REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 4 OF 2018

M.A MWINYI ADVOCATE.....ADVOCATE/RESPONDENT

-VERSUS-

MATANO MWASINA .....CLIENT/APPLICANT

RULING

(Application seeking to set aside the taxation of an advocate/client bill of costs; Advocate filing a bill of costs for taxation after a Notice of Change of Advocate was filed on behalf of the client in an ongoing suit where the client was defendant; taxation notice served upon the new counsel but counsel not attending court; taxation proceeding ex parte; application now filed on behalf of client to set aside the taxation; no affidavit sworn by client; only affidavit sworn by counsel; held that counsel incompetent to swear the affidavit in the circumstances and application must fail; court nevertheless addressing itself on whether service upon counsel was sufficient; court holding that service was proper as taxation proceedings in a contested matter arise from the suit itself and counsel on record in the suit must be deemed to be counsel in the taxation matter unless demonstrated otherwise; taxation notice was thus properly served; application dismissed)

1. The application before me is one filed on 3 December 2020 by (or is it on behalf of) the respondent in this miscellaneous application, which is a taxation matter involving an advocate and client (in the context of this application, I will refer to the client as the applicant and the advocate as the respondent). The taxation proceeded ex parte and the advocate threatened to execute for his fees. It is then that this application was filed by the client. The principal order sought is to have the taxation set aside. The application is based on two grounds being :-

(i) That there was no service on the applicant in terms of Order 9 of the Civil Procedure Rules, and

(ii) That it is the interest of justice that the applicant be given an opportunity to be heard and the matter determined on merits.

1. The bill of costs was filed by the law firm of M/s M.A Mwinyi Advocate who represented the applicant in the suit Mombasa ELC No. 120 of 2007. The applicant was one of the defendants in the suit. The suit itself was a claim for adverse possession filed by one Amri Mchoro Mwamuri. In it, he claimed to have acquired, by way of adverse possession, title to the parcels of land Kwale/Diani Complex/391, 393, 395, 397, and 399. The land parcel Kwale/Diani Complex/391 was owned by the applicant. The applicant appointed M.A Mwinyi Advocate who represented him until a Notice of Change of Advocates was filed by the law firm of M/s G.A Okumu & Company Advocates while the suit was still on going. It is then that the law firm of M/s M.A Mwinyi Advocate filed this taxation matter. Service was effected upon the law firm of M/s G.A Okumu & Company Advocates, but they did not attend, and the bill of costs was thus taxed ex parte in the sum of Kshs. 557,087.15/= on 28 February 2019. The Advocate then moved to execute for the said costs and it is thereafter that this application was filed.

2. The application is supported by an affidavit sworn by Ms. Grace Okumu, who is counsel for the applicant/client, and who practices in the name and style of G.A Okumu & Company Advocates. She has deposed that she took over the conduct of the suit Mombasa ELC No. 120 of 2007 (O.S) from the firm of M.A. Mwinyi Advocate, and filed a Notice of Change of Advocate on 29 November 2017. Ms. Okumu has deposed that upon perusing the file herein, she noted that she was not on record for the applicant, though there are various affidavits of service confirming that her firm was served with hearing notices. She has further deposed that every time service was effected on her law firm, she notified the process server that her law firm was not on record. Ms. Okumu has contended that service upon her firm (for this miscellaneous taxation cause) was invalid, as she was never a recognized agent under Order 9 Rule 2 of Civil Procedure Rules. She has deposed that an advocate/client bill of cost is personal, and ought to be served to the client who will then appoint his advocate, or appear in person. Ms. Okumu avers that the bill of cost was taxed unopposed as a result of the affidavit of service which lacked basis because she was not on record, and further to this, the bill of costs as drawn was exaggerated owing to the value of the land in dispute. She has deposed that the value of the land is Kshs. 2,400,000/= , clearly in reference to the claim in the bill of costs that the land was valued at Kshs. 3,000,000/=.

3. The application is opposed by the replying affidavit of Mohammed Athumani Mwinyi who practices in the name and style of M/s M.A Mwinyi Advocate. He deposed that the chronology of events preceding the Notice to Show Cause (which was execution of the taxed bill of costs by way of notice to the applicant to show cause why he should not be committed to civil jail) is that on 6 June 2018, he filed a bill of

costs dated 31 May 2018, and served on 22 June 2018. He deposed that the taxation matter came up for hearing on 9 August 2018, 20 September 2018, and 16 November 2018, when due to one misadventure or the other did not proceed. He further stated that on 15 February 2019, the Bill of Costs was argued ex-parte, and ruling was set for 28 February 2019 after the court had satisfied itself of due service upon the applicant's advocates (respondent in the taxation matter). Mr. Mwinyi has deposed that the ruling wasread on 28 February 2019 and a copy was provided. He has further deposed that the Certificate of Taxation was served upon the firm of Ms. Grace Okumu on 19 March 2019. He has stated that a Notice of Motion under Section 51 (2) of the Advocates Act (for judgment to be entered for the amount taxed) was filed on 26 April 2019 and served upon the firm of Ms. Grace Okumu on 29 April 2019. The same proceeded on 11 November 2019, whereupon ruling was read on 14 November 2019. The decree was extracted on 2 December 2019, and Notice to Show cause was filed thereafter. Mr. Mwinyi states that the applicant only took action after being served with the Notice to Show Cause.

4. When the application came up for *inter-partes* hearing, I directed that the matter be canvassed by way of written submissions.

5. In her submissions, Ms. Okumu submitted inter alia that she represented the respondent in (Mombasa) ELC No. 120 of 2007 (O.S) having taken over the conduct of the matter from the firm of M.A. Mwinyi Advocate. She submitted that service of the taxation cause (which it will be noted is Mombasa ELC Miscellaneous Application No. 4 of 2018) was effected on her firm but her firm was not on record in the said taxation matter. Counsel submitted that the two suits (meaning the main suit and the taxation cause) are separate and distinct, and that all the notices served upon her firm in relation to the taxation cause are invalid. She submitted that it was as a result of the said service that her client's bill of costs was taxed unopposed. Ms. Okumu further submitted that there is no notice of appointment indicating that the firm of G.A Okumu & Co. Advocates was on record for the miscellaneous application herein, and also there is no affidavit of service to confirm that the respondent was served with the hearing notice for 15 February 2019. Counsel referred me to Order 9 Rule 1 of the Civil Procedure Rules, and submitted that the firm of G.A Okumu & Co. Advocates was not on record, and had no authority to plead or act in this matter. She submitted that there is no evidence placed before the court to confirm that the applicant was served in person for the hearing of the bill of costs on 15 February 2019, and further to this, there is no memorandum of appearance on behalf of the respondent in terms of Order 6 Rule 2 (1) of the Civil Procedure Rules. She also referred me to Order 5 Rule 8 (1) and Order 12 Rule 7. Counsel cited the case of *Shah vs. Mbogo 1967 EA 116* which laid down the principles which the court should consider in setting aside an *ex parte* judgment or order. Ms. Okumu submitted that the discretion of the court is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. She submitted that it is trite law, that as far as possible, all matters must be heard and determined on merits at a full hearing, where all the issues raised in the pleading can be fully conversed and documents scrutinized under cross-examination. Counsel cited the case of *Jaivirsinthinji T/A Darbar Wholesalers & 3 others vs. Prudential Drycleaners Limited (2004) eKLR*, and submitted that where justice of the case mandates, mistakes of advocates, even if they are blunders, should not be visited on the clients when the situation can be remedied by costs. Counsel also referred me to the case of *Lucy Bosire vs. Kehancha Division Land Dispute Tribunal & 2 Others (2013) eKLR* and submitted that there is no allegation presented by Mr. Mwinyi that he stands to suffer any prejudice that cannot be compensated by way of costs if the application is allowed. Ms. Okumu submitted that as per Article 50 of the Constitution, all parties need to be given a fair hearing. She further submitted that this application was made without undue delay. Lastly, Ms. Okumu submitted that the application has been made in good faith, in accordance with the principles of natural justice and fairness, that demands that a party should not be condemned unheard.

6. On his part, Mr. Mwinyi submitted that his law firm of M/s M.A Mwinyi Advocate represented the respondent in Mombasa ELC No. 120 of 2007, until sometime in November 2017, when the firm of G. A. Okumu & Co. Advocates took over from him. He submitted that he filed a Bill of Costs on 6 June 2018, for determination of his fees after the respondent failed to pay. Counsel submitted that the Bill went for taxation on 15 February 2019, after the court was satisfied of proper service upon the applicant. He submitted that in the supporting affidavit, Ms. Okumu has acknowledged that her firm was duly served. Counsel submitted that M/s G. A. Okumu & Company Advocates chose to ignore service upon them and all the proceedings in court, to which they did not respond or attend from way back in 2018, and they have woken up now after the Deputy Registrar issued a warrant of arrest against her client. Mr. Mwinyi submitted that this application is meant to deny him his due fees as awarded and is wholly unmerited. Counsel submitted that when a party seeks to challenge a taxing master's award, they have to write to the taxing master spelling out their specific reservation within 14 days of the decision, which was not done, and subsequently if not successful, they have to proceed by way of reference to the High Court, and not by the path now being taken. To lay emphasis on his assertion, counsel referred me the Court of Appeal decision of *Machira & Co. Advocates vs. Arthur K. Magugu & Another, Civil Appeal No. 199 of 2002 (2012) eKLR*, which according to him is the closest in fact to the issues in contention herein.

7. I have considered the rival affidavits and the submissions plus the authorities cited. Before I go too far, I have wondered to myself where the applicant, Mr. Matano Mwasina is, within this application, for he has not sworn any affidavit. The supporting affidavit is indeed sworn by Ms. Okumu advocate and not by Mr. Matano Mwasina himself. Although in her affidavit, Ms. Okumu stated that she has the consent of Mr. Matano Mwasina to swear the supporting affidavit, no such consent was annexed. That is why earlier in this ruling, I was questioning whether this application has been filed by Mr. Matano Mwasina, or merely on his behalf.

8. There is a long chain of authorities which frown upon the practice of advocates swearing affidavits on behalf of their clients without the clients themselves making the depositions. To cite one matter, The Court of Appeal in the case of *Gerphas Alphonse Odhiambo v Felix Adiego [2006] eKLR* stated as follows:-

> *"Ordinarily, an affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to swear and prove the facts of their own knowledge. In appropriate cases such affidavits may be struck out or given little or no weight at all. Even where exception is made to section 2(2) of the Evidence Act, as it is in interlocutory proceedings under the Civil Procedure Rules, Order 18 rule 3(1), the need to ensure that facts are proved by a person or persons who have personal knowledge of such facts is closely guarded."*

9. Order 19 Rule 3 of the Civil Procedure Rules provides that affidavits should be confined to such facts as the deponent is able of his own knowledge to prove. It is drawn as follows:-

> *Matters to which affidavits shall be confined [Order 19, rule 3.]*

(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.

10. It therefore follows that Advocates, acting on behalf of their clients, should be slow to swear affidavits unless such advocate is privy to all relevant facts.

11. In this matter, I ask myself why Mr. Matano himself, who is the client, has not come to court to state whether or not he was aware of the taxation, and whether or not he indeed instructed Ms. Okumu to act in it. The taxation concerned Mr. Matano, and it is him who was faced with a notice to show cause why he should not be arrested and committed to civil jail for not making good the taxation sum. Given that position, I find it strange that Mr. Matano has not even deemed it fit to swear the supporting affidavit herein. He has not told us whether or not he is aggrieved by the taxation and why he thinks it should be set aside. All we have before us are the words of his advocate, and I am afraid, that I cannot take the words of the advocate to be the words of the client. The client himself should have been the one to swear the affidavit, say whether or not he was aware of the taxation matter, and say why he is aggrieved by the taxation. These are issues that the client ought to have deposed. For example, one of the reasons given by Ms. Okumu as a basis for setting aside the taxation is that the value of the property is Kshs. 2,400,000/= and not Kshs. 3,000,000/=, which led to the Advocate's Bill being exaggerated. No valuation report was annexed and I do not see how Ms. Okumu can claim to be competent to give evidence on the value of the land. It appears to me as if it is the advocate now complaining and not the client. No reason has been given why it is Ms. Okumu and not her client who has sworn the supporting affidavit. I am therefore not persuaded that this application is supported by a competent affidavit and in my view the application ought to fail on that ground alone.

12. Without prejudice to the above, and in case I am wrong, let me address the issue of whether or not Ms. Okumu was properly served, for that to me, appears to be the main grievance raised in this application. The contention is that Ms. Okumu was wrongly served as she was not counsel in this matter and that her involvement was only restricted to the case *Mombasa ELC No. 120 of 2007 (OS)*. In her affidavit, Ms. Okumu deposed that *"every time service was effected on us we notified the process server that we were not on record."* There is no proof of such allegation. I have in fact gone through the affidavits of service. I can see that some were stamped *"received'* by the said firm of M/s G.A Okumu & Company Advocates. Some were not stamped and the explanation given by the process server is that the secretary who received, one Ruth, claimed that she had been instructed not to stamp the received copy for reasons that were not explained. I have not seen any document received *"under protest"* or with a disclaimer that the law firm being served is not on record. I am not thus persuaded by the above deposition of Ms. Okumu that she notified the process server that she was not on record. The evidence shows the contrary.

13. The question however remains whether Ms. Okumu was on record in the taxation matter despite not filing any Memorandum of Appearance of Notice of Appointment of Advocate, and whether service on her firm was proper. In her submissions, Ms. Okumu referred me to Order 9 Rule 1, Order 6 Rule 2 (1) , Order 5 Rule 8, and Order 12 Rule 7. Order 5 relates to service of summons and I do not think that it applies here, for no summons were being issued for purposes of service as this was not a fresh suit. What was to be served was the Taxation Notice and not Summons. Order 12 Rule 7 applies to the setting aside of an ex parte judgment and I do not see how it applies because we are not dealing with a judgment in a suit. Order 6 Rule 2 (1) provides for the filing of Memorandum of Appearance which should be after service of summons. This cannot apply for I have already pointed out that this was not a case where summons were being issued. A Memorandum of Appearance was not among any document to be filed. Order 9 Rule 1 was cited by Ms. Okumu, and I think for our purposes, Order 9 may be critical. The title of Order 9 reads "Recognised Agents and Advocates." I will set out Order 9 Rule 1 and Order 9 Rule 3, which I think may apply. They provide as follows :-

Order 9 Rule 1 - Applications, appearances or acts in person, by recognized agent or by Advocate.

Any application to or appearance or act in any court required or authorized by the law tobe made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

Provided that—

a. any such appearance shall, if the court so directs, be made by the party in person; and

b. where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney-General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act. "Any application or appearance or act in any Court required or authorized by the law to be made or done by a party in such Court may except where otherwise expressly provided by the law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf."

Order 9 Rule 3 Service of process on recognized agent

i. Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the court otherwise directs.

ii. The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

14. The question here would be whether Ms. Okumu qualified to be a recognized agent or an advocate duly appointed by the applicant, for service effected upon an appointed advocate or recognized agent, would be as good as service upon the litigant himself. My view is that she qualified, for purposes of the taxation of the Advocate's Bill of Costs, immediately she came to act for the applicant in the main suit. The taxation proceedings herein emanated from a substantial case that was ongoing in court. They did not arise from a subject matter that was novel or from a non-contested matter in court. There was already in the substantive matter an advocate acting for the applicant herein. Such advocate must be deemed, unless the client demonstrates the contrary, that he is continuing to so act even in auxiliary proceedings related to the substantive suit in court. In my view, a bill of costs emanating from a matter in court, is an appendage of to the substantive suit; and cannot be divorced from it. It is in my opinion, directly connected to the said suit, and the advocate acting for the client in the suit, unless the contrary is shown, must be deemed as also acting for the client in the taxation cause. The taxation cause in such a case is not a new matter for which service upon the advocate acting in the substantive suit would be deemed to be improper. My above opinion is buttressed after reading Rules 70 – 73 of the Advocates (Remuneration) Order, under the Advocates Act, Cap 16. The said rules provide as follows :-

> *70. Filing bills for taxation*
>
> *Every bill of costs of taxation shall be lodged with the registrar and shall be endorsed with the name and address of the advocate by whom it is lodged, and also the name and address of the advocate (if any) for whom he is agent, and the name and address of any advocate or other person entitled to receive notice of the taxation. Every such bill shall be accompanied by one carbon or other true copy thereof for each name endorsed thereon of any advocate or other person entitled to receive such notice.*
>
> *71. (not relevant)*
>
> *72. Notice of taxation to be given by taxing officer*
>
> *When a bill of costs has been lodged for taxation as aforesaid the registrar shall, upon payment of the fee prescribed, issue to the party lodging the bill a notice of the date and time (being not less than five days after the issue of such notice, unless a shorter time is specially allowed by the registrar) fixed for taxation thereof and shall also issue a copy of such notice, accompanied by a copy of the bill, to each advocate and other person whose name is endorsed on the bill as entitled to receive nice of the taxation thereof:*
>
> *Provided that where any person so entitled to receive notice cannot be found at his last-known address for service the taxing officer may in his discretion by order in writing dispense with service of notice upon such person.*
>
> *73. No notice of taxation where party has not appeared*
>
> *(1) It shall not be necessary for notice of taxation of costs to be given to a party against whom such costs are being taxed in any case in which such party has not appeared in person or by advocate.*
>
> *(2) Where an advocate has withdrawn, the provisions of Order 3, rule 12 of the Civil Procedure Rules (Cap. 21, Sub. Leg.)*

15. It will be seen from a reading of Rule 70 above that the bill of cots will have endorsed the name of the advocate lodging it, and also the name of the advocate or other person entitled to receive the notice of taxation. This advocate entitled to receive the notice of taxation can be no other than the advocate acting in the main suit. Rule 73 makes proviso for service where an advocate has withdrawn and this can only be withdrawal by the advocate acting for the client. It is not the case herein that the law firm of M/s G.A Okumu & Company Advocates had withdrawn acting for the client.

16. No authority and no law has been availed to me to support Ms. Okumu's argument that an advocate acting in a substantive suit cannot be deemed as also acting in a taxation matter arising from the same suit. I am not therefore persuaded by the argument of Ms. Okumu that since she did not file a notice of appointment of advocate in the taxation matter, she cannot be deemed to have been the advocate for the client in the said matter. My finding therefore is that service upon her law firm was proper. Whether or not she acted as instructed by her client is not something that we will ever know because the client has not sworn any affidavit. But since service was proper, and the client has not presented his reasons as to why the taxation should be set aside, I see no reason to do so.

17. Even if I was to analyze the conduct of Ms. Okumu to determine whether there was a subsisting advocate-client relationship, I will still end up with the same decision. Ms. Okumu was served with the Notice to Show Cause on 20 November 2020; she went ahead to appear in court on 25 November 2020, and sought for time to respond to the notice to show cause. This was before she filed a "Notice of Appointment of Advocate" on 3 December 2020. If indeed she was not an advocate for the applicant prior to filing her said appointment, why then was she appearing in court and making submissions for the applicant? Her conduct shows that there was indeed an advocate-client relationship. My view of the filing of the "Notice of Appointment of Advocate" is that it is nothing but an afterthought and a gimmick to try and support the argument that Ms. Okumu was not on record, which as I have analysed above, cannot be considered to be the position. This, to me, is a situation where a counsel is being protective of a client who wishes to escape from paying his advocate his hard earned fees. As was stated in the case of *Shah v Mbogo* the discretion to set aside "*is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."* If indeed Ms. Okumu was of the view that she was not on record, what was so hard with her coming to court to say that she was not on record before the taxation commenced? Why did she and her client have to wait until the taxation has been concluded, judgment entered for the advocate, and execution to take place before coming to court? This conduct, in my view, is not excusable and I am unable to exercise my discretion in favour of the applicant.

18. Whichever way I look at it, there is no merit in this application and it is hereby dismissed with costs.

19. Orders accordingly.

DATED AND DELIVERED THIS 21 DAY OF SEPTEMBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

In the presence of:

Ms. G. A Okumu for the appellant

Mr M. A Mwinyi – Respondent

Court Assistant; Wilson Rabong'o