



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
HIGH COURT MISC. 240 OF 2001

MUEMA KITULU & CO. ADVOCATES ::::::::::::::::::::::::::::::: APPLICANT

VERSUS

LUKENYA RANCHING & FARMING CO-OP. SOCIETY ::::::: RESPONDENT

R U L I N G

The application dated 1/4/03 by way of Chamber Summons is brought pursuant to rule 11 (1) and 2 of the Advocates Remuneration Order and Section 3 A Civil Procedure Act. Prayer 2 of the Chamber Summons was determined by a consent order recorded by the parties on 29/7/04. What is left for determination is prayer 3 of the Chamber Summons in which the applicant seeks orders that the miscellaneous cause herein comprising thirteen purported bills of costs be struck off.

The grounds upon which the application is brought are that the applicant/Respondent unprocedurally filed 13 advocate/client bills of costs under one miscellaneous cause instead of filing separate causes as the various bills arise out of different cases which include arbitration, lower court and High Court cases and that therefore the provisions of the Advocates Remuneration Order on taxing of bills was offended.

The application is supported by the affidavit of Mrs Nzei advocate for the Respondent/applicant. A supplementary Affidavit was also filed by Alfred Johnson Mbindyo the treasurer of the applicant society in which the deponent urged the court to strike off the grounds of opposition and the replying affidavit because they are filed by Muema Kitulu Advocates who are not advocates for the Respondent.

Grounds of objection dated 24/4/03 were filed by Muema Kitulu Advocates and Guserwa Advocates. Their contention was that the application cannot be sustained under provisions of Rule 11 (2) of the Advocates Remuneration Order. It is also contended that the objection to the format of the bills should have been done before taxation; that there is no provision limiting the format or number of Advocates/Clients bills that can be combined for taxation where the client and the Advocate are same parties and that the application is, therefore, frivolous, vexatious and an abuse of court process.

Arising out of the submissions by counsel, one issue that arose is whether this court can grant an order to strike out the bill of costs as filed. Mr Musyoki for the Respondent submitted that this court has no jurisdiction to issue an order to strike out the bill of costs. He further submitted that before the taxation, the bills as filed were before the Deputy Registrar for taxation severally but the applicant never objected to their form and that the issue should have been considered by the Deputy Registrar (taxing officer) and that under Para 11 of the Advocates Remuneration Order where issues touching on taxation can be entertained by the High Court, the objecting party issues notice on items being objected to but not the bill and that once the taxing officer indicates how he arrived at the decision, then the objector proceeds under Para 11 (2) by filing Chamber Summons before a Judge. Mrs Nzei for applicant contends that indeed she has complied with the above paragraphs and the application is properly before this court.

From the record I do notice that counsel for applicant sent a notice dated 30/1/03 to the Deputy Registrar Machakos High Court in which it was indicated that the applicant objected to the taxing officer's decision on all items of the 13 Advocate/client bills of costs. By a court order of 29/1/03, the Deputy Registrar gave his reasons for the decision he made as a result of which the present application dated 1/4/03 was filed by the Respondent/Applicant. The bills herein had been taxed ex parte and that is why a consent order was filed setting the order aside; since taxation had not taken place inter partes, it cannot be ruled out that the applicant would not have raised an objection as to the format of the bills. By giving notice that the whole decision of the Deputy Registrar was objected to, I believe that would include the form of the bills so that if it was incompetent or improper, then the applicant can still challenge it within Para 11 (2) of Advocates Remuneration Order by bringing the application and this court has jurisdiction to consider this application.

Another issue that Mrs Nzei raised is that the grounds of objection and replying affidavit filed by Guserwa Advocates and Kitulu Advocates are incompetent and should be expunged from the record. It is her contention that once Guserwa and Co. Advocates filed their notice of appointment on 28/8/01, Muema Kitulu Advocates who are the applicant/Respondent in this case ceased to act for themselves and the fact of the filing the replying affidavit was improper. Further to the above Mr Musyoki then came on record by filing a notice of appointment instead of notice of change. It is Mr Musyoki's argument that an Advocate who is a party to a suit can be represented by himself through its proprietor or a partner and that Muema Kitulu were on record for applicant and the documents filed were therefore properly before the court and that there was no mess on record as submitted by Mrs Nzei for the applicant. The bills of costs were filed by Muema Kitulu Advocates. The applicant in the bills was the same Muema Kitulu. It is true that a firm of Advocates can have conduct of a matter in which they are a party or a partner can appear for them. Later on 27/8/01 Guserwa Advocates filed notice of appointment as an Advocate for the applicant and served the notice on the Respondent's Counsel. There is no indication that they were to act alongside Muema Kitulu Advocate or that they were taking over from Muema Kitulu as advocates for applicant. The two firms of Guserwa Advocate and Muema then filed grounds of objection on 24/4/03. Mrs Nzei contends that Muema Kitulu being a party to the suit could not have filed joint grounds with Advocates. Since it is agreed that a firm of Advocates can appear for itself if sued, it follows that they can file grounds of objection even if jointly with another counsel because they are based on law and not evidence and are properly on record.

Mr Kinyua Musyoki came on record on 13/5/03. He filed a notice of appointment. Though Mr Kinyua says that he was appointed in addition to the other advocates, that is not correct because the notice clearly indicates that he took over from Guserwa Advocates. He should have filed a notice of change. The question is whether the filing of notice of appointment instead of change would render the notice incompetent. In my view, it does not. It does not prejudice anybody and since it indicates when it is taken over from, the court will accept it as a valid notice.

The other issue raised is whether the 13 bills of costs as filed by the applicant Muema Kitulu are proper or incompetent. It was Mrs Nzei's submission that the filing of the 13 bills in one miscellaneous application offends provisions of Par 13 of Advocates Remuneration Order and that each bill should have been filed in its own miscellaneous cause. On the other hand, Mr Musyoki argues that what is on record is one bill in respect of various matters in which the applicant was instructed to act for one client. He contends that the 13 bills are in a block form or one bill in a summarized form and that under Para 13 of Advocates Remuneration Order it was up to the client to seek to have the bills separated and itemized bill filed, which they did not do and that applicants cannot be let to apply to do so at this stage.

Section 45 of the Advocates Act makes provisions on how the Advocate and client can agree on the Advocates remuneration. It would not be applicable under the circumstances. Section 48 of the Advocates Act goes ahead to give guidelines on how fees is to be charged if they had not agreed as provided under Section 45 of the same Act. No advocate can file a suit for recovery of costs unless the bill of costs has been sent to the client and it can only be filed after expiry of one month. The bill can be in summarized form. What this means is that Section 48 bars an Advocate from filing a suit against his client for recovery of costs before issuing a fee note which is in the form of bill.

Para 13 (1) of the Advocates Remuneration Order then provides that if the bill was filed in block or summarized form, when it comes up for taxation the taxing officer can allow the advocate to submit an itemized bill. The question then is what is a block or summarized bill and what is an itemized bill?

I do agree with Mrs Nzei that a block or summarized bill is one whose charges are cumulative so that the specific charges of each item are not indicated. However, an itemized bill is one where the Advocate specifies or tabulates the charges for every item.

The issue then is whether what the Respondents presented before the taxing officer was a block or summarized bill. The Respondents have admitted that they acted for their client Lukenya Ranching in different matters. Indeed a look at the bill clearly shows different case numbers, some bills arising from arbitration. The cases are totally unrelated and under each case is a list of items charged. The amount of each bill is indicated. It is evident that these are different bills lumped together in one miscellaneous application which is irregular. Para 13 of Advocates remuneration Order envisages a situation where an advocate files a bill in respect of a particular case not cases and has to file a miscellaneous cause in respect of such bill. Par 13 (3) provides as follows:

“The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue but no advocate shall be entitled to an instruction fee in respect thereof.”

The above paragraph provides, therefore that a miscellaneous application will be filed in respect of each bill. They cannot be lumped up in one miscellaneous application as the Respondents have done. What is in the application is not a block or summarized bill. The taxing officer should not have taxed the said bills as the form was irregular and cannot be cured.

As earlier found when the applicant filed objection to the taxation of the 13 bills of costs filed, the taxing officer filed his reasons to why he taxed the bill as he did. There was no reference to the form of the bills as filed. The taxing officer did not note the anomaly in the bills as filed. Under normal circumstances if the bill was improperly taxed this court would remit back the bill for taxation before the same court or another taxing officer. This is a different scenario because the bills cannot be taxed as filed. The only option this court has, under its inherent jurisdiction is to have the 13 bills struck off so that the Respondent can file proper bills for purposes of taxation. The order taxing the bills had already been set aside by consent of the parties. The miscellaneous cause comprising of 13 bills of costs be struck off and costs in the miscellaneous cause and this application be paid to the applicant.

Dated at Machakos this 9th day of November 2004

Read and delivered in the presence of

R.V. WENDOH

JUDGE