



BM Mungata & Company Advocates v Kakonzi (Miscellaneous Reference Application 160 of 2019) [2023] KEHC 20165 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS REFERENCE APPLICATION 160 OF 2019**

GMA DULU, J

JULY 13, 2023

BETWEEN

BM MUNGATA & COMPANY ADVOCATES APPLICANT

AND

DAVID MUIMI KAKONZI RESPONDENT

RULING

1. Before me is a Chamber Summons dated November 26, 2019 filed under Rule 11(1) and (2) of the Advocates Remuneration Order 1962 (as subsequently amended), Schedule 6 of the Advocates (Remuneration) Order 2014, Section 1A, 1B and 3A of the Civil Procedure Act (cap.21).
2. The application has been filed by BM Mungata & Company Advocates against David Muimi Kakonzi, and seeks the following orders:-
 1. That the court do set aside the orders of the taxing master issued on November 20, 2019 striking out the bill of costs dated August 8, 2019.
 2. That the bill dated August 8, 2019 be reinstated and the same be taxed by a different taxing master other than Hon. Otieno.
 3. That costs of the application be paid by the respondent.
3. The application has grounds on the face of the Chamber Summons that the taxing master misapprehended Section 44, 51 and 46 (c) of the Advocates Act, that she misunderstood the decision in JR Misc 3 of 2018 delivered on July 27, 2018 that she erroneously defined an advocate as a party, and wrongly found that the application was unopposed while a replying affidavit dated October 22, 2019 had been filed on October 23, 2019.
4. The application was filed with a supporting affidavit sworn on November 26, 2019 by BM Mungata Advocate which amplifies the grounds of the application, and annexed other documents.



5. The applicant also filed a further affidavit which he swore on March 20, 2022 principally explaining that under Rule 11 of the *Advocates Remuneration Order*, no appeals procedure is provided from a decision of the taxing master.
6. The application is opposed through a replying affidavit sworn by the respondent on February 20, 2020 in which it was deponed that the taxing master was correct in striking out the bill of costs as the respondent's cause was struck out due to the negligence of the advocate/applicant, and that in any case the only available option open was for the applicant to appeal, and not come to this court through a reference, as the bill was not taxed in the first place.
7. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the applicant's counsel as well as the submissions filed by the respondent's counsel.
8. The applicant's counsel has argued that the taxing officer erred in stating that a replying affidavit had not been filed. A perusal of the ruling reveals that the taxing officer said that by October 2, 2019 when directions were given, the respondent (now applicant) was yet to file a response and that the court could not at that time appreciate the issues. That observation is not what made the taxing officer strike out the bill of costs, but other documents which were filed by both sides after October 2, 2019.
9. That said however, in my view, the taxing officer erred in striking out the bill of costs, as there is no evidence or allegation, even in this court, that the bill of costs was fatally defective either in form or in substance such as for example, being brought under non-existent legislation, or in the name of wrong parties, or asking for orders that have nothing to do with taxation of bills of costs.
10. It was also a bill of costs between advocate and client, and the fact that the client's case or litigation was lost or was struck out, does not mean that the bill of costs between advocate and client cannot be taxed. Again, the fact that retainer has been paid is also no basis for striking out the bill of costs, as drastic action such as striking out pleadings is only reserved for the worst of cases wherein pleadings are hopeless and cannot be saved.
11. With regard to the issue of the advocates negligence, in my view, that is an argument which can be put in determining whether the advocate should be paid any instruction fees or not, in the taxation, and it can also be a separate claim for damages by the client.
12. I thus find that the taxing officer erred in striking out the bill of costs, and order as follows:-
 1. I set aside the orders of the taxing master issued on November 20, 2019 striking out the bill of costs dated August 8, 2019.
 2. The bill of costs dated August 8, 2019 is hereby reinstated and the same will be taxed by a different taxing master at Makueni court other than Hon Otieno, who will take into account that the respondent's Judicial Review application was struck out "because of negligence on the part of both sides," in the matter which was represented by advocates.
 3. Parties will bear their respective costs of this reference.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF JULY 2023 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of:-



Mr. Mutuku for the applicant

Mr. Sila for the respondent

Mr. Otolu court assistant

