



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

MISC. CASE NO. 299 OF 2004

S. GICHUKI WAIGWA PLAINTIFF

VERSUS

ROCKLAND (K) LIMITED DEFENDANT

R U L I N G

This Chamber Summons, dated 15/7/04, under Section 48 of the Advocates Act; Rule 11, Advocates Remuneration Order, Cap.16, and Section 3A of Cap.21, Laws of Kenya, seeks the following Orders:-

- 1. Extension of the time within which the client may object to the Certificate of Taxation dated 15/6/04 and the taxed costs thereunder.**
- 2. Setting aside the Certificate of Taxation dated 15/6/04 and the taxed costs thereunder.**
- 3. Leave to the client to defend the Advocate/Client Bill of costs dated 20/4/04.**
- 4. Stay of the hearing of the Advocate's Chamber Summons Application dated 24/6/04 pending determination of this application.**
- 5. Costs of this application be in the Cause.**

The application is supported by Affidavits of Johnson Muthama and Kethi Kilonzo, of even date, and on the grounds that:-

- (a) The client was not given an opportunity to defend itself against the Advocate/Client Bill of costs dated 20/4/04;**
- (b) The taxed costs of K.shs.306,103/50 against the client are excessive.**
- (c) The Bill of Costs was taxed and the Certificate of Costs obtained contrary to the law generally and particularly the Advocates Act.**
- (d) The Bill of Costs was taxed in the absence of the Client, thus occasioning a miscarriage of justice and in breach of the Rules of Natural Justice.**
- (e) The Bill of costs was taxed in the absence of the Client as a result of a mistake of its Advocates on record and the Client ought not be punished for the inadvertence of its Advocates on record.**

(f) The Client is under threat to suffer undue prejudice arising from the Certificate of Taxation and the taxed costs thereunder both obtained in its absence.

In opposition, through their Replying Affidavit, dated 12/9/04, the Advocate/Respondent avers, inter alia, that:-

- 1. The application is vexatious and only intended to delay the payment of what is rightfully due as Advocate/Client costs;**
- 2. The Advocate/Client Bill of costs was filed on 21/4/04 and slated to be heard on 12/5/04.**
- 3. When Notice of Taxation dated 23/4/04 was issued, the applicant was duly served on 28/4/04 and it acknowledged by stamping a copy of the notice of taxation.**
- 4. Respondent filed the Bill of Costs after the advocates for the applicant gave an undertaking to pay the amount taxed within 30 days of taxation.**
- 5. Having been served at least 19 days before the taxation date, the applicant cannot be heard to say that it was not given an opportunity to defend itself.**
- 6. The applicant was indolent and no miscarriage of justice can be said to visit such a litigant.**
- 7. The application dated 15/7/04, together with the Supporting Affidavits, are not meritorious as they are not consistent as to the facts deponed thereto.**
- 8. Prayer No.4 is already spent.**

Upon perusal of the pleadings herein, and the submissions by learned counsel for both sides, the following are matters of common ground:-

The Client/applicant was duly served with both the Notice of the Bill of Costs and the hearing of the Taxation. The Bill of Taxation dated 20/4/04 was duly served on the Client on 28/4/04 and the Taxation was on 12/5/04 and the Ruling, on 13/5/04, dealt with the Certificate of Taxation. Deligently, the Client/Applicant in this application handed over all the papers and Notices to its counsel who, as per her Affidavit, inadvertently, by error or mistake, failed to file The Notice of Appointment, much less enter any appearance until 15/6/04, long after the Taxation process had been completed and when the Advocate/Respondent herein, was seeking to enforce professional undertaking against the Clients' advocates – Kilonzo & Company Advocates.

Accordingly, to say that the client was taxed and condemned to pay costs unheard, and against the Rules of Natural Justice, is strictly a misnomer. Upon the Respondent serving the relevant Notices to the Client, what else is expected of him short of physically dragging the client to court? That is not the law.

It is also common ground that the mistake or non-appearance to challenge the Bill of Costs at the Taxation lies squarely on the client's Advocates, not on the client, or the Respondent/Advocate, in this application. That I believe is the basis for deposit of the Taxed amount, by the clients counsel, by way of professional undertaking.

Whether the Chamber Summons herein, dated 15/7/04, should or should not be granted turns on in a very simple but important principle – that is whether a litigant should be victimized for the mistake, oversight, or even negligence, of that litigant's counsel? That is the only issue in this application.

The pleadings show that the failures by the client's counsel were not intentional, and that the client acted promptly upon receipt of the Notices from the Respondent.

On the basis of the pleadings, there is no doubt that the Taxation was done ex parte because, for the

reasons given above, the client could not, and did not, appear at the taxation hearing. I believe and accept the reasons given by the client applicant in the two Affidavits by Johnson Muthama and Ms. Kilonzo, and so do I trust that the taxed sum of K.shs.306,103.50/= was deposited in interest bearing account, in the joint names of counsel for both sides, as per this court's orders of 19/7/04.

That being the case, this court's view is that no litigant should be a victim of his/its counsels errors, mistakes, or negligence, especially in a case like this one where, because of the counsel's failings, the litigant feels that it was excessively taxed and prays for an opportunity to challenge the taxation and the items therein.

Whether the taxed sum is excessive or not is not for me to pass on at this stage. That will be the substantive issue to be canvassed at another forum. Any comment on it, at this stage, would be prejudicial.

For all the above reasons, this court grants the following orders:-

- 1. Extends the time within which the Client/applicant herein may object to the Certificate of Taxation, dated 15/6/04 and the taxed costs thereunder, by two weeks from today's date.**
- 2. Sets aside the Certificate of Taxation herein above and the taxed costs thereunder.**
- 3. Grants leave to the client to defend the Advocate/Client Bill of Costs dated 20/4/04.**
- 4. Costs of this application to be paid by the Client applicant herein.**

DATED and delivered in Nairobi, this 17th day of June 2005.

O.K. MUTUNGI

JUDGE