



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. (REFERENCE) APPLICATION NO. 631 OF 2016

COUNTY GOVERNMENT OF KILIFI.....APPLICANT

-VERSUS-

ROBINSON ONYANGO MALOMBO T/A OM ROBINSON ADVOCATES....RESPONDENT

RULING

1. There are two applications for consideration before the Court and are subject to this Ruling. The first is the Chamber Summons application dated 9/9/2020 filed by the County Government of Kilifi whilst the second is a Notice of Motion Application dated 18/9/2020 filed by the firm of M/S O. M Robinson & Company Advocates.

2. For purposes of discussion in this Ruling, I will refer to the County Government of Kilifi as the Applicant while the firm of M/S O. M Robinson will be referred to as the Respondent.

3. The first application is the Applicant's Chamber Summons has been brought under Section 11(4) of the Advocates Remuneration Order and

seeks for *inter alia* orders that: -

a) Spent;

b) The Honourable Court be pleased to set aside the decision of the Taxing Officer made on 3rd September, 2020 awarding the Applicant Kshs. 2,567,356.76 legal fees ;

c) That in the alternative, the Honourable Court orders that the Advocates, Bill of costs dated 21/11/2016 be referred for taxation to another taxing Officer with appropriate directions or the Court do make such Orders as are Just and fair in the circumstances;

d) That the Honourable Court be pleased to re-assess the fees due to items No. 1 of the Bill of costs dated 21st November, 2016 and make a finding on the same;

e) That the costs of and occasioned by the reference be awarded to the Applicant.

4. The application is premised on grounds (a)-(m) on face of the application and further supported by grounds in the affidavit sworn by the Applicant's advocate on record, Mr. Bwire Okano on 9/9/2020. He deponed that on 3/6/2020, this Court directed that the subject bill of costs be re-taxed and the assessment of instruction fees be based on Kshs. 6,522,146.00 being the amount settled at as opposed to Kshs. 13,044,292. Nonetheless, the taxing officer disregarded the directions of this Court and taxed the bill based on Kshs. 13,044,292/= and thereby committing an error in principle. Further, Mr. Bwire submitted that the taxing officer descended into the arena of litigation in trying to outsource reasons to support her view of taxation.

5. In opposition of the Chamber Summons Application, the Respondent filed grounds of opposition dated 21/9/2020 which can be summarized as follows. That the Applicant has now applied for taxation before three different taxing officers and for the fourth time, has applied for similar orders. As such the Applicant cannot be allowed to fish for a taxing officer to render a decision in its favour as such conduct offends the doctrine of finality. It is on that view that the Respondent seeks the Court to dismiss the application.

6. The second Application as earlier indicated is the Respondent's Notice of Motion dated 18/9/2020. It is brought under **Section 51(2) of the Advocates Act and Order 52 Rule 1 of the Civil Procedure Rules, 2010** and seeks for an order that Judgment be entered for the

Respondent against the Appellant for Kshs. 2,567,356.72 being the sum taxed and certified by the Deputy Registrar on 10th September, 2020 as due to the Respondent. The grounds in support of the application are that the Respondent had been instructed to demand and collect rate arrears of Kshs. 13,044,292.0 owed by the Agricultural Development Corporation to the Respondent. Based on those instructions, the Respondent's bill of costs was taxed at Kshs. 2,567,356.72 and certificate of taxation for the said sum was subsequently issued by the taxing officer on 10/9/2020. In the supporting affidavit by Mr. Robinson Onyango Malombo, it is deponed that justice can only be served by having a Judgment entered according to the certificate of costs.

7. The Applicant opposed this application and in doing so filed grounds of opposition on the 8/10/2020. In a brief summary, the Applicant avers that the application is premature for the reason that the Applicant has filed a reference under Rule 11 (1) of the Advocates (Remuneration) Order challenging item 1 on instruction fees. Accordingly, the certificate of costs can await the determination of the reference before it is adopted as a Judgment of the Court.

8. Directions were issued that the applications be canvassed by way of written submissions. The Applicant filed its submissions on 12/10/2020 whilst the Respondent filed his on the 30/11/2020. I have had the liberty to read through the submissions, the Statute and the case law relied on by the parties in support of their respective positions.

Analysis and Determination

9. Having carefully considered the Client/Applicant's Reference dated 9/9/2020 as well as the Advocate/Respondent's application dated 18/9/2020, the objections thereto, the submissions filed by the parties and the authorities supplied and statutory provisions relied on, it is my humble view that a brief background on the matter would suffice in guiding this Court as to what orders it should make.

10. First, I note that this is the second reference to be placed before this Court in this matter. In the first reference, vide a Ruling delivered on 3/6/2020, this Court directed that the file be re-taxed by a different taxing officer other than the Hon. Nyariki. The reason behind those directions was that the Hon. Nyariki had based his taxation on instruction fees on the amount the Respondent was instructed to claim other than the amount actually recovered after the reconciliation process. In other words, this Court found it was wrong to calculate instruction fees based on the amount of Kshs. 13,044,292/= claimed under the instruction letter and directed that re-taxation be undertaken and calculation of instruction fees be based on the amount of Kshs. 6,522,146/= being the actual amount collected.

11. On directing as such, this Court had formed an opinion that if an advocate taxes his bill before a matter is determined, the taxing officer is supposed to base the instruction fees on the amount in the pleadings, but when an award has been made, then the taxing officer is supposed to use the figure awarded in calculating the payable instruction fees.

12. When the bill went back for re-taxation, taxation was done by Hon. C. A. Ogweno who delivered a Ruling on 3/9/2020. In her Ruling, she stated that even after considering the directions by this Court, she was still persuaded that the calculation of the instruction fees was to be based on Kshs. 13,044,292.00 being the amount claimed by the Applicant. Clearly, Hon. Ogweno did not adhere to what this Court had directed hence the purpose for which the file was placed before her was not served. My understanding is that the deputy registrar is supposed to work hand in hand with the High Court and it is incomprehensible how the taxing officer deviated from express directions of this Court.

13. In my view, the operation of the doctrine of precedent binds the lower Court and it is a constitutional imperative for respect for Courts of higher authority. The Deputy Registrar, while she has the right and indeed the duty to critically examine the decisions of this Court, must in the end follow those decisions unless the case placed before her is distinguishable. It is necessary for each lower tier to accept loyally the decisions of the higher tiers.

14. On the importance of following the decisions of a higher Court, I will refer to the decision of the Court of Appeal in the case of **National Bank of Kenya Ltd v Wilson Ndolo Ayah Civil Appeal No. 119 of 2002; [2009] KLR 762**, where it was held: -

“It is good discipline in Courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that Court. The High Court has no discretion in the matter.”

15. Similarly in our case, although the taxing officer might have had reasons not to agree with the directions given by this Court vide its Ruling delivered on 3/6/2020, she should have expressed her views but in the end follow the directions given by this Court.

16. Having stated as such, it is my finding that the Deputy Registrar had no discretion in determining what amount was to form the basis of calculating the instruction fees. This Court had directed that instruction fees be based on the amount recovered after conciliation which is Kshs. 6,522,146/= and any deviation from those directions means the **Ruling** made by the taxing officer on 3/9/2020 was in excess of jurisdiction and therefore a **nullity**. This therefore means that the subsequent certificate of costs cannot be adopted as a Judgment of this Court.

17. In the meantime, I am once again inclined to refer the file back for taxation, specifically on instruction fees and the basis for assessment of the legal fees to be based on Kshs. 6,522,146/= for reasons highlighted herein above and in the Ruling delivered by this Court on 3/6/2020.

18. I further direct that the taxation to be undertaken by a different taxing officer, and at this point I must hasten to add that the taxing officer's discretion in assessing the instruction fees is not limited to the subject matter, he/she has the discretion to increase the amount taking into account a number of factors including but not limited to; *The nature and importance of the cause or matter, The complexity of the issues raised and novel points of law and The time, research and skill expended in the brief.*

19. Each party shall bear its own costs.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 9th day of February, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and Rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY