



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

**Misc Appli 653 of 2003**

**KHAN & KATIKU ADVOCATES.....APPLICANT**

**VERSUS**

**SHABBIR MOTOR SPARES LTD .....RESPONDENT**

**RULING**

Before me is an application by the Defendant/Applicant hereinafter called the client under Order 1XB Rule 8 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all the enabling provisions of the Law. The application is seeking one main order which is that the certificate of taxation dated 31<sup>st</sup> July 2003 pursuant to a taxation of the Plaintiffs' (hereinafter called the Advocates) Bill of costs lodged on 8<sup>th</sup> July 2003 and taxed on 17<sup>th</sup> July 2003 be set aside.

The main reasons for the application are that the client was not served with the Bill of costs and the Notice of taxation at all and that the client had fully paid all fees due and owing to the Advocates. The application is supported by an affidavit sworn by one Shabbir M. Khatau the client's proprietor.

The application was opposed and there is replying affidavit sworn by one John Katiku a partner in the Advocate's firm. The application came before me for hearing on 22<sup>nd</sup> November 2004. The client was represented by Mr. Oonge and the Advocates were represented by Mr. Masese. Counsel for the client restated what was in the Chamber Summons and the supporting affidavit. He insisted that the client was not served with the Bill of Costs in question and the Notice of Taxation. He further submitted that the Courts' discretion is unfettered and in this case the Advocates will suffer no prejudice if the application is allowed as they can be compensated by an award of costs. Counsel relied upon two cases for the proposition that where costs are an adequate remedy, a litigant should not be denied a hearing. The cases are:

1. Kenya Ports Authority -v- Kustron (K) Limited:

NAIROBI C.A. No.142 of 1995 (UR)

2. Patriotic Guards Limited –v- Barclays Bank of Kenya Limited

NAIROBI HCCC No.838 of 2000. (UR).

Responding to the submissions made on behalf of the Client's, Counsel for the Advocates relied upon the Advocate's replying affidavit aforesaid. He maintained that the client had been served with the Bill of Costs and the Notice of taxation as stated in the affidavit of service of one Peter Mburu Waithaka sworn

on 16<sup>th</sup> July 2003. In Counsel's view the client is not entitled to the order sought as it has come to Court with unclean hands having denied service when it was clearly served. Counsel further argued that the client was guilty of laches. It admits service of Summons to Enter Appearances on 19<sup>th</sup> September, 2003 and yet took no step until 23<sup>rd</sup> January, 2004 when this application was filed. In Counsel's view the conduct of the client is undeserving of the Court's discretion.

The above are the rival submissions made for and against the application. I have given due consideration to the submissions. I have also perused the record and the authorities cited. Having done so I take the following view of the matter.

The gist of the client's application is that it was not served with the Bill of Costs and the Notice of Taxation. I have perused the affidavit of service exhibited by the Advocate in the replying affidavit aforesaid. At paragraph 2 of the said affidavit the process server deponed that he received a Notice of Taxation dated 10<sup>th</sup> July 2003. He did not depone that he also received the Bill of Costs. At paragraph 3 of the same affidavit of service the process server deponed that he only served the Notice of Taxation and not the Bill of Costs. It is possible therefore that the client may not have been served with the Bill of Costs.

Regarding identification, the process server purportedly served a Mr. Shabbir after he identified himself as the proprietor of the Defendant Company. At paragraph 4 of the said affidavit of service the process server depones that he had previously been to the Defendants business premises for a similar service in this case. The process server does not depone that he had served Mr. Shabbir before. Indeed if he had, then Mr Shabbir would not have had to identify himself. I have also gone over this record I have not traced any other process having been served by the process server.

In the result I am not satisfied that the client was served with both the Notice of Taxation and the bill of Costs.

Even if I had found that the client was served with the Notice of Taxation and the Bill of Costs, I would still exercise my discretion in its favour for the following reasons. It has alleged, that it paid the Advocates agreed fees in full. This is an issue which was not canvassed before the Taxing Officer. The Advocates have also stated that they obtained leave to cease acting for the client in HCCC No.70 of 2000. The suit is therefore still pending disposal. The client may still require representation in the suit and the same instructions fees claimed in the Bill of Costs will still be expected by the Advocates who will conclude the proceedings. The Taxing Officer may consider this during an inter partes taxation. I am of the view that the participation of the client at the taxation would not be a mere formality. I bear in mind the principles for setting aside default orders. Harris J. in Jesse Kimani -v- McConnel (1966) E.A. 541 said that the Court should consider whether or not it would be just and reasonable to set aside or vary the judgment upon terms to be imposed. And in Mbogo -v- Shah (1968) E.A. 93, the Court of Appeal for East Africa held:

***“The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however, irregularly, should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned, should be considered and finally I think, it should always be remembered that to deny a subject a hearing should be the last resort of a Court.”***

Keeping in mind the above principles, I cannot shut out the client from its day in Court. I accordingly allow the clients' application dated 23<sup>rd</sup> January, 2004 and set aside the Certificate of Taxation dated 31<sup>st</sup> July 2003 in respect of the Advocates Bill of Costs lodged on 8<sup>th</sup> July 2003 and taxed on 17<sup>th</sup> July 2003. I order that the said Bill of Costs be taxed afresh by a different Taxing Officer.

There will be no order as to the costs of this application. The Advocates shall however have their thrown away costs of the application before the Taxing Officer. These then are the orders of the Court.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>th</sup> DAY OF DECEMBER 2004.**

F. AZANGALALA

**AG. JUDGE**

Read in the presence of:-