondent came to court and perused the court file, he realised the applicant's bill of costs had been taxed at Kshs.119,610/-. No mention had been made of the pending ruling. The respondent, who was unrepresented, submitted that the applicant was not competent to file his bill of costs when he did not have a practicing certificate at the time. He referred to a letter dated 31st May 2006 addressed to him by the Secretary of the Law Society of Kenya which had been annexed to one of his affidavits in the court file. The said letter stated as follows:-

“The dates on which Mr. Benson Njau Kayai took out their practicing certificates are set out against the years in question as follows:-

2002 - 21st May 2002

2003 - 10th June 2003

2004 - 26th February 2004

2005 - 10th May 2005

2006 - 16th February 2006”

The applicant's bill of costs was drawn on 12th April 2005 and filed on 14th April 2005.

The respondent had raised the issue of incompetence of the applicant in so far as the bill of costs was concerned before the Deputy Registrar on 27th June 2006. The Deputy Registrar was of the view that the issue of lack of practicing certificate was a serious one which required proper determination and granted the respondent stay of execution for thirty days so that he could determine his next cause of action. Thereafter, the respondent filed the present application before this court.

In his reply, Mr. Kayai submitted that the respondent's application was brought under the wrong provisions of the law. He stated that **Order XXI rule 22** of the **Civil Procedure Rules** was not applicable. He further submitted that under **Rule 11** of the **Advocates (Remuneration) Order, subrules (1), (2) and (4)**, a clear procedure was outlined that was to be followed by a party who was dissatisfied with a decision of a taxing officer. The respondent had breached the said procedure in filing his application. He further submitted that the respondent's application was totally incompetent because he had not filed any application for review of the ruling by the taxing officer.

With regard to the issue of lack of practicing certificate at the time of filing the bill of costs, Mr. Kayai submitted that it had been raised in bad faith.

I have anxiously considered the matter before me. The respondent, being dissatisfied with the manner in which the applicant's bill of costs was taxed, ought to have filed an appropriate application pursuant to the provisions of **rule 11(1)** of the **Advocates (Remuneration) Order**. He should have objected to the decision of the taxing officer within fourteen days after the decision by giving notice in writing to the taxing officer of the items of taxation to which he objected. Under **rule 11(2)**, the taxing officer is obliged to forthwith record and forward to the objector the reasons for his decision on the affected items. Within fourteen days from the date of receipt of the reasons of the taxing officer, the objector may apply to a judge by a chamber summons, setting out the grounds for his objection. Having failed to follow the above procedure, the application now before this court is incompetent. On the other hand, it is not in dispute that as at the time of filing the bill of costs that gave rise to this application, the applicant did not hold a valid practicing certificate.

In **KENYA POWER AND LIGHTING COMPANY VS CHRIS MAHINDA t/a NYERI TRADE CENTRE, Civil Appeal No. 148 of 2004** at Nyeri (unreported), the applicant filed a notice of motion seeking to strike out an appeal filed by the respondent on the ground that the notice of appeal and the memorandum of appeal were signed by an advocate who did not have a practicing certificate. The court upheld the argument by the applicant and proceeded to strike out both the notice of appeal and the memorandum of appeal as being incompetent. There is a litany of other similar decisions on the issue. I equally hold that Mr. Kayai was not competent to practice as an advocate at the time when he drew his bill of costs, knowing very well that he did not have a practicing certificate. A court of law cannot condone an illegality. In the circumstances, the applicant cannot be allowed to benefit from his own misdeed. This court will on its own motion strike out the applicant's bill of costs as the same is an abuse of the court process. In the circumstances, I strike out the respondent's application as being incompetent and at the same time strike out the applicant's bill of costs for the reason aforesaid. Each party will bear its own costs.

DATED, SIGNED and DELIVERED at Nakuru this 27th day of October, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Kayai for the applicant and the respondent in person.

D. MUSINGA

JUDGE