



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 218 OF 2017**

**GITHINJI, KIMAMO & COMPANY ADVOCATES.....ADVOCATE/APPLICANT**

**=VERSUS=**

**ENDMOR STEEL MILLERS LTD.....CLIENT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Ruling herein is in respect of an Application dated the **5<sup>th</sup> February 2019**, filed by the Applicant/ Advocate and supported by an affidavit sworn on even date by one Hiram Thimba, whereby same sought for the following Reliefs;

- a. *That judgment be entered for the Applicant against the Respondent for the sum of Kshs.5, 759, 508.26 together with interest thereon at 14% per annum from 5<sup>th</sup> July 2018 until payment in full.*
- b. *That the Applicant be at liberty to execute against the Respondent; and*
- c. *That the costs of this application be provided for.*

2. Upon being served with the Notice of Motion Application herein, the Client filed Grounds of opposition dated the 18<sup>th</sup> March 2019, in respect of which same opposed the claim by and/or on behalf of the advocate/applicant herein.

**DEPOSITION BY THE PARTIES:**

3. Vide the supporting affidavit sworn on the 5<sup>th</sup> February 2019, the deponent has averred that the Applicant herein had *hitherto* been instructed and/or engaged by the Client/Respondent in respect of conveyance, pertaining to sale of properties known as LR No. 127701/2 & 127702/4, respectively, hereinafter referred to as the suit properties.

4. It is the deponent's further averment that pursuant to and in line with the instructions, same carried out and/or undertook the instructions and thereafter forwarded a bill of costs to the client for purposes of settlement.

5. Notwithstanding the foregoing, the deponent has further averred that the Client/Respondent failed to settle the Applicants Professional fees and as a result of the failure to do so, the Applicant/Advocate was constrained to and indeed filed the Advocate/ Client Bill of Costs for purposes of taxation.

6. It is the deponent's further averment that upon the filling of the Advocate/ Client Bill of Costs, same was subjected to taxation and certificate of taxation was issued on the 12<sup>th</sup> June 2018, whereby the Bill of costs, was taxed and certified in the sum of kes.5,759,508.26/= only.

7. The deponent has further averred that following the taxation of the bill of costs, the Client/Respondent herein filed an Application dated the 23<sup>rd</sup> January 2020, whereby same sought extension of time within which to file a Reference. However, the Application by the Client/Respondent seeking to file a Reference out of time was disposed of vide ruling delivered on the 8<sup>th</sup> December 2020, when same was dismissed.

8. On the other hand, the deponent has further averred that there being no Reference, same are now entitled to entry and/or endorsement of

judgment on the basis of a Certificate of taxation issued on the 12 June 2018.

**RESPONSE BY THE CLIENT/ RESPONDENT:**

9. The client herein chose to file Grounds of opposition dated the 18<sup>th</sup> March 2018, and in respect of which same has contended that the Application by the Applicant/Advocate is misconceived and otherwise legally untenable.

10. On the other hand, the client has also contended that the Advocate/Applicant herein should proceed to file a suit for purposes of obtaining judgment as opposed to filing the subject application.

**SUBMISSIONS:**

11. On the 28<sup>th</sup> September 2021, the subject matter came up for mention for directions, when the court directed that the Notice of Motion Application dated the 5<sup>th</sup> February 2019, be canvassed and/or disposed of by way of written submissions and time lines were set within which the submissions were to be filed and exchanged.

12. Pursuant to and in line with the directions of the court issued on the 8<sup>th</sup> September 2021, the Applicant/Advocate proceeded to and filed his written submissions, which were filed on the 2<sup>nd</sup> November 2021, even though on the face thereof, it is indicated that the said Submissions are dated 2<sup>nd</sup> November 2020.

13. On the other hand, the Client/Respondent herein did not file her written submissions and contended that she had not done so, because same had not been served with the Application dated 5<sup>th</sup> February 2019.

14. However, when the court pointed out to counsel for the Respondent that same had even filed Grounds of opposition dated 18<sup>th</sup> March 2019, the Respondent's counsel beat a retreat and thus had no explanation for the failure to file the written submissions.

15. Be that as it may, the court directed that the subject matter shall now be reserved for delivery of the ruling on the basis of the Documents filed, as well as the written submissions, if any filed.

16. I must point out, that the submissions filed by the Advocate/Applicant herein, are on record and same have been duly considered.

**ISSUES FOR DETERMINATION:**

17. Having reviewed and/or appraised the Notice of Motion Application dated the 5<sup>th</sup> February 2019, the Affidavit in support thereof and the written submissions filed on behalf of the Advocate/Applicant and having also considered the Grounds of opposition filed by the Respondent, the following issues arise for determination;

I. Whether the certificate of taxation issued on the 12<sup>th</sup> June 2018, has been altered, varied and/or set aside.

II. Whether the Advocate/Applicant are entitled to judgment on the basis of the certificate of taxation

**ANALYSIS AND DETERMINATION:**

**ISSUE NUMBER 1**

18. It is common ground that the Advocate/Applicant herein filed and/or lodged a bill of costs dated the 31<sup>st</sup> October 2017, for purposes of taxation. For clarity, the said bill of costs was set down for taxation and same was ultimately taxed vide ruling dated the 12<sup>th</sup> June 2018.

19. Following the taxation, it was open to the Client/Respondent to object to the taxation and/or otherwise challenge the certificate of taxation, in accordance with the law. In this regard, the relevant provision of the law would have been **Rule 11 of the Advocates Remuneration order 2009**, which provide as hereunder;

**Objection to decision on taxation and appeal to Court of Appeal**

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph

(2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

20. Pursuant to the foregoing provisions, if the Client/Respondent was keen to object to the certificate of taxation, same was obliged to generate and/or issue a Notice of objection to taxation, containing the specific items, which were being objected to. For clarity, the Notice of objection to taxation ought to have been filed within 14 days of issuance of the certificate of taxation.

21. However, in respect of the instant matter, no such Notice of objection to taxation was ever issued, filed and/or served. Consequently, the client's/Respondent's right to challenge the certificate to taxation lapsed and/or extinguished.

22. To understand the importance and/or critical role played by a Notice of Objection to taxation, it is important to refer to the decision in the case of **Machira & Company Advocates v Arthur K Magugu & Another (2012) eKLR**, where the honourable Court Of Appeal observed as hereunder;

*As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1<sup>st</sup> August 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.*

23. On the other hand, it is also important to note that even though the Respondent did not file a Notice of Objection to taxation in the manner required by law, same proceeded to and filed an Application seeking extension of time to file a Reference. However, the Application whereby the Applicant sought for leave to file a Reference out of time, was dealt with and/or disposed of vide ruling rendered on the 8<sup>th</sup> December 2020, whereupon same was dismissed.

24. Essentially, upon the dismissal of the application seeking leave to file a Reference out of time, the only avenue for challenging the certificate for taxation lapsed and/or Ceased to exist.

25. In the premises, the certificate of taxation issued on the 12<sup>th</sup> June 2018, remains valid and lawful. Consequently, same has never been altered, varied, rescinded and/or set aside.

## **ISSUE NUMBER 2**

26. Having found and held that the certificate of taxation has not been varied, altered and/or rescinded, the only other existing bar to entry of judgment on the basis of a certificate of taxation, would be a dispute as to the existence to a Retainer.

27. Be that as it may, a dispute as to the Retainer could only be raised at the time when the bill of costs was presented for taxation and in the event Same was so raised, the Deputy Registrar would have been constrained to refer the matter to the Court for determination or adjudication, which was not the case. For clarity, the Court herein means the High Court and where appropriate, the Courts of Equal Status, subject the Provisions of Article 162 of the Constitution, 2010.

28. In support of the foregoing decision, I invoke and rely on the decision in the case of **Mugambi & Company v John Okal Ogwayo & Another (2013) eKLR**, where the honourable court held as hereunder;

*The jurisdiction of a taxing officer is provided for in the Advocates (Remuneration) Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of court. See paragraphs 2, 10 and 13 of the remuneration order.*

*12. Where the very fundamental issue whether or not an advocate was duly retained and thus entitled to any costs arises before a taxing officer, that issue ought first to be determined by the court. "Court" is defined in section 2 of the Advocates Act. Cap 16 as the High Court. "Court" is thus not the taxing officer or a deputy registrar of the court.*

29. On the other hand, the issue as to Retainer, could also be ventilated through a Reference, if any was ever filed in accordance of the law. However, it suffices to note that no Reference was ever filed or at all.

30. To the extent that no Reference was ever filed, it cannot be gainsaid that there is no dispute as to the Retainer. Consequently, no legal bar exists to prohibit the entry and/or endorsement of judgment on the basis of the Certificate of Taxation, which was issued and signed by the Taxing Mistress.

31. In view of the foregoing, the only ground envisaged under section 51(2) of the advocates Act, that would have barred the entry and endorsement of judgment in favor of the Advocate/Applicant herein does not exist. Consequently, the Applicant herein has satisfied and/ or established the conditions to warrant the endorsement of judgment.

32. In support of the foregoing position, I adopt and reiterate the decision of the court in case of **Professor Tom Ojienda v County Government of Meru (2021) eKLR**, where the Honourable court stated as hereunder;

“When is a decision on taxation enforceable? Section 51 (2) of the Advocates Act provides.

**“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs” (emphasis added)**

*The provision tells me that a decision of the taxing master on taxation is not a final judgment capable of execution and the court, as defined by the Act, must be resorted to pronounce a judgment. I further read and understand the statute to say that a judgment would only be entered by the court where there is no contention as to retainer of the advocate. Where there is dispute as to retainer, the recourse is a suit in which retainer is to be proved.”*

**FINAL DISPOSITION:**

33. Having considered the provisions of **Section 51(2) of the Advocates Act, Chapter 16, Laws Of Kenya**, and having establish that there is no Reference on the Certificate of taxation herein, I am constrained to and do hereby find that the Application dated 5<sup>th</sup> February 2019, is merited.

34. In the premises, the Notice of Motion Application dated the 5<sup>th</sup> February 2019, be and is hereby allowed as prayed.

35. As pertains to costs of the Application, same are hereby assessed and certified in the sum of kes.15,000/= only, to be borne by the Client/Respondent herein.

36. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF NOVEMBER 2021.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE,**

**ENVIROMENT AND LAND COURT,**

**MILIMANI.**

**In the Presence of;**

**June Nafula Court Assistant**

.....For the Applicant/ Advocate.

.....For the Client/ Respondent\.