



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC. CIVIL APPLICATION NO. 13 OF 2018**

**OLEL, ONYANGO INGUTIAH**

**& CO. ADVOCATES.....APPLICANT**

**-VERSUS-**

**JOHN OMWARE RONGA.....RESPONDENT**

**RULING**

The application dated 8<sup>th</sup> November 2018 sought the quashing of the decision which the taxing officer made upon taxing the Advocate/Client Bill of Costs.

1. The Applicant, **JOHN OMWARE RONGA**, (who shall hereinafter be cited as “*the Client*”) asserted that he was never given an opportunity to defend himself.
2. By his supporting affidavit, the Client deponed that the assertions in the Process Server’s Affidavit of Service were false.
3. The process server had indicated that he effected service on 20<sup>th</sup> April 2018, but the Client said that it was only on 24<sup>th</sup> April 2018 when the process server visited his home.
4. According to the Client, he and his wife were away from home on 24<sup>th</sup> April 2018, as they were attending a funeral. He said that it was not until the following day, (on 25<sup>th</sup> April 2018) that he and his wife returned home.
5. The Respondent, **OLEL, ONYANGO, INGUTIAH & CO. ADVOCATES**, is a Law Firm (and shall hereinafter be cited as “*the Advocate*”).
6. In answer to the application, Advocate **RAYOLA OCHIENG OLEL** swore a Replying Affidavit. He deponed that he had personal knowledge that the Client had been served with the Taxation Notice on 20<sup>th</sup> April 2018.
7. It is the understanding of the advocate that the Client had, indeed, confirmed on oath, that he was served on 20<sup>th</sup> April 2018. The said confirmation is said to be in paragraph 3 of the Client’s affidavit.
8. The following is the relevant portion of paragraph 3 of the Client’s affidavit;

***“The fact is that the process server came***

***to my home on 24<sup>th</sup> day of April 2018. I***

***and my wife were away in a funeral, where***

***we slept overnight. On coming home on the***

***25<sup>th</sup> day of April 2018, I found the documents***

***left in my home, and I went to town to trace1***

*the Advocates on record. I found that they had shifted office. I proceeded to court and I was informed that I have been overtaken by events.”*

9. Contrary to what the Advocate has said, I find that the Client never confirmed that he had been served on 20<sup>th</sup> April 2018, or on any other date.
10. The Advocate further deponed that service had been effected upon the Client’s granddaughter, after;

*“..... the Respondent advised his granddaughter to accept the documents on his behalf.”*
11. The Advocate said that the deposition by the process server cannot have been materially false.
12. In my considered opinion, the only proper way that the Client’s affidavit could have been controverted is through an affidavit sworn by the process server.
13. An affidavit is evidence. Therefore, when the Advocate answered to the Client’s affidavit by reference to the affidavit sworn by the process server, that could be construed as hearsay.
14. In the alternative, when the Advocate advances the reasoning that the statements made by the process server *“cannot be materially false .....*”, that constitutes submissions, rather than a factual answer to the matters raised by the Client.
15. In any event, unless the Advocate was present at the place and time when the process server was effecting service upon the Client, he cannot attribute to his personal knowledge, the facts about what actually transpired.
16. The Advocate has not said that he had been present when the process server allegedly served the Client. If the Advocate had been present, he would have said so expressly. As the Advocate did not say that he was present at the material time, the court can only conclude that he was not there.
17. Meanwhile, the process server also failed to mention, in his affidavit of service that the Advocate had accompanied him when he went to serve the Client. That is a further reason for my conclusion that the Advocate was absent at the time and place when the Client was allegedly served. He cannot therefore vouch for the same.
18. Accordingly, I find that there was no factual basis upon which the Advocate could conclude that the Client had instructed his granddaughter to receive documents on his behalf.
19. As the Advocate has said in his replying affidavit, the process server did not call the Client. Therefore, the process server did not have any first-hand information about what, if any, the Client had told his granddaughter. In the circumstances, there is no evidence that the person who was allegedly served on 20<sup>th</sup> April 2018, had the requisite authority of the Client to receive service on his behalf.
20. For all those reasons, I find that the Client was not served with the Notice for the Taxation on 20<sup>th</sup> April 2018.
21. I find that the Notice was left at the home of the Client on 24<sup>th</sup> April 2018, whilst the Client and his wife were away, attending a burial.
22. However, upon his return home, on 25<sup>th</sup> April 2018, the Client became aware that the Advocate/Client Bill of Costs was scheduled for taxation on that same date.
23. As the Client first became aware of the date when the Bill of Costs was due for taxation, on the very same date when the taxation took place; and because taxation had already taken place by the time the Client reached the Court, I find that he was condemned unheard.
24. In the circumstances, I find that Justice demands that the proceedings at which the taxation was undertaken be and are hereby set aside.
25. I find that the application before me is not in the nature of a Reference from taxation, and I therefore decline to delve into the merits or otherwise of the decision by the Taxing Officer.
26. However, I also find that the Client could have moved the court sooner, as he had become aware of the taxation on the same day when the process had been undertaken.
27. I am alive to the fact that neither of the parties has raised the issue of delay, but the court cannot overlook the fact that the application

before me was filed about 8 months after the Taxing Officer had rendered her decision.

**28.** In the result, although I have set aside the proceedings at which taxation was carried out, I order that each party shall meet his own costs of the application dated 13<sup>th</sup> November 2018.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 4<sup>TH</sup> DAY OF MAY 2021**

**FRED A. OCHIENG**

**JUDGE**