



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 658 of 2004 (OS)

POSTAL CORPORATION OF KENYA.....PLAINTIFF

VERSUS

DONALD KIPKORIR & 3 OTHERS.....DEFENDANTS

RULING

This is an originating summons brought by a client (the Plaintiff) against its erstwhile advocates (the Defendants) under Order 42, Rule 4(1) (b) and (2) of the Civil Procedure Rules (the Rules). It seeks the following main orders.

- (1) That the advocates be ordered to pay up to the client the sum of Kshs.16,007,739/50 within 14 days from the determination of the originating summons.**
- (2)**
- (3)**

The grounds for the application as stated on the face thereof, and which constitute the background of the matter, are as follows:-

(i) that there existed an advocate and client relationship between the Defendants (M/S KIPKORIR, TITOO & KIARA, ADVOCATES) and the Plaintiff (POSTAL CORPORATION OF KENYA) with the former acting for the latter in HCCC No. 919 of 2002 (POSTAL

COROPRATION OF KENYA VS NATION MEDIA GROUP LIMITED AND 6 OTHERS);

(ii) that the Defendants were paid by the Plaintiff the sum of Kshs.21,286,225/00 as a deposit towards their legal costs in the said suit;

(iii) that upon termination of the relationship of advocate and client between the Plaintiff and the Defendants in the aforesaid suit the Defendants filed their bill of costs for taxation in HC MISC. CAUSE NO. 1109 OF 2003, and the same was on 5th March, 2004 taxed at Kshs.5,278,485/50;

(iv) that consequently the Defendants are holding the sum of Kshs.16,007,739/50 that is rightly due to the Plaintiff; and

(v) that the Defendants have refused or neglected to pay up the same amount to the Plaintiff despite request in that regard.

There is a supporting affidavit sworn by one EDGAR IMBAMBA, the manager, legal services of the Plaintiff, in which are deponed matters constituting the grounds of the application. To it are annexed copies of the plaint in the suit in which the Defendants acted for the Plaintiff, deposit request notes by the Defendants addressed to the Plaintiff, payment vouchers by the Plaintiff in favour of the Defendants, the Defendants' bill of costs filed in HC MISC. Cause No.1109 of 2003 charged at Kshs.169,810,992/00, the taxing officer's ruling on taxation, and the certificate of taxation in the sum of Kshs.5,278,485/50 dated 19th March, 2004.

The Defendants have opposed the application upon the following grounds (grounds of opposition dated 7th April, 2005):-

(i) that the application is an abuse of the process of the court;

(ii) that the Defendant's bill of costs having been taxed on 5th March, 2004, and the Defendants intending to object to the taxation, they wrote to court requesting for the reasons on the taxation;

iii) that the taxing officer concerned, Mr. Muya, left the Judiciary before he could give the reasons, and the Defendants have therefore applied for taxation de novo;

(iv) that the Defendants are entitled to hold the monies concerned pending the outcome of the fresh taxation; and

(v) that there has been inordinate delay in bringing the present originating summons.

There is a replying affidavit sworn by DONALD B. KIPKORIR, one of the Defendants. In it it is deponed, inter alia, that the Defendants objected to the ruling on taxation of 5th March, 2004 by a letter dated 15th March, 2004 in respect to certain items of the bill and that the said letter was filed in court on 26th March, 2004. It is further deponed that the said letter also requested for the reasons for the ruling on taxation, that the taxing officer has since left the Judiciary and has not give the reasons for his ruling on taxation as required by Rule 11(2) of the Advocates (Remuneration) Order. It is argued in the replying affidavit that the reasons for the ruling ought to be given in addition to the ruling itself on the taxation, that the Defendants will be greatly prejudiced if this present application proceeds before the reference intended to be filed by the Defendants is heard, and that since the taxing officer is not available to give his reasons for the ruling the taxation should be heard afresh.

The learned counsels appearing made submissions along the positions taken by their respective clients as stated in their respective pleadings. The Plaintiffs' counsel cited some three cases, all being decisions of this court. In MACHIRA & CO ADVOCATES –VS- ARTHUR K. MAGUGU & ANOTHER, Nairobi HCCC No. 358 of 2001 (unreported), Ringer, J. (as he then was) emphasized the need to comply with the provisions of Rule 11 of the Advocates (Remuneration) Order with regard to lodging objection to taxation and filing reference to the High Court against the decisions of taxing officers on taxation as such decisions can only be challenged as provided in the said rule. Okwengu, J. similarly held in MBURU THUKU –VS- MUTHANGA THUKU, Nyeri HC Misc. Application No. 87 of 2004 (unreported). And in KOBIL PETROLEUM LIMITED –VS ALMOST MAGIC MERCHANTS LIMITED, Nairobi HCCC No. 1970 of 2000 (unreported), Ringer, J held, in effect, that where a taxing officer has give a reasoned ruling on taxation further reasons need not be sought or supplied subsequently, and that a reference to the High Court can be lodged upon such ruling. In his view, to hold otherwise would be to “make a fetish of the procedural rule in paragraph 11(1) of the Advocates (remuneration) Order”, a provision which in his opinion was not intended to be “ritualistic”.

For his part the Defendants' counsel heavily relied upon the decision of Mwera, J. in OSEKO & COMPANY ADVOCATES –VS- OCCIDENTAL INSURANCE COMPANY LIMITED, Machakos HC Misc. Applications Nos. 149, 153, 156, 157, 158, 159, 160 and 161, all of 2000 (unreported) where he

held:-

“.....The law does not allow for directly filing a chamber summons to object to an item in the taxed bill before a judge BEFORE (the emphasis is his) requiring the taxing officer first to render reasons for awarding the sum on (the) contested item....

“.....No matter that the taxing officer gave reasons in his first ruling, if Mr. Omolo’s client was not satisfied, it was bound by the law to require reasons from the taxing officer regarding his decision before coming here.....”

I must, respectfully differ with Mwera, J. if the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, why should further reasons be sought or supplied simply because the unfortunate wording of subrule (2) of Rule 11 of the Advocates (Remuneration) Order seems to demand so? What further purpose will be served by the further reasons not already served by the reasons contained in the considered ruling? To borrow the words of Ringer, J., did the Chief Justice, in formulating the said subrule, intend that there should be ritualistic observance thereof even when reasons for the disputed taxation are already contained in the formal and considered ruling? I think not.

In the instant case, immediately after the taxing officer delivered his ruling on taxation on 5th March, 2004 the Defendants’ counsel applied for “typed reasons for the ruling”. The taxing officer ordered:-

“The ruling to be typed upon payment as it has the reasons.”

I have not heard any complaint from the Defendants that they have not been able to get a copy of the taxing officer’s ruling. So, what other “reasons for the ruling” did they expect from the taxing officer? In my view they could have legitimately lodged a reference under subrule (2) of Rule 11 aforesaid upon receipt of a copy of the ruling of the taxing officer. And in any event, the Defendants having lodged their objection to taxation on 26th March, 2004 (by their own word) the objection was out of time as the taxation was on 5th March, 2004. Sub-rule (1) of Rule 11 requires that notice of the objection be given within fourteen (14) days after the taxation.

As things now stand, there is no reference filed by the defendants challenging the taxation. The application for an order for taxation afresh said to be now pending before another division of this court is not such reference. There is no claim by the Defendants for any other fees or costs from the Plaintiff upon which they may claim to hold the money the subject-matter of this present application as a lieu. Nor have I heard any claim by the Defendants that the Plaintiff will be unable to pay them any additional fees found to be due should they ultimately succeed in challenging the taxation of 5th March, 2004. So, why should they be permitted to continue holding onto the Plaintiff’s money? I thin, with respect, that the Defendants are merely trying to exploit the leaving of the Judiciary of the taxing officer as a means of holding onto the Plaintiff’s money without just cause.

Under Rule 4(1) (b) of Order 42 of the Rules, where the relationship of advocate and client exists or has existed and the court may, on the application of the client or his legal personal representative, make an order for the payment or delivery up by the advocate of money or securities. Under subrule (3) of the same rule, if the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocates lieu, if any, as the court thinks fit. In the instant case there is no such claim or lieu. Indeed the Defendants’ costs have already been taxed and paid. There is no legitimate challenge to that taxation pending.

For all the reasons given above I will allow the originating summons and grant prayer No. 1 thereof with costs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JUNE, 2005.

H.P.G WAWERU

JUDGE

DELIVERED THIS 17TH DAY OF JUNE, 2005.