



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Misc Civil Appli 135 of 2004

KALYA & CO. ADVOCATES:.....APPLICANT

VERSUS

TAUSI ASSURANCE CO. LTD:.....RESPONDENT

RULING

This is an application by the applicant, for inter alia, an order that this court do order the Deputy registrar to tax items 1 and 2 of the Advocate - client bill of costs dated 29th June, 2004. Four other prayers in the application had been disposed of or were spent before the hearing and counsel only argued prayer 5 of the application.

The grounds in support of the prayer for taxation of the bill of costs are:-

1. That items 1 and 2 of the Bill of costs were not taxed.
2. Counsel for the Respondent instructed M/S Nyaundi Tuiyott & Co. Advocates who inadvertently conceded items 1 and 2 of the Applicant's bill.
3. Mistakes of counsel should not be visited upon an innocent litigant.
4. It is just and equitable that items 1 and 2 are retaxed.

In their supporting affidavit, The Applicant stated that the bill of costs came up for taxation before the Taxing Master on the 21st June, 2005. During the taxation, the applicant's advocates did not object to items 1 to 9 of the bill of costs. The taxing Master delivered her Ruling on the taxation on 5th July, 2005. She did not tax off items 1 to 9.

The applicant's advocates claimed that later when they perused their file, they discovered that there was a letter from their instructing Advocates to the effect that they should object to items 1 and 2 of the bill of costs. They assert that this was a mistake on their part and the same ought not be visited on their client, an innocent litigant. They add that even if they did not object to the items in question the Taxing Master had a duty to consider the items in question.

The Respondent filed a Replying Affidavit and Grounds of opposition. I have considered the application, the Replying Affidavit, Grounds of opposition and submissions of counsel. The Taxing master delivered a short ruling on 5th July, 2005 in which she taxed the bill of costs at Shs.206,455/=.

She said that she had carefully scrutinized the Advocate-client of costs and the submissions made by counsel.

Before filing this application, the Applicant had made an application for review of the Ruling and taxation. The application was dismissed with costs by the Deputy Registrar as the Taxing Master. The applicants did not file any appeal or reference against the said dismissal of their application for review.

Applicants also did not file any reference to this court against the Ruling on taxation under the provisions of Rule 11(1) and (2) of the Advocates Remuneration Order. They chose to apply for review before the taxing master. The present application is made under the provisions of section 3A of the Civil Procedure Act invoking this court's inherent jurisdiction. The Respondent have taken issue with this procedure and have raised a jurisdictional point of law in this regard.

I was referred to the decision of my brother, Honourable Justice Ringera (retired) in **MACHIRA & CO. ADOVATES –VS- ARTHUR MAGUGU & ANOTHER** Civil suit Misc. Application No.358 of 2001 (un reported) in which he stated:-

“ First, the Advocates Remuneration Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. It does not provide for an appeal from any sort of decision by the Taxing Officer and indeed Order 42 of the Civil Procedure Rules is clear that appeals lie either as a matter of right or with leave from orders made under the Civil Procedure Rules. No mention is made of orders made under the Advocates Remuneration Order. And it is a basic principle of procedural law that appeals to the High Court lie only where a right of appeal has been conferred by statute. Secondly, as I understand the practice relating to taxation of bills of costs, any decision of a taxing officer whether it relates to a point of law taken with regard to taxation or a grievance about the taxation of any item in the bill is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates Remuneration Order. In the premises, I reject the submissions that the client's reference is misconceived.”

I wholly agree with the said decision and the interpretation of the law by the Judge. In this application, the Applicant has invoked the provisions of Section 3A of the Civil Procedure Act. It is trite law that this provision cannot be invoked to commence any proceedings before the court. The section gives the court the power to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is always complimentary to the specific provisions which commence proceedings.

I do hold that the Applicant ought to have invoked Regulation or Paragraph 11 of the Advocates Remuneration Order. This court has no jurisdiction to determine any Reference or appeal against the decision of a taxing master under the provisions of section 3A of the Civil Procedure Act.

I would add that the Applicant having applied for review of the Ruling on taxation could only appeal against the said decision and not file a reference as if nothing happened before the Taxing Master. There was no disclosure of this material fact by the Applicant and this amounts to an abuse of the court process.

In the light of the foregoing, I do hereby dismiss the Applicant's Notice of Motion dated 13th September,2006 with costs to the Respondent.

DATED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF NOVEMBER,2006.

M.K. IBRAHIM

JUDGE